Legislative Document (1959) No. 17

STATE OF NEW YORK

THIRD PRELIMINARY REPORT
of the
ADVISORY COMMITTEE
ON PRACTICE AND PROCEDURE

reported to
THE GOVERNOR
and
THE LEGISLATURE
of the
STATE OF NEW YORK
by the
SENATE FINANCE COMMITTEE
and the
ASSEMBLY WAYS AND MEANS COMMITTEE

March 1, 1959

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March 1, 1959

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To: HON. NELSON A. ROCKEFELLER, *Governor of the State of New York:*

The Legislature of the State of New York:

We submit herewith the Third Preliminary Report of the Advisory Committee on Practice and Procedure. Upon termination of the Tempoaray Commission on the Courts, funds were made available by our respective Committees to continue the revision of New York civil practice. The work has been conducted under our supervision.

AUSTIN W. ERWIN,
Chairman, Senate Finance Committee

WILLIAM H. MACKENZIE,
Chairman, Assembly Ways and Means Committee

March 1, 1959

To:

HON. AUSTIN W. ERWIN, *Chairman, Senate Finance Committee:*

HON. WILLIAM H. MACKENZIE, *Chairman, Assembly Ways and Means Committee:*

The Advisory Committee on Practice and Procedure submits herewith its third preliminary report. The scope of the entire project undertaken by us has been indicated in the 1956 Report of The Temporary Commission on the Courts, pp. 38–39, 141–155. N.Y. Leg. Doc. No. 18 (1956). Our first preliminary report was printed as Part III of the 1957 Report of The Temporary Commission on the Courts. N.Y. Leg. Doc. No. 6(b) (1957). Our second preliminary report was printed as Part II of the 1958 Report of The Temporary Commission on the Courts. N.Y. Leg. Doc. No. 13 (1958).

The drafts in this report are tentative. They are being released at this time so that the various bar association committees set up to cooperate with the Commission as well as interested members of the bar will have an opportunity to study them carefully and give us their detailed comments and criticisms. Particularly helpful will be suggestions with respect to types and content of official forms. The committee wishes to acknowledge with gratitude the many excellent suggestions already received from members of the bench and bar.

The Committee plans to prepare a bill replacing the present Civil Practice Act and Rules of Civil Practice for submission to the 1960 Legislature. If it is possible, therefore, suggestions with respect to drafts in this report as well as the prior two reports should be submitted to the Committee by October 15, 1959.

Communications to the Committee should be addressed to the Advisory Committee on Practice and Procedure, Box No. 2, Law School, Columbia University, New York 27, New York.

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TENTATIVE DRAFT

ARTICLE 1. GENERAL PROVISIONS

INTRODUCTION

This article contains introductory provisions, similar to those in article 1 of the civil practice act, concerning the title and applicability of the civil practice law and the forms of judicial proceedings. The essentials of sections 1, 4, 5, 6 and 8 and part of section 7 of the civil practice act have been included. It is contemplated that further definitions will be added to proposed section 1.3, and that a section will be drafted embodying the rules of construction of sections 2 and 3 of the civil practice act.

No major change in the present law as to applicability has been effected. See *Applicability of the Civil Practice Act* at pp. 557–572 *infra.*

Contrary to present law, under which applicability of the civil practice act to special proceedings may be dependent upon the wording of the particular section, the proposed civil practice law and rules are applicable to actions and special proceedings alike, unless a different procedure is prescribed by rule or statute. See proposed title 27; *Special Proceedings* at pp. 659–672 *infra.*

The section on declaratory judgments, since it contains a general grant of power to the supreme court, has been added to this article.

TABLE OF SECTIONS IN ARTICLE 1

SECTIONS—ARTICLE 1. GENERAL PROVISIONS

1.1. Short title; application.

This chapter shall be known as the civil practice law. The civil practice law shall govern the civil procedure in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute or rules adopted in conformance thereto. The civil practice law shall succeed the civil practice act and shall be deemed substituted for that act throughout the statutes of the state.

Notes

This section replaces section 1 and the first sentence and part of the second sentence of section 62 of the civil practice act. The entire second sentence of section 62 will also be transferred to the Judiciary Law. Both of these sections purport to define the general applicability of the civil practice act. Section 1 states that the act "shall apply to the civil practice in all the courts of record of the state" and section 62 that the "courts referred to in this act are enumerated in section two of the judiciary law."

The actual effect of these general provisions, and their operation in conjunction with the many applicability provisions in the acts governing particular courts, is extremely difficult to determine. See, generally, *Applicability of the Civil Practice Act* at pp. 563–572 *infra*.

As for the general provisions, section 1 of the civil practice act was added as new by the authors of the act in 1920, and the first sentence of section 62 was derived from section 1 of the Throop code. The latter was the only general applicability section in the Throop code. When transferred to the civil practice act in 1921, it stated that the "courts referred to in this act are enumerated in sections two and three of the judiciary law." At that time section 2 of the Judiciary Law purported to list all courts of record and section 3 all courts not of record.

By the terms of section 1 of the Throop code, then, it was generally applicable to both courts of record and courts not of record, although other provisions in the code (particularly section 3347) severely limited this broad applicability provision. See *Applicability of the Civil Practice Act* at pp. 562–63 *infra*. The authors of the civil practice act obfuscated the general applicability question, however, by retaining this broad provision as the first sentence of present section 62 and at the same time adding a new applicability provision, as section 1, which refers only to "the courts of record of the state." See Report of the Joint Legislative Committee on the Simplification of Civil Practice 67, 89 (1919).

The matter was further confused as a result of subsequent amendments to Judiciary Law sections 2 and 3. Section 2, although purporting to enumerate all courts of record, included as the last item in its list "[s]uch other local courts as are now constituted courts of record"; and section 3 concluded with a similar catch-all phrase for courts not of record. In 1938 the Judicial Council, dissatisfied with the "indefinite condition" of these provisions, recommended the repeal of section 3 and enactment of a new section 2 which would list *all* courts of record and provide that "[a]ll courts other than these specified in this section are courts not of record." 2 N. Y. Jud. Council Rep. 42 (1938). This recommendation was enacted. N. Y. Laws 1938, c. 53. The following year section 62 of the civil practice act was amended to strike the words "and three." N. Y. Laws 1939, c. 359. This amendment undoubtedly was designed to conform section 62 to the Judiciary Law amendments of the previous year, for there now was no longer any section 3 in the Judiciary Law; courts not of record were defined

instead in section 2 as all courts "other than those specified in this section." Yet these changes introduced an ambiguity into the language of section 62 of the civil practice act, since only the courts of record are actually "enumerated" in section 2 of the Judiciary Law.

In any event, as indicated in *Applicability of the Civil Practice Act* at pp. 564–570 *infra*, the applicability of any general practice act will depend very little on its own applicability provisions but a great deal on the provisions, both general and specific, in the individual court acts. The provision as drafted, therefore, attempts to maintain the status quo until the individual court acts can be reviewed with a view to providing uniform applicability provisions and amending specific provisions to conform to the new law and rules. Such an approach is particularly desirable now since the Judicial Conference has drafted a proposed Uniform City Court Act to "make the Civil Practice Act and Rules of Civil Practice apply to the city courts, except where the provisions of the [City Court] Act are inconsistent . . . ." 2 N.Y. Jud. Conference Rep. 128, 147–48 (1956).

The law will apply both to courts of record and to those not of record in so far as the Constitution permits and where it is not inconsistent with other more particular statutes or rules adopted in conformance with particular statutes. See, *e.g.*, N.Y. Const. art. VI, §11 (limiting jurisdiction of County Courts over defendants); *id.*, §18 (limiting equity jurisdiction of inferior local courts); *cf.* notes to proposed section 13.10. "Civil procedure" is intended to cover both actions and special proceedings. See proposed section 1.2 (b).

This draft follows in some respects sections 2 and 60 of Rodenbeck's proposed civil practice act. 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 17, 26, 168, 229 (1915). The Rodenbeck draft, however, permitted the code—repealed for other purposes—to remain in force wherever it was incorporated by reference in another act. Such a resolution of the difficulty is obviously unsatisfactory for it would mean substituting two full practice acts for one. Under the proposed draft the civil practice law will be substituted for the civil practice act in all inferior court acts.

Rule 3 of the rules of civil practice, making the rules applicable to Surrogate's Court proceedings, is omitted since a practically identical provision appears in section 316 of the Surrogate's Court Act.

1.2. Form of civil judicial proceedings.

(a) One form of action. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.

Notes

This subdivision is identical with section 8 of the civil practice act.

(b) Action or special proceeding. All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. Except where otherwise required by statute or rule, procedure in special proceedings shall be the same as in actions.

Notes

The first sentence of this subdivision expresses the present law. An action is the "ordinary" method of obtaining relief. See N.Y. Civ. Prac. Act §4. A court will not grant relief by special proceeding unless specifically authorized by law to do so. See *Special Proceedings* at p. 659 *infra.*

A "civil judicial proceeding" is defined in section 1.3 of the proposed civil practice law. An action or a special proceeding, however, will not be further defined. Sections 4 and 5 of the civil practice act have been eliminated as offering little aid in such definition. See *Special Proceedings* at pp. 657–59 *infra.* Section 11-a and 46-a of the General Construction Law, containing similar provisions, should be repealed.

The first sentence of this subdivision contains the essentials of the definitions contained in present sections 4 and 5, *i.e.,* that they are both civil judicial proceedings and that they are mutually exclusive. Further definition is left to the case law. Those proceedings which have traditionally been commenced by a summons, and employ other procedure of an action, are actions. See *Special Proceedings* at p. 659 *infra.* In special proceedings, certain procedure other than that of an action is authorized. The major difference in procedure is that a special proceeding is commenced by a notice of petition, or the equivalent, which brings on a hearing in a relatively short time.

The second sentence of this subdivision varies somewhat from present law. Where under present law a special statute governing a particular special proceeding is silent as to certain procedure, it may not safely be assumed that the section of the civil practice act governing corresponding procedure in an action will apply. Applicability of the civil practice act to special proceedings must be determined from an analysis of each section. See *Special Proceedings* at pp. 659–668 *infra.*

Under this subdivision, the civil practice law and rules would be generally applicable in special proceedings except to the extent that procedure is otherwise provided for. The major source of such provisions for special proceedings are the rules of proposed

title 27 and the special statutes governing particular special proceedings. Because of the exception in this subdivision, such statutes need not state expressly that they affect the civil practice law or rules, as would be otherwise required by section 101 of the General Construction Law.

(c) Improper form. If a court has obtained jurisdiction over the parties, an application for relief shall not be dismissed solely because not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

Notes

This subdivision is designed to eliminate the last remnants of dismissal for improper form of proceeding that continue to exist under present law. Although a litigant no longer risks dismissal for couching his complaint in the terminology of the wrong "form of action" (see N.Y. Civ. Prac. Act §8), his claim may be dismissed, for example, if he makes an appplication for relief in the form of a special proceeding when he should have brought an action. *Cf. Special Proceedings* at p. 671 *infra.* The theory which prompted the inclusion of the counterpart of present section 8 in the Field Code is extended by this subdivision to allow the court to order that the proceeding continue as an action, in such a case, rather than that it be dismissed.

This subdivision also prevents dismissal where an application for relief is made in the form of an action or special proceeding, instead of as a motion, since the term "application for relief" includes motions (see proposed rule 33.1) and civil judicial proceedings. See proposed section 1.3.

1.3. Definitions.

A civil judicial proceeding is a prosecution, other than a criminal action, of an independent application to a court for relief.

Notes

"Civil judicial proceeding" is a generic term used in this state to include both civil actions and civil special proceedings. It has a somewhat broader scope than the sum of the present definitions of an action and a special proceeding. See N.Y. Civ. Prac. Act §§4, 5; N.Y. Gen. Constr. Law §§11-a, 46-a. Proceedings which are not "against another party" are included. The definition is phrased

from the point of view of the real object of a judicial proceeding—to obtain relief from a court—rather than from the point of view in present section 4 of the purpose for which such relief is sought: "for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." *Cf. In re Judicial Inquiry,* 6 A.D.2d 1045, 179 N.Y.S.2d 301 (2d Dep't 1958).

The word "independent" in the definition distinguishes a motion, which is an application for an order incidental to a judicial proceeding. See proposed rule 33.1 and introduction to proposed title 33.

This section incorporates section 6 of the civil practice act and section 16-a of the General Construction Law by expressly excluding a criminal action, which is defined by section 18-a of the General Construction Law in the words of the exception in section 6.

It is contemplated that further definitions will be added to the proposed section.

1.4. Declaratory judgment.

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds for refusal.

Notes

This section is derived from section 473 of the civil practice act and rule 212 of the rules of civil practice. Although the language of the proposed section varies slightly from the two present provisions, no change in substance is intended. The words "justiciable controversy" have been added to codify existing case law. See, *e.g., Goodman & Co.* v. *New York Tel. Co.,* 309 N.Y. 258, 128 N.E.2d 406 (1955); *Bd. of Education* v. *Van Zandt,* 204 App. Div. 856, 197 N. Y. Supp. 899 (4th Dep't 1922), *aff'd,* 234 N.Y. 644, 138 N.E. 481 (1923); see also Borchard, Declaratory Judgments 29 *et seq.* (2d ed. 1941).

ARTICLE 7. HABEAS CORPUS

INTRODUCTION

Its origins tracing back to early English common law (1 Bailey, Habeas Corpus 2–6 (1913)), the writ of habeas corpus ad subjudiciendum, to inquire into the cause of detention, is today protected against legislative encroachment by provisions in both the Federal and State Constitutions. U.S. Const. art. I, §9; N.Y. Const. art. I, §4. Each contain a virtually identical prohibition against suspension of the privilege of the writ except where, in case of rebellion or invasion, the public safety requires it. See also *People ex rel. Tweed* v. *Liscomb,* 60 N.Y. 559 (1875) ("This writ cannot be abrogated, or its efficiency curtailed by legislative action").

It is considered a civil proceeding because its function is to inquire into the cause of a restraint and because it is based upon a civil right to be free from unlawful detention. *People ex rel. Curtis* v. *Kidney,* 225 N.Y. 299, 122 N.E. 241 (1919). The proposed article is primarily a condensation and simplification of the fifty-four sections of article 77 of the civil practice act which relate to habeas corpus proceedings.

In view of the historic importance of this "great writ of liberty" (*In re Kelly,* 123 N.J. Eq. 489, 497, 198 Atl. 203, 207, *aff'd,* 124 N.J. Eq. 350, 1 A.2d 926 (1938)) and the desirability of providing an integrated series of provisions, the advisory committee has placed the material in the proposed Civil Practice Law rather than dividing it between rule and act. *Cf.* 28 U.S.C. §§2241–2255 (1952); N.J. Rev. Stat. §§2A: 67-1–2A: 67-36 (1951); Ill. Rev. Stat. c. 65, §§1–36 (1955).

No effort has been made to reexamine the situations in which the writ may be issued, since the committee considers this a substantive matter beyond the scope of its authority. In recent years, particular interest has been focused upon the use of the writ in the post-conviction area. With the growth of coram nobis as a remedy for the release of those unlawfully convicted, the precise limits of habeas corpus, and the boundaries between the two remedies, have become the subject of some doubt. See *People ex rel. Harrison* v. *Jackson,* 298 N.Y. 219, 224, 226, 233, 82 N.E.2d 14, 16, 17, 21 (1948); *People ex rel. Carollo* v. *Brophy,* 294 N.Y. 540, 542, 63 N.E.2d 95, 96(1945); *Morhous* v. *New York Supreme Court,* 293 N.Y. 131, 56 N.E.2d 79 (1944); Conable, *Habeas Corpus Curtailed,* 25 N.Y.S. Bar Bull. 163 (1953). Indeed, one of the hallmarks of the writ has been its great flexibility and vague scope. See Longsdorf, *Habeas Corpus—A Protean Writ and Remedy,* 8 F.R.D. 179 (1949). An examination of the scope of various post-conviction remedies is presently being conducted by the Law Revision Commission and there is no need for this committee to duplicate that work. See Paulsen, *Post-Conviction Remedies in New York* in N.Y. Law Rev. Comm'n Rep., Leg. Doc. (1959) No. 66(L).

Nothing in the proposed article should be construed as an attempt to delineate the "shadowy" area between "a void judgment" for which the writ will furnish relief and "an erroneous judgment" for which it will not. See *People ex rel. Carr* v. *Martin,* 286 N.Y. 27, 33, 35 N.E.2d 636, 639 (1941); see also *People* v. *Silberglitt,* 4 N.Y. 2d 59, 68–69, 149 N.E.2d 76, 82 (1958). The grounds for the writ are left unchanged.

The proposed article makes no separate provision for the writ of certiorari to inquire into the cause of detention, but its purpose may be accomplished by proposed section 7.3(a). The writ of certiorari is seldom relied upon and its purpose is precisely the same as that of habeas corpus: to obtain the release of someone unlawfully imprisoned. 21 Carmody-Wait, Cyclopedia of New York Practice 10 (1956). Persons entitled to seek the writs and restrictions on their issuance do not depend upon which one is sought. See, *e.g.,* N.Y. Civ. Prac. Act §§1230, 1231, 1232. Certiorari differs from habeas corpus only in that the prisoner is not present during the hearing. See N.Y. Civ. Prac. Act §1261; *People ex rel. Semenoff* v. *Nagle,* 118 Misc. 476, 478, 194 N.Y. Supp. 602, 604 (Sup. Ct. 1922). The writ of certiorari is, in effect, an order to show cause why an order releasing the prisoner should not be issued. In the Federal courts the practice of issuing an order to show cause rather than the writ where the prisoner's presence at the hearing was not required was approved in *Walker* v. *Johnston,* 312 U.S. 275, 284 (1941), and is now embodied in section 2243 of the Judicial Code. See also, *e.g.,* Uniform Post Conviction Procedure Act §7.

Section 1261 of the civil practice act provides that on an application for a writ of habeas corpus, if it appears "that the cause or offense for which the party is imprisoned or detained is not bailable, a writ of certiorari *may* be granted instead of a writ of habeas corpus." (Emphasis added.) This has been interpreted by some to mean that, "[w]here the offense is not bailable, it is not necessary to produce the prisoner upon the argument." 5 Bender, New York Practice 47 (Warren ed. 1953); see also *People ex rel. Taylor* v. *Seaman,* 8 Misc. 152, 154, 29 N.Y. Supp. 329, 330 (Sup. Ct. 1894). Such an interpretation seems unsound in any case where the prisoner has raised an issue of fact which, if decided in his favor, would entitle him to release. The right of the prisoner to be present is discussed in the notes to proposed section 7.3(a). See also Paulsen, *supra.* In the light of the decisions there discussed, the present provision seems meaningless. The use of a special writ of certiorari solely to obtain a fixing of bail, which evidently is contemplated by civil practice act section 1264 (see 21 Carmody-Wait, Cyclopedia of New York Practice 114 (1956)), seems unnecessary in view of the extensive procedures for fixing bail in all courts provided by sections 550 to 606 of the Code of Criminal Procedure.

Abolition of the writ of certiorari will not introduce any procedural difficulties. Appropriate provision for the presence or absence at the hearing of the person detained can be made in the

petition for and the writ of habeas corpus. Practitioners are now advised to seek the writ of habeas corpus if "there is any doubt" about its availability because section 1261 of the civil practice act specifically gives the court power to grant a writ of certiorari instead of a writ of habeas corpus. 21 Carmody-Wait, Cyclopedia of New York Practice 34 (1956). Moreover, a writ of habeas corpus may be issued on return of a writ of certiorari. N.Y. Civ. Prac. Act §1263. Even after issuance of a writ of habeas corpus, if the failure to produce a person is due to sickness or infirmity, the court may proceed as upon certiorari. N.Y. Civ. Prac. Act §1260. In view of the elimination of the separate writ of certiorari, sections 1261 and 1263 of the civil practice act, relating to the alternative uses of habeas corpus and certiorari, are omitted from the proposed article. See proposed section 7.3(a).

Two practices codified in the 1948 revision of the United States Judicial Code have been adopted. Discretion is given to a court or judge to deny a writ where justice will not be served by granting it after successive unsuccessful applications in which no new evidence or grounds are raised. See proposed section 7.3(b). The court or judge holding a hearing on return of the writ is also given discretion to receive the certificate of a trial judge or affidavits in place of testimony. See proposed section 7.9(c). A provision permitting a hearing where the prisoner is sick or infirm, derived from the Illinois statute, is embodied in proposed section 7.9(d).

Proposed title 27 prescribes basic procedure for all special proceedings and only those provisions of the civil practice act which are unique to habeas corpus have been included in this article. Some changes in terminology have also been made to conform the language used with respect to a proceeding in habeas corpus with title 27. The traditional terms "writ" and "return" are retained but the "answer" to the return is termed the "reply." See proposed sections 7.8, 7.9(b).

Provisions for forfeiture for noncompliance with the requirements of the statute have been omitted. See, *e.g.,* N. Y. Civ. Prac. Act §§1235, 1248, 1269. So far as can be determined, actions for penalties provided by habeas corpus provisions have been before the New York courts only twice. In neither instance did the plaintiff win, and both decisions indicate the hostility of judges toward these statutory penalties. *Sutton* v. *Butler,* 74 Misc. 251, 133 N.Y. Supp. 936 (Sup. Ct. 1911), *aff'd without opinion,* 151 App. Div. 894 (2d Dep't 1912); *Yates* v. *Lansing,* 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd,* 9 Johns. 395 (N.Y. Ct. Errors 1811). In the United States there are only a handful of cases reported; there are none in the last quarter century. See Annot., 84 A.L.R. 807 (1933) ("The number of cases in which the penalty has actually been imposed is zero.").

Present section 1281-a, dealing with fees of officials in New York city, will be considered with the article on fees. The duty of an officer to deliver a mandate under penalty of forfeiture referred to in present section 1281 is omitted. Section 66 of the Public

Officers Law requires a public officer to furnish a copy of any official document upon payment of his fees. If the petitioner is unable to obtain a copy of a mandate he may explain this in his petition and its absence is no barrier to obtaining the writ. See proposed section 7.2(c)(1).

Provisions on habeas corpus ad testificandum, now in sections 415 to 420 of the civil practice act are covered by proposed rule 38.2(b).

Consolidated Law sections dealing with habeas corpus (*e.g.*, N.Y. Dom. Rel. Law §§70–71) have been left untouched except as indicated in the notes to this article. See *Habeas Corpus Provisions in the Code of Criminal Procedure and Consolidated Laws*, at p. 649 *infra*.

TABLE OF SECTIONS IN ARTICLE 7

SECTIONS—ARTICLE 7. HABEAS CORPUS

7.1 Application of article; special proceeding.

Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention. A proceeding under this article is a special proceeding.

Notes

The first sentence of this section incorporates section 1282 of the civil practice act. It includes writs of certiorari since they are merged with writs of habeas corpus.

The second sentence of this section applies, to a habeas corpus proceeding, the provisions of proposed title 27 governing procedure in special proceedings generally. See N.Y. Civ. Prac. Act §1247 ("a special proceeding instituted by either writ"). The application of proposed title 27 permits the omission of some details of practice provided in the present law and also requires the changing of some terminology. Because of the unique nature of habeas corpus, however, most of present practice has been retained, although not always in conformity with proposed title 27. Except in so far as this article or proposed title 27 otherwise provide, procedure in a habeas corpus proceeding, under the proposed act and rules, will be the same as in an action. See proposed section 1.2(b). Thus, provisions of present law applying specific portions of procedure in an action to habeas corpus have been omitted as unnecessary. See, *e.g.*, N.Y. Civ. Prac. Act §1266 (final order "enforced in same manner as a judgment"); *id.* §1268 ("provisions of this act relating to amendments, motions and intermediate orders in an action").

7.2. Petition.

(a) By whom made. A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf, may petition for a writ of habeas corpus to inquire into the cause of such detention and for deliverance. A judge authorized to issue writs of habeas corpus having evidence, in a judicial proceeding before him, that any person

is so detained shall, on his own initiative, issue a writ of habeas corpus for the relief of that person.

Notes

The first sentence of this subdivision is derived from section 1230 of the civil practice act. The reference to "one acting on . . . behalf" of the prisoner is derived from present section 1232. The restrictions on issuance of the writ contained in present section 1230 through its reference to section 1231 have been omitted from this section, since they are separately stated in proposed section 7.3(a).

Throughout the proposed article the single word "detained" is substituted for the two words "imprisoned" or "restrained" of the present statutes. All three words are used in the proposed subdivision, however, to make it clear that no change in present meaning is intended.

Section 1233 of the civil practice act has been deleted. It was formerly a general provision designating the Attorney General and district attorney as persons to make application for any one of a number of state writs that might be required in actions in which the state was interested. N.Y. Code Civ. Proc. §1993. With the abolition of most state writs by the civil practice act (see N.Y. Civ. Prac. Act §§1283, 1313, 1341), the provision was incorporated into the article dealing solely with habeas corpus and certiorari to inquire into the cause of detention, where it has no more effect than to permit the production of a prisoner as a witness in an action or special proceeding. Provisions for that procedure are already found in sections 415 through 420 of the civil practice act and in proposed rule 38.2(b).

The second sentence of the proposed subdivision is derived from section 1241 of the civil practice act. The term "judge" encompasses justices of the Supreme Court. See N.Y. Gen. Constr. Law §26. The proposal broadens the scope of section 1241 by permitting a judge authorized to issue writs of habeas corpus, other than a Supreme Court justice, to do so without application, if it appears in a proceeding before him that someone is illegally detained anywhere in the state. Under present section 1241, a judge other than a Supreme Court justice may not issue a writ of habeas corpus for the relief of a prisoner outside the county in which the judge resides; special provision is made for such relief in an adjoining county, however, in situations where there is no judicial officer who is capable of issuing the writ residing in the county where the prisoner is restrained. N.Y. Civ. Prac. Act §1232; *cf.* proposed section 7.2(b). The slight increase proposed, in the powers of judges other than Supreme Court justices, would not be open to abuse: there would be notice to interested parties, a proper return and a full hearing of the cause. *Cf. Polo* v. *D'Achille,* 157 App. Div. 300, 142 N.Y. Supp. 511 (2d Dep't 1913). As the Court of Appeals pointed

out in the leading case of *People ex rel. Tweed* v. *Liscomb,* 60 N.Y. 559, 567 (1875):

> There is no occasion to be alarmed, or to be frightened out of our propriety, lest, by reason of the number of magistrates to whom this great power has been committed, the judgments of superior courts will be nullified, and judicial proceedings rendered nugatory, so far as they interfere with personal liberty. The power has existed in many inferior magistrates for more than three-fourths of a century, and the laws and judgments of courts have been executed without unseemly interruption by means of this writ of liberty. . . .

(*b*) *To whom made. A petition for the writ shall be made to*

1. a special term of the supreme court, held in the judicial district in which the person is detained; or

2. the appellate division in the department in which the person is detained; or

3. any justice of the supreme court; or

4. a county judge or judge of general sessions in the county in which the person is detained; where there is no judge within the county capable of issuing the writ, or if all within the county capable of doing so have refused, the petition may be made to a county judge present in an adjoining county.

Notes

This subdivision is derived from the first paragraph and the three numbered subdivisions of section 1232 of the civil practice act. Minor language changes have been made, but, with one exception, no change in meaning is intended. That part of subdivision 3 of present section 1232 which permits a petition for habeas corpus to be made to a specified officer who "resides" in a county adjoining the one in which the prisoner is detained has been retained by use of the phrase "judge present in an adjoining county." The first part of the present subdivision, which authorizes application to an officer "being or residing" in the county where the prisoner is detained has been limited to a judge "in" that county.

Officers authorized to perform the duties of a "justice of the supreme court at chambers"—the present phrase of subdivision 3

of section 1232—include County Court judges. N.Y. Civ. Prac. Act §77; see 5 Bender, New York Practice 9 (Warren ed. 1953). They have been referred to explicitly in view of proposed title 33 which abolishes the distinction between powers of judges in court and at chambers. See notes to proposed rule 33.2, *infra*.

(c) Content. The petition shall be verified and shall state, or shall be accompanied by an affidavit which shall state

1. that the person in whose behalf the petition is made is detained, naming the person by whom he is detained and the place of detention if they are known, or describing them if they are not known; where the detention is by virtue of a mandate, a copy of it shall be annexed to the petition, or sufficient reason why a copy could not be obtained shall be stated;

2. the cause or pretense of the detention, according to the best knowledge and belief of the petitioner;

3. that a court or judge of the United States does not have exclusive jurisdiction to order him released;

4. if the writ is sought because of an illegal detention, the nature of the illegality;

5. whether any appeal has been taken from any order by virtue of which the prisoner is detained, and if so, the result;

6. the date, and the court or judge to whom made, of every previous application for the writ, the disposition of each such application and of any appeal taken, and the new facts, if any, presented in the petition that were not presented in any previous application; and

7. if the petition is made to a county judge outside the county in which the prisoner is detained, the facts which authorize such judge to act.

Notes

This subdivision is substantially the same as section 1234 of the civil practice act. It also includes, as proposed subparagraph 7, the provision of the last paragraph of present section 1232, which has been simplified in language, with no change in meaning intended. The specific authorization in present section 1232 for an officer specified in that section to require proof, outside the petition, that an application for the writ may properly be made to him is omitted as unnecessary. There is also no need for an explicit requirement such as that found in present section 1232 that the petition be in writing, since it is implicit in the proposed subdivision.

Subdivision 6 of present section 1234 has been deleted in view of the proposed abolition of the writ of certiorari to inquire into the cause of detention.

That part of subdivision 7 of present section 1234 which requires information about appeals taken from the mandate under which a prisoner is confined has been replaced by proposed subparagraph 5; the portion dealing with information about appeals from orders made upon prior applications for writs of habeas corpus is covered by proposed subparagraph 6. A requirement that the dates of the prior applications be stated in the petition has been included in proposed subparagraph 6.

The term "mandate" as used in this subdivision and the remainder of the proposed article is broad enough to include any "writ, process or other written direction" including an order or judgment. N.Y. Gen. Constr. Law §28-a.

7.3. When the writ shall be issued.

(a) Generally. The court to whom the petition is made shall issue the writ without delay on any day, or, where the petitioner does not demand production of the person detained or it is clear that there is no disputable issue of fact, order the respondent to show cause why the person detained should not be released. If it appears from the petition or the documents annexed thereto that the person is lawfully detained or that

a court or judge of the United States has exclusive jurisdiction to order him released, the petition shall be denied.

Notes

This subdivision combines sections 1231, 1252 and 1253, and the first and third sentences of section 1235 of the civil practice act. By use of the phrase "or . . . order the respondent to show cause," it also includes the writ of certiorari to inquire into detention.

The second sentence of section 1235 of the civil practice act, imposing an automatic forfeiture of one thousand dollars upon a judge who fails properly to grant a writ of habeas corpus in a case in which it should issue, has been deleted. The provision imposes an unjust burden upon a judge whose failure to issue the writ results from an honest mistake of law. His error can be corrected by application to another judge or by appeal. Moreover, the provision is not used. See introduction to this title.

The respondent, instead of being ordered to produce the body of the person detained, may be required to justify his continued imprisonment without bringing the prisoner to court. This function is presently served by the writ of certiorari. Under the Federal statute, the device used is an order to "show cause why the writ [of habeas corpus] should not be granted." 28 U.S.C. §2243 (1952); see also N.J. Rev. Stat. §2A; 67–16 (1951). If the hearing under the Federal statute results in a finding that the imprisonment is unlawful, the prisoner should be released and there seems little reason to then issue a writ of habeas corpus. The Federal terminology is explicable on historical grounds. The Judicial Code did not contain this phrase. In order to avoid needless production of prisoners the device of orders to show cause was developed. See Longsdorf, *Habeas Corpus—A Protean Writ and Remedy,* 8 F.R.D. 179, 187–88 (1949). This procedure was approved by the Supreme Court in *Walker* v. *Johnston,* 312 U.S. 275, 284 (1941), where the court noted:

> By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

The procedure was then explicitly incorporated in the Judicial Code in 1948. See Hart & Wechsler, The Federal Courts and the Federal System 1311–12 (1953); *cf.* N.Y. Civ. Prac. Act §§1261, 1263.

The advisory committee has limited the discretion of the court not to require production of the prisoner to cases where the petition does not request his production (in effect, a petition for a writ of certiorari) or where there are no disputed questions of fact. *Cf.* N.Y. Civ. Prac. Act §1235 ("unless it appears from the petition itself . . . that the petitioner is prohibited . . . from prosecuting the writ"). The first exception may be preferred by a petitioner who wishes to avoid the cost of producing a prisoner. See *People ex rel. Semenoff v. Nagle,* 118 Misc. 476, 478–79, 194 N.Y.Supp. 602, 604 (Sup. Ct. 1922).

The second exception incorporates that suggested for coram nobis cases by the Court of Appeals, since the "difference" between coram nobis and habeas corpus is "procedural only." *People* v. *Richetti,* 302 N.Y. 290, 97 N.E.2d 908 (1951); *United States* v. *Hayman,* 342 U.S. 205 (1952); see also Note, *The Uniform Post-Conviction Procedure Act,* 69 Harv. L. Rev. 1289, 1298–99 (1956). In view of the narrow scope of habeas corpus in criminal cases (see *People* v. *Silberglitt,* 4 N.Y.2d 59, 149 N.E.2d 76 (1958); *Morhous* v. *New York Supreme Court,* 293 N.Y. 131, 135, 56 N.E.2d 79, 81 (1944)), providing few possibilities for its abuse, and the limited authority of the advisory committee to propose changes verging on the substantive, the committee decided on the conservative position granting maximum protection to the prisoner which is reflected in the draft. The provision also reflects the committee's desire to give the person for whose benefit the hearing is held the right to be present when a witness is heard, whether or not he himself has testimony to give.

The second sentence of the proposed subdivision replaces civil practice act section 1231, dealing with restrictions on allowance of writs, section 1252, covering cases in which the prisoner must be remanded, and section 1253, listing situations in civil cases where the prisoner can be released. The grounds for issuance of the writ and for release of the person detained should be the same, since release will follow if the allegations on which the writ must issue are found to be true. The present statutory scheme clearly reveals this identity by using almost the same language and organization in sections 1231 and 1235. Integration of the present sections is emphasized by a reference in proposed section 7.10(a) to "a case in which the writ should issue."

Analysis of the specific provisions in sections 1231, 1252 and 1253 indicates that they are misleading rather than helpful to the lawyer or layman attempting to determine when the writ should issue.

Subdivisions 1 of sections 1231 and 1252 are replaced by the phrase in the proposed subdivision, "or that a court or judge of the United States has exclusive jurisdiction to order him released."

The restriction of the writ to exclude challenge of orders "issued by a court or judge of the United States in a case where such court or judges have exclusive jurisdiction," is presently found in sections 1231 and 1252 of the civil practice act and in the laws of other states. *E.g.*, Ill. Rev. Stat. c. 65, §21(1) (1955); N.J. Rev. Stat. §2A: 67-14(a) (1951). The words "exclusive jurisdiction" in these statutes are misleading, since they appear to mean that only if the state courts could not have issued the order upon which the detention rests are they prevented from issuing the writ. In fact, if a Federal court issued the order, whether it had concurrent or exclusive jurisdiction is irrelevant to the issue of immunity of Federal judicial process to interference by state judicial process. See *Abelman* v. *Booth,* 21 How. 506 (U.S. 1858). Since the issue of the Federal court's having exceeded its jurisdiction could not be tested in a state habeas corpus proceeding, the only question for the state court when a writ is sought could be whether the order under which the prisoner was held was issued by a judge or court of the United States. Even a serious dispute about this issue would, it would seem, be one beyond the power of the state court to decide. Apparently the statutes in other states were copied from the New York statute or a common source for the New York statute read the same way it does now as early as 1829. N.Y. Rev. Stat. pt. 3, c. 9, tit. 1, art. 2, §22 (1829). These statutes were adopted before decisions by the Supreme Court of the United States clarified the lack of power of the states to use habeas corpus to challenge a detention made on Federal order.

It seems clear that the state courts have also been denied power to issue the writ even in cases where there was no Federal court order where "the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release." *Tarble's Case,* 13 Wall. 397, 411 (U.S. 1871); see Hart & Wechsler, The Federal Courts and the Federal System 388–390 (1953).

The committee decided against a formulation that would embody in our statutes the rule of *Tarble's Case* and of the *Abelman* case. It believes the state writ should be available to prevent illegal imprisonment within the state in all cases except where Federal law prohibits its issuance. Since there is doubt of the wisdom of the present Federal position on the matter, the proposed provision makes the writ available in the state courts should the United States decide to give up its claim to exclusive jurisdiction.

Subdivision 2 of section 1231 and subdivisions 2 and 3 of section 1252 are designed to serve the same purpose. The first of these subdivisions appears to require the writ to issue whenever the prisoner is detained for *any contempt.* Section 1252 appears to require release wherever the imprisonment is based upon a *civil*

contempt by "virtue of a final judgment or decree." This apparent inconsistency between when the writ should issue and when, if the allegations of the petition prove to be true, the prisoner should be released was introduced by the revision of 1880, evidently because of the confusion about what constituted a criminal contempt. See 2 N.Y. Code Civ. Prac. §2016, note (Throop ed. 1880). Issuing a writ which on its face must result in a remand seems singularly useless.

It is difficult to justify any exception for contempts—whether civil or criminal—to the normal habeas corpus test of illegal detention. If the error is one which ought to be reviewed by appeal there should be no collateral attack, whether by habeas corpus or writ of certiorari. If the detention is one beyond the "jurisdiction" of the court, it should make no difference whether the "order" of commitment was final or not—a distinction that sections 1231 and 1252, read literally, appear to make. 21 Carmody-Wait, Cyclopedia of New York Practice 101–105 (1956); *cf.* Cohen & Karger, Powers of the New York Court of Appeals 176 (1952) (contempt order final if against someone not a party but not final if against a party).

The law today is not clear with respect to the proper mode of attacking a contempt order. See, *e.g.*, Cohen & Karger, *op. cit. supra* at 174–76, 709, and cases there cited. If the adjudication, whether criminal or civil, is made by a court of civil jurisdiction, appeal is available under the civil practice act; except that an order punishing for contempt in the "immediate view and presence" of the court is reviewable under present article 78 and proposed rule 111.1, whatever the nature of the court. *Id.* at 174–75, 709; 21 Carmody-Wait, *op. cit. supra* 361, 364–65.

The Code of Criminal Procedure does not apply to reviews of criminal contempts (N.Y. Code Crim. Proc. §515), unless prosecution was for the crime of criminal contempt as a misdemeanor under section 600 of the Penal Law. Since the Code of Criminal Procedure does not apply, review must be had by civil appeal, an article 78 proceeding in the nature of certiorari (*Douglas v. Adel,* 269 N.Y. 144, 149, 199 N.E. 35, 38 (1935); *Knapp* v. *Schweitzer,* 2 A.D.2d 579, 580, 157 N.Y.S.2d 158 (1st Dep't 1956), *aff'd,* 2 N.Y.2d. 913, 141 N.E.2d 825, *cert. granted,* 355 U.S. 804 (1957) (commitment for contempt for refusing to answer grand jury question; article 78 proceeding in nature of prohibition) or by collateral attack through habeas corpus. *People ex rel. Sarlay* v. *Pope,* 230 App. Div. 649, 651, 246 N.Y. Supp. 414, 416 (3d Dep't 1930) (appeal from commitment order and appeal from denial of writ of habeas corpus heard together). The preferred practice is to review by civil appeal. See the full discussion in *Matter of Grand Jury, County of Kings (Reardon),* 278 App. Div. 206, 209, 104 N.Y.S.2d 414, 417 (2d Dep't 1951); see also *People* v. *DeFeo,* 308 N.Y. 595, 127 N.E.2d 592 (1955) (commitment for contempt for refusing to answer grand jury questions); *Pawolowski* v. *Schenectady,* 217 N.Y. 117, 111 N.E. 478 (1916); *People* v. *Diefendorf,* 281 App. Div. 465, 468, 119 N.Y.S.2d 469, 473 (1st

Dep't 1953), *aff'd,* 306 N.Y. 818, 118 N.E.2d 824 (1954) ("There has been some confusion in the past as to the proper method of review but we regard it as settled practice now that an order of criminal contempt of the character here involved [juror discussing case outside jury room] is appealable.").

In view of the full review by direct civil appeal now afforded, there seems no reason to permit review through a collateral attack by habeas corpus as present section 1231 seems to do. This is particularly true since, after issuing the writ by virtue of the command of section 1231, the court could not release the prisoner unless the committing court in a criminal contempt case lacked "authority to commit" (N.Y. Civ. Prac. Act §1252) or in a civil contempt case where the "jurisdiction" of the civil court was "exceeded," or for some other jurisdictional reason set out in civil practice act section 1253. In short, while apparently permitting a full review of contempt commitments, it is doubtful whether the habeas corpus provisions do so. The practitioner who attempts to use this method instead of appeal, having wended his way through the statutory maze, may find himself against a blank wall. *But cf. People ex rel. Sarlay* v. *Pope,* 230 App. Div. 649, 651, 246 N.Y. Supp. 414, 416 (3d Dep't 1930).

Commitment for contempt should not be treated differently from any other commitment. Review of errors should be by appeal and only if there is a jurisdictional defect should habeas corpus be used. The exception for orders summarily punishing for contempt in the presence of the court is retained because of the possible absence of a record. See proposed rule 111.1 and notes. However, under both present and proposed law, the proceeding is started in the Appellate Division and is in the nature of an appeal. See proposed rules 111.3(4), 111.4(d) and notes.

To clarify the law with respect to appeals in criminal contempt cases, and to make clear the right to appeal in cases of commitment for civil contempt, it is recommended that the following provision be added to proposed section 16.3(a)(2):

> (ix) punishing for contempt except an order summarily punishing a contempt committed in the presence of the court.

Those portions of subdivisions 2 of sections 1231 and 1252 which do not deal with contempt appear to prevent an attack on final orders or judgments, or process issued upon such orders or judgments by "a competent tribunal of civil or criminal jurisdiction." The scope of the limitation cannot be determined from the statute, however, but requires a review of what constitutes a "jurisdictional" defect under the cases. See introduction to proposed article 7. As the Court of Appeals stated in *Morhous* v. *New York Supreme Court,* 293 N.Y. 131, 135, 56 N.E.2d 79, 81 (1944):

> The express statutory limitation was not intended to abridge the privilege of the writ of habeas corpus. Indeed, the Legislature had, under the Constitution of the State, no power to do that. The statute merely formulates the limitation which had generally been applied by the court of Kings Bench in England and by the courts of America.

The proposed test of "lawfully detained" furnishes as precise a guide as do the present sections. The only sound alternative to a test such as that proposed is an enumeration which at best can be only suggestive. The proposed change will not result in any diminution of the rights of persons imprisoned; indeed, the grounds for the writ may not be decreased by the legislature. *People ex rel. Tweed* v. *Liscomb,* 60 N.Y. 559, 566 (1875).

The listing contained in present section 1236 is only slightly more helpful than that in present sections 1231 and 1252. Subsections 1, 3, 4 and 6 of section 1236 say no more than that the prisoner shall be discharged when he is detained on authority of an order which was issued by an officer lacking jurisdiction to issue it. This aspect is covered by the proposed subdivision's use of the words "lawfully detained." Subdivision 5 of present section 1236 appears to require release where the prisoner is detained by the wrong person. This is misleading because, in such a case, he should not be released, but should be remanded to the custody of the proper person. N.Y. Civ. Prac. Act §1256; see also proposed sections 7.10(a), 7.10(c) and notes. Subdivision 2 of present section 1253 provides for the case of lawful imprisonment where subsequent events entitle the prisoner to discharge. If the mandate to keep the prisoner expired by a condition subsequent, then his continued detention is "illegal" and he would be released under any formulation. If exercise of judgment with respect to the need for continued imprisonment is required, application should be made for a modification of the original order and not by collateral attacks. See cases cited in 21 Carmody-Wait, Cyclopedia of New York Practice 101 n. 4 (1956).

(b) Successive petitions for writ. A court is not required to issue a writ of habeas corpus if the legality of the detention has been determined by a court of this state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it.

Notes

This provision is based upon section 2244 of title 28 of the United States Code. It continues the common law and present position in this state that res judicata has no appplication to the writ. See, *e.g., People ex rel. Lawrence* v. *Brady,* 56 N.Y. 182, 191–92 (1874);

Annot., 161 A.L.R. 1331 (1946); 21 Carmody-Wait, Cyclopedia of New York Practice 519 (1956). Nevertheless, courts do not look with favor on successive applications for the writ which raise no new grounds or supply no new facts, and they may give weight to a prior refusal to grant the writ. *Ex parte Hawk*, 321 U.S. 114, 118 (1944); *Wong Doo* v. *United States*, 265 U.S. 239, 240 (1924); see also Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 314 *ff.* (1948); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 174 (1949). Moore succinctly sums up the effect of the Federal provision as follows:

> Section 2244 is new and although it had no statutory counterpart in prior law, many courts had "consistently refused to entertain successive 'nuisance' applications for habeas corpus." The elementary rule that a denial of habeas corpus is not res judicata remains undisturbed. A circuit or district judge has complete freedom to entertain an application for a writ of habeas corpus despite a previous denial. The point is that they are not required to do so when there is a concurrence of all of the following circumstances: (1) a federal judge or court has denied a prior application; (2) the petition presents no new ground not theretofore presented and determined; and (3) the judge or court to whom the present petition is presented is satisfied that the ends of justice will not be served by the present inquiry. [Moore, Commentary on the U.S. Judicial Code 437–38 (1949).]

The last paragraph of present section 1234 of the civil practice act (added by N.Y. Laws 1930, c. 81) is susceptible of being interpreted in the same way as the proposed subdivision. It reads as follows: "For failure to . . . state any new facts other than were stated in the previous applications the writ on such subsequent application may be vacated without notice or the application may be denied. . . ."

7.4. Content of writ.

Preliminary Note

A form for the writ, and one for the writ of certiorari to inquire into the cause of detention, are presently included in the civil practice act as sections 1237 and 1238. They do not appear in the proposed article, but will be included in the forms to be appended to the proposed act and rules. Subdivisions 1 and 4 of present section 1236 have been deleted. Subdivision 1 of that provision, dealing with the seal under which the writ must be issued, formerly applied to all state writs. N.Y. Code Civ. Proc. §1992. With the abolition of state writs other than habeas corpus and certiorari to inquire into the cause of detention, it was transferred to the habeas corpus provisions of the civil practice act. A seal is not required to insure compliance; its absence has been held not to invalidate the writ of habeas corpus. *Jenkins* v. *Kuhne*, 57 Misc. 30, 31, 107 N.Y. Supp. 1020, 1022 (Sup. Ct. 1907), *aff'd* 195 N.Y. 610, 89 N.E. 1109 (1909). Subdivision 4 of section 1236, dealing with indorsement of the writ, is covered in proposed rule 33.10, covering the signing of an order.

(a) For whom issued. The writ shall be issued on behalf of the state, and where issued upon the petition of a private person, it shall show that it was issued upon his relation.

Notes

This subdivision, except for minor language changes, is the same as subdivision 2 of section 1236 of the civil practice act. See proposed rule 110.1 obviating the need for the phrase "the people of."

(b) To whom directed. The writ shall be directed to, and the respondent shall be, the person having custody of the person detained.

Notes

The first phrase of this subdivision is new, and codifies existing practice. See 21 Carmody-Wait, Cyclopedia of New York Practice 44 (1956). The second phrase restates subdivision 3 of present section 1236. Instead of being styled a defendant, the person to whom the writ is directed is referred to as a respondent, in keeping with the treatment of the petition as one commencing a special proceeding. See proposed rule 27.1.

(c) To whom returnable. A writ to secure the discharge of a person from a state institution shall be made returnable before a justice of the supreme court or a county judge of the county in which the person is detained; if there is no such judge available it shall be made returnable before the nearest accessible supreme court justice or county judge. In all other cases, the writ shall be made returnable in the county where it was issued, except that where the petition was made to the supreme court or to a supreme court justice outside the

county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention.

Notes

The first sentence of this subdivision is derived from subdivision 3 of section 1239 of the civil practice act. The only change in substance is that requiring the writ in certain instances to be returned to the "nearest accessible" judge, rather than to the "nearest accessible . . . judge in an adjoining county." This seems more reasonable than the original provision, and will prevent difficulty should all judges in adjoining counties be incapable of hearing the matter. The term "institution" is intended to encompass "prisons."

The second sentence of the proposed subdivision is derived from subdivision 2 of present section 1239. Although the latter provision clearly permits the Supreme Court or its justices in one county to make a writ returnable in another county when the prisoner is detained there, it does not specifically provide for the place of return where the prisoner is detained in the same county as the court or justice. The negative implication of the provision, however, is that writs in the latter instance may be returnable only in the county from which issued. This reading of the subdivision is supported by the fact that it was originally enacted as a separate amendment to the existing habeas corpus provisions (N.Y. Laws 1837, c. 240, §1), and presumably would not have been required had the Supreme Court and its justices already had the power to make writs returnable in other counties. The interpretation seems to be in accord with actual practice (see *People ex rel. Potterton* v. *Potterton*, 169 Misc. 404, 7 N.Y.S.2d 273 (Sup. Ct. 1938)), and it is incorporated in the proposed subdivision. Other language changes have been made in the present provision, but no change in meaning is intended.

Note should be taken of section 25 of the Code of Criminal Procedure. This provision prevents the removal of a prisoner from a county jail by habeas corpus when the Supreme Court is in session in the county, unless the writ has been either issued by or made returnable to that court. It is derived from an early statute dealing with the government of county jails generally, and formerly applied to courts of oyer and terminer. N.Y. Laws 1847, c. 460, §27. Its purpose appears to be to assure that control over the prisoner is vested in the court entrusted with his ultimate disposition. *People ex rel. Whitman* v. *Woodward*, 150 App. Div. 770, 135 N.Y. Supp. 373, (2d Dep't 1912). The provision is both illogical and unduly restrictive, and therefore has not been incorporated into the proposed subdivision; its repeal is recommended. The trial or other disposition of a County Court prisoner is not always within the exclusive jurisdiction of the Supreme Court.

See N.Y. Code Crim. Proc. §39 (County Court); *id.* 50 (Court of General Sessions). The fact that the practical operation of the provision is suspended when the Supreme Court is not in session is clear indication that the provision is not essential to effective jail delivery. Any reason for the rule is outweighed by the inflexible restriction it imposes upon the place of return of a writ issued by any judge or court other than the Supreme Court in the county where the prisoner is detained. Not only must the writ be returnable to the Supreme Court sitting in the county of detention, but it must be returned to that court as a body and not to a justice thereof. See *People ex rel. Whitman* v. *Woodward, supra* at 775, 135 N.Y. Supp. at 376. The sound discretion of the officer issuing the writ should be adequate assurance that it will be returnable before an appropriate official.

(d) When returnable. The writ may be made returnable forthwith or on any day or time certain, as the case requires.

Notes

This subdivision is based upon subdivisions 1 and 4 of present section 1239. It changes the rule of subdivision 4, by permitting a court or judge petitioned to make a writ returnable on Sunday. Section 1235 explicitly permits the writ to be granted on a Sunday and where strong reason exists for making it returnable on this day, no restrictions should prevent it. See proposed section 7.6(a) for the time of return where the writ is made returnable forthwith. *Cf.* proposed section 7.8(a). The words "or time" permits the court to require production of the prisoner on the same day.

(e) Expenses; undertaking. A court issuing a writ directed to any person other than a public officer may require the petitioner to pay the charges of bringing up the person detained and to deliver an undertaking to the person having him in custody, in an amount fixed by the court, to pay the charges for taking back the person detained if he should be remanded. Service of the writ shall not be complete until such charge is paid or tendered and such undertaking is delivered.

Notes

Under the civil practice act, in order for service of a writ directed against a sheriff, coroner, constable or marshal to be complete, there must be tendered to the official his fees for bringing up the prisoner

and an undertaking covering both the fees for return of the prisoner and security should he escape. N.Y. Civ. Prac. Act §§1242, 1243(2), 1243(3), 1243(4); see 5 Bender, New York Practice 26-27 (1956). Although there is no requirement for the court or judge issuing the writ to specify these items in his certificate allowing the writ, the officer may refuse to obey the writ if the fees and undertaking are not tendered to him. N.Y. Civ. Prac. Act §1243(2).

The proposed subdivision requires a public officer to whom the writ is directed to deliver the person detained whether or not fees are paid to him. Liberty of our citizens, the committee believes, is too precious to depend upon the payment of fees. Persons other than public officers to whom the writ is directed will not, however, be required to assume the cost of producing the prisoner if the court orders payment of charges. The requirement of an undertaking against the escape of the prisoner from a private person is made discretionary with the issuing court or judge. No sound reason can be seen to unnecessarily burden the petitioner with the expense of such an undertaking, unless the court or judge petitioned deems it necessary. Service is deemed to be incomplete until the required fee and undertaking are tendered.

7.5. Service of the writ.

A writ of habeas corpus may be served on any day. Service shall be made by delivering the writ and a copy of the petition to the person to whom it is directed. If he cannot with due diligence be found, the writ may be served by leaving it and a copy of the petition with any person who has custody of the person detained at the time. Where the person to whom the writ is directed conceals himself or refuses admittance, the writ may be served by affixing it and a copy of the petition in a conspicuous place on the outside either of his dwelling or of the place where the person is detained. If the person detained is in the custody of a person other than the one to whom the writ is directed, a copy of the writ may be served upon the latter with the same effect as if the writ had been directed to him.

Notes

The first sentence of this subdivision is based upon the last sentence of section 1242 of the civil practice act. It permits service on Sunday.

The second and third sentences of this subdivision are derived from the first three sentences of section 1242 of the civil practice act with no change in substance.

The last sentence of this subdivision is new. It will avoid the problem faced by a petitioner who discovers, on serving the original writ, that the prisoner has been transferred to the custody of some other person.

The question of who may make service is covered in proposed rule 32.3(a). Application of this rule reduces the minimum age of the process server from twenty-one to eighteen years. See N.Y. Civ. Prac. Act §1243(1); notes to proposed rule 32.3(a).

7.6. Obedience to the writ.

(a) Generally; defects in form. A person upon whom the writ or a copy thereof is served, whether it is directed to him or not, shall make a return to it and, if required by it, produce the body of the person detained at the time and place specified, unless the person detained is too sick or infirm to make the required trip. Where a writ requires production of a person forthwith, he shall be produced within twenty-four hours after service of the writ. A writ of habeas corpus shall not be disobeyed for defect of form so long as the identity of the person detained may be derived from its contents.

Notes

This subdivision is derived from section 1240, subdivisions 1 and 3 of section 1244 and part of section 1246 of the civil practice act. Since it is possible that the writ will not require production of the prisoner (see proposed section 7.3(a)), the phrase "if required by it" is used in this subdivision.

The time within which the prisoner must be produced where the writ it returnable "forthwith" has been set at twenty-four hours in all cases. See notes to proposed section 7.8(a). The court may require that the prisoner be produced at some earlier time. See notes to proposed section 7.4(d).

(b) Compelling obedience. If the person upon whom the writ or a copy thereof is served refuses or neglects fully to obey it, without showing sufficient cause, the court before whom the writ is returnable, upon proof of its service, shall forthwith issue a warrant of attachment against him directed to the sheriff in any county in which such person may be found requiring him to be brought before the court issuing the warrant; he may be ordered committed in close custody to the county jail until he complies with the order of the court. Where such person is a sheriff, the warrant shall be directed to any coroner of the county or to a person specifically designated to execute it. Such coroner or other person shall have power to call to his aid the same assistance as the sheriff in executing the warrant; a sheriff shall be committed to a jail in a county other than his own.

Notes

This subdivision is derived from section 1248 of the civil practice act. Language has been simplified with no change in meaning intended. The procedure outlined has been held to be the exclusive remedy for a refusal or neglect to obey a writ of habeas corpus requiring production of a child. *Application of Hebo*, 95 N.Y.S.2d 545, 548 (Sup. Ct. 1950); *People ex rel. Kniffin* v. *Knight*, 184 Misc. 545, 551–54, 56 N.Y.S.2d 108, 114–16 (Sup. Ct. 1945). The discussion in the *Knight* opinion indicates that it is also the exclusive remedy in other habeas corpus cases.

Section 1250 of the civil practice act, permitting the sheriff, coroner or other person to seek assistance, has been incorporated in this subdivision. *Cf.* N.Y. County Law §§652–655 (authorizing appointment of special deputies).

(c) Precept to bring up person detained. A court issuing a warrant of attachment as prescribed in subdivision (b) may at the same time, or thereafter, issue a precept to the person to whom the warrant is directed ordering him immediately to bring before the court the person detained.

Notes

This subdivision is derived from section 1249 of the civil practice act. The part of the latter provision dealing with custody of the person for whose benefit the writ was issued is covered in proposed section 7.9(e). Minor language changes have been made without a change of meaning. The word "immediately" is used in place of "forthwith." See proposed sections 7.6(a), 7.7. The power of the court to appoint a substitute for the sheriff and for such substitute to seek assistance is implied from the preceding subdivision.

7.7. Warrant preceding or accompanying writ.

A court authorized to issue a writ of habeas corpus, upon satisfactory proof that a person is wrongfully detained and will be removed from the state or suffer irreparable injury before he can be relieved by habeas corpus, shall issue a warrant of attachment directed to an appropriate officer requiring him immediately to bring the person detained before the court. A writ of habeas corpus directed to the person having custody of the person detained shall also be issued. Where it appears that the detention constitutes a criminal offense, the warrant may order the apprehension of the person responsible for the detention, who shall then be brought before the court issuing the warrant and examined as in a criminal case.

Notes

This section is derived from sections 1271 through 1273 of the civil practice act. It seeks to assure an effective remedy for a prisoner in emergency situations. Normally, the warrant would be issued upon a petition made in behalf of the person detained. See

5 Bender, New York Practice 25 (1956); 21 Carmody-Wait, Cyclopedia of New York Practice 12–13 (1956). The broad language of the civil practice act provisions has been retained, however, to permit a court or judge to issue the warrant on his own initiative where, in a proceeding before him, its necessity becomes apparent. The warrant is usually used in cases involving the custody of a child (5 Bender, New York Practice 25 (1956)); it may also be used where a prisoner is to be extradited to another state. See 21 Carmody-Wait, *op. cit. supra* at 12–13.

The proposed section changes the civil practice act provisions in only one respect. It requires a writ of habeas corpus to be issued, directed to the person detaining the prisoner. This may be done concurrently with or subsequent to the time of issuance of the warrant. Under the civil practice act, apparently a return is required of the person detaining the prisoner, whether or not the warrant ordered him brought before the court with the prisoner. It is specified that proceedings shall then be had as if a writ of habeas corpus had been issued in the first instance; but there is no specification of the manner in which the person detaining the prisoner is to be apprised of the need for a return. The new requirement is designed to fill this gap.

The examination of the person detaining the prisoner is to be made as specified in sections 188 to 221-b of the Code of Criminal Procedure.

Present section 1270, making it a misdemeanor to conceal a person entitled to the writ, is deleted, since such a provision is already contained in section 1789 of the Penal Law. The language of the latter provision, however, should be amended to delete reference to the writ of certiorari, as follows (brackets indicate deletions, italics indicate insertions):

> § 1789. Concealing persons entitled to writ of [deliverance] *habeas corpus.* A person having in his custody or power or under his restraint[,] one who would be entitled to a writ of habeas corpus [or certiorari] or for whose relief *such* writ [of habeas corpus or certiorari] has been issued who, with intent to elude the service of such writ, or to avoid the effect thereof, transfers the party to the custody, or places him under the power or control of another, or conceals or changes the place of his confinement, or who without lawful excuse refuses to produce him, is guilty of a misdemeanor, punishable as prescribed in the last section.

7.8. Return.

(a) When filed and served. The return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding and filed at the time and place specified in the writ, or, where the writ is returnable forthwith, within twenty-four hours after its service.

Notes

This subdivision is derived from subdivision 3 of section 1244 of the civil practice act. The phrase "affidavit to be served in the same manner as an answer in a special proceeding" has been added to explain the word "return," but complete conformity with proposed rule 27.3 is not recommended because of the committee's desire to retain the historic writ terminology.

The time within which an affidavit must be submitted for a writ that is returnable forthwith has been set at twenty-four hours after service of the writ in all cases. The provision of the civil practice act allowing twenty-four hours for each twenty miles from the place of service to the place where the writ is returnable was drafted at a time prior to modern modes of transportation. See N.Y. Rev. Stat. pt. 3, c. 9, art. 3, §101 (1859). Should more than twenty-four hours be necessary, the judge issuing the writ may take this into account in fixing the return date. Where the writ is not made returnable forthwith, the affidavit is to be served at the times indicated for an answer in proposed rule 27.2(b). Where the writ is returnable less than eight days after service, the answering affidavit may be served on the return day.

(b) Content. The affidavit shall fully and explicitly state whether the person detained is or has been in the custody of the person to whom the writ is directed, the authority and cause of the detention, whether custody has been transferred to another, and the facts of and authority for any such transfer. A copy of any mandate by virtue of which the person is detained shall be annexed to the affidavit, and the original mandate shall be produced at the hearing; where the mandate has been delivered to the person to whom the person detained was transferred, or a copy of it cannot be obtained, the reason for failure to produce it and the substance of the mandate shall be stated in the affidavit.

Notes

This subdivision is derived from section 1245 of the civil practice act. The language has been simplified but no change in meaning is intended.

The last paragraph of present section 1245 requiring a verification except for a sworn public officer has been omitted in view of the reference to an affidavit.

7.9. Hearing.

Preliminary Note

This section deals only with those aspects of the hearing which are unique to the writ of habeas corpus. Provisions governing special proceedings generally are contained in proposed title 27. Consequently, section 1268, applying provisions relating to actions to habeas corpus proceedings, has been omitted. Section 1247, dealing with appearance of parties at the hearing, is also deleted. See also proposed section 7.1. Matters concerning the disposition of the proceeding after hearing of the evidence are considered in proposed section 7.10.

(a) Notice before hearing. Where the detention is by virtue of a mandate, the court shall not adjudicate the issues in the proceeding until written notice of the time and place of the hearing has been either personally served eight days prior to the hearing, or given in any other manner or time as the court may order,

1. where the mandate was issued in a civil cause, to the person interested in continuing the detention or to his attorney; or,

2. where a person is detained by order of the domestic relations court in the city of New York, or by order of any court while a proceeding affecting him is pending in the said domestic relations court, to the presiding justice of the said domestic relations court; such presiding justice shall be represented in the habeas corpus proceeding by the corporation counsel of the city of New York; or,

3. where a person is detained by order of the children's court of any county outside the city of New York, to the judge who made the order; or,

4. in any other case, to the district attorney of the county in which the prisoner was detained when the writ was served and the district attorney of the county from which he was committed.

Notes

This subdivision is the same as present section 1258, except for minor language changes which do not change meaning. It seeks to assure that those interested in upholding the validity of a person's detention are given notice of any challenge to that detention by way of habeas corpus. The final paragraph of section 1258 is covered by proposed section 7.11.

Normally, notice of issuance of the writ is personally served upon the prescribed persons. Where personal service cannot be made, however, the court may authorize service by registered mail. See 21 Carmody-Wait, Cyclopedia of New York Practice 51–55 (1956).

The language of the present provision has been changed to clarify any doubt about whether notice may be served before there has been a return to the writ. "[I]t is permissible practice, where the prisoner is known to be held by virtue of a mandate, to give immediate notice. This practice is embraced within the language of the section. . . ." *Id.* at 54.

(b) Reply to return. The petitioner or the person detained may under oath, orally or in writing, deny any material allegation of the answering affidavit or make any allegation of fact showing that the person detained is entitled to be discharged.

Notes

This subdivision is based upon the first sentence of section 1259 of the civil practice act. The term "reply" is substituted for "answer" in accordance with proposed rule 27.3.

The proposed subdivision permits either the prisoner or a person who has petitioned on his behalf to reply to the answering affidavit. No reason can be seen for restricting the applicability of the provision to the prisoner. In *People ex rel. Hubert* v. *Kaiser*, 206 N.Y. 46, 50, 99 N.E. 195, 196 (1912), although the Court of Appeals indicated that the return should have been answered by the prisoner rather than the petitioner, it determined the issues in dispute on the petitioner's answer.

Permitting the reply to be made either orally or in writing is in keeping with actual practice. See 21 Carmody-Wait, Cyclopedia of New York Practice 64 (1956).

(c) Hearing to be summary; certificates and affidavits. The court shall proceed in a summary manner to hear the evidence produced in support of and against the detention and to dispose of the proceeding as the justice of the case requires. Evidence may, in the court's discretion, be taken orally, by deposition, by affidavit, or by certificate of a judge who presided at a trial resulting in a judgment pursuant to which the detention took place.

Notes

The first sentence of this subdivision embodies the first clause of section 1251 and the second sentence of section 1259 of the civil practice act. It emphasizes the need for speed. Since the hearing is summary in nature, rules of evidence are not controlling. *Matter of Heyward*, 1 Sandf. 701, 704 (N.Y. Sup. Ct. 1848); 21 Carmody-Wait, Cyclopedia of New York Practice 106 n.4 (1956).

The second sentence is new. It restates the procedure used in practice and embodies sections 2245 to 2247 of title 28 of the United States Code, described by the revisors of that Code as "clarifying existing practice." Moore, Commentary on the U.S. Judicial Code 438–39 (1949); see Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172, 174, 178 (1949). It need hardly be noted that this provision may not be used to deprive a prisoner of a full trial of any issue of fact, including the right of cross-examination where it is necessary to protect his rights. See notes to proposed section 7.3(a).

(d) Sickness or infirmity of person detained. Where it is proved to the satisfaction of the court that the person detained is too sick or infirm to be brought to the appointed place, the hearing may be held without his presence, may be adjourned, or may be held at the place where the prisoner is detained.

Notes

This subdivision embodies the substance of present section 1260. It is based upon the provision found in Illinois (Ill. Rev. Stat. c. 65, §14 (1955)), and allows the court or judge handling the proceeding to make the most just disposition possible where the prisoner was required by the writ to be present but is too sick or infirm to attend the hearing at the prescribed place.

(e) Custody during proceeding. Pending final disposition, the court may place the person detained in such custody as the case may require.

Notes

Except for minor language changes, this section is the same as section 1257 of the civil practice act. The last part of present section 1249, requiring that a prisoner brought before a court or judge by an officer other than the one to whom the writ was directed remain in the custody of that officer, has been changed to give the court discretion to fix custody. Normally, the sheriff's office in the county where the proceedings are held would be equipped to maintain custody of the prisoner.

7.10. Determination of proceeding.

(a) Discharge. If the person is unlawfully detained in a case in which the writ should issue, a final order shall be made discharging him forthwith. No person detained shall be discharged for a defect in the form of the commitment, or because the person detaining him is not entitled to do so if another person is so entitled. A final order to discharge a person may be enforced by the court issuing the order by attachment, in the manner prescribed in section 7.6(b).

Notes

This subdivision is derived from part of sections 1251, 1253, 1255, 1256 and 1267 and the first sentence of section 1262 of the civil practice act. *Cf.* notes to proposed section 7.3(a).

The provision of the second sentence that there shall be no discharge solely for a "defect in form of the commitment" corresponds to the provision in present section 1255 that the prisoner shall be discharged on bail or remanded "although the commitment is irregular."

The additional requirement of section 1255, where the commitment is irregular, that the prisoner "appears by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offense," has been omitted as misleading. The primary question in most habeas corpus proceedings is whether the detention is "lawful." This question is most often phrased in terms of "jurisdiction." See 21 Carmody-Wait, Cyclopedia of New York Practice 7(1956). Thus, in cases involving unlawful detention or commitment, the issue is whether the committing magistrate acted without jurisdiction. The magistrate has jurisdiction if there is "any" or "some" evidence produced at the hearing before him that the person detained is guilty of the crime for which he is committed; it is not the function of the court on habeas corpus, however, to make an independent determination that the defendant "appears" to be guilty. *People ex rel. Howey* v. *Warden,* 207 N.Y. 354, 101 N.E. 167 (1913); *Matter of Henry,* 13 Misc. 734, 35 N.Y. Supp. 210 (Sup. Ct. 1895); see 21 Carmody-Wait, *op. cit. supra* at 73–75; N.Y. Code Crim. Proc. §208.

The purpose of present section 1255, and of the corresponding provision in this subdivision, is to prevent the release of the person detained merely for a defect in the form of the commitment. As the Court of Appeals noted in *People ex rel. Howey* v. *Warden, supra* at 360, 101 N.E. at 169:

> What the section in question contemplated and provides for are those practically immaterial errors in the description or nomenclature of the crime or in the form of the warrant which might well be overlooked when the evidence disclosed the probable commission by the accused of a crime substantially and fairly described in the warrant.

A judge who may hear a habeas corpus petition would also be qualified to sit as a committing magistrate. *Compare* N.Y. Code Crim. Proc. §147, *with* proposed section 7.2(b). Thus it would appear that where there is no evidence to support the commitment, but evidence that the person detained is guilty of some other crime, the judge holding the hearing on return of the writ could commit the prisoner for the other crime instead of discharging him. However, the court in *People ex rel. Howey* v. *Warden, supra* at 360, 101 N.E. at 169, appears to have rejected such a possibility:

> A judge sitting in habeas corpus proceedings would have no authority to remand the accused for further confinement under this warrant of commitment because the evidence disclosed to his mind the probable commission of a crime by the accused radically differing from the one named and with which he had never been charged, and as to which no examination had taken place, and on which he had never been committed by the magistrate who alone had authority to commit. Such a result would involve not the disregard of a mere irregularity in the warrant but practically the commission of the accused to confinement by a new warrant made by the judge in a habeas corpus proceeding rather than by the committing magistrate.

But cf. People ex rel. Childs v. *Knott,* 187 App. Div. 604, 620, 176 N.Y. Supp. 321, 333–34 (1st Dep't 1919), *aff'd,* 228 N.Y. 608, 127 N.E. 329 (1920). No attempt has been made to resolve this apparent conflict since it involves primarily an interpretation of the Code of Criminal Procedure. Apparently, however, nothing would prevent the rearrest and commitment for another crime of the person discharged, "by virtue of a subsequent lawful mandate." See proposed rule 7.12; N.Y. Civ. Prac. Act §1269.

The specific exclusion from discharge because of detention by the wrong person, in the second sentence of this subdivision, follows from the provisions of present section 1256 which are incorporated in proposed section 7.10(c).

Although confined by its terms to cases of illegal detention, this rule is not intended to exclude habeas corpus proceedings based upon other grounds, such as in matrimonial cases, where a different determination from that provided for herein may be appropriate. See N.Y. Dom. Rel. Law §§70, 71.

Section 1254 of the civil practice act, providing that a court shall not inquire into the legality of a mandate or order except as permitted by section 1252, is omitted as unnecessary.

The final sentence of the proposed subdivision incorporates the substance of the first sentence of section 1267 of the civil practice act. The second sentence of present section 1267 has been deleted; an aggrieved party's right to compensation for his wrongful detention may be satisfied in an action for false imprisonment. Section 1266 of the civil practice act, dealing with service of a final order of discharge, has also been deleted as unnecessary. See notes to proposed section 7.1.

The last sentence of present section 1262 has been deleted. Its provisions are now fully covered by section 204 of the Mental Hygiene Law, by virtue of a 1921 amendment to its predecessor, the Insanity Law. N.Y. Laws 1921, c. 673, §5. The term "final order" has been used to conform to present terminology. *But cf.* proposed rule 27.9.

(b) Bail. If the person detained has been admitted to bail but the amount fixed is so excessive as to constitute an abuse of discretion, and he is not ordered discharged, the court shall make a final order reducing bail to a proper amount. If the person detained has been denied bail, and he is not ordered dis-

charged, the court shall make a final order admitting him to bail forthwith, if he is entitled to be admitted to bail as a matter of right, or if it appears that the denial of bail constituted an abuse of discretion. Such order must fix the amount of bail, specify the time and place at which the person detained is required to appear, and order his release upon bail being given in accordance with the code of criminal procedure.

Notes

This subdivision is a substitute for part of the first and all of the second sentence of section 1255, part of section 1276, and all of sections 1264, 1265, 1277, 1278, 1279, and 1280 of the civil practice act. The subdivision regulates the granting of bail as a result of a habeas corpus proceeding, the lowering of excessive bail through such proceeding, and prescribes the procedure for the release of a prisoner when bail is so granted. Bail is to be given in the manner required by the Code of Criminal Procedure. See N.Y. Code Crim. Proc. §§550–606. No reason can be seen for treating the procedure for release of a prisoner on bail after habeas corpus proceedings differently from the procedure for his release on bail at any other time. The procedures in the civil practice act are archaic; they have been carried forward unchanged through various revisions of the civil practice act and civil code. See N.Y. Code Civ. Proc. §§2061–2065 and notes (Throop ed. 1880). The Code of Criminal Procedure provides a detailed system kept up to date because of its constant use and the procedures there set out should be adopted for bail on applications for habeas corpus. *Compare, e.g.*, N.Y. Civ. Prac. Act §§1276–1278, *with* N.Y. Code Crim. Proc. §§583–585.

The language of present section 1255 makes it appear mandatory that a person be admitted to bail on the return of a writ of habeas corpus in all cases where the offense is a "bailable" one. If the word "bailable" were given its normal meaning of any case not specifically non-bailable, the section would be contrary to section 553 of the Code of Criminal Procedure, which provides that in all cases other than misdemeanors or those cases specifically enumerated in section 552 of that Code, a person may be admitted to bail "as a matter of discretion."

Section 1255 has not been given this literal meaning. Its predecessor provided that on the return of a writ of habeas corpus the person hearing the return was required to "either discharge, or bail, or remand the party so brought, as the case shall require, and as to justice shall appertain. . . ." N.Y. Laws 1818, c.277,

§2. Once discretion has been exercised in denying or allowing bail, a court hearing a habeas corpus proceeding may only determine whether there has been an abuse of that discretion. *People ex rel. Shapiro* v. *Keeper of the City Prison,* 290 N.Y. 393, 49 N.E.2d 498 (1943). A habeas corpus proceeding may not be utilized to reduce bail unless it has been set so high that discretion in fixing it was abused. *People ex rel. Rao* v. *Adams,* 296 N.Y. 231, 72 N.E.2d 170 (1947); *People ex rel. Lobell* v. *McDonnell,* 296 N.Y. 109, 71 N.E.2d 423 (1947). The reason for the present practice of limiting habeas corpus to cases where discretion has been abused—reflected in the proposed subdivision—was succinctly stated by the Court of Appeals in *People ex rel. Shapiro* v. *Keeper of the City Prison, supra,* at 399, 49 N.E.2d at 501:

> [T]he lack of any statutory right of appeal from the General Sessions order [denying bail] made it doubly important that habeas corpus be made available to a prisoner forced to lie in jail without an adjudication of guilt. It does not follow, however, that the court which entertained the writ could exercise an independent discretion as to bail. The Legislature which forbade any appeal from an order denying bail, did not intend, in a backhanded way and under other forms, to permit the equivalent of an appeal, as to matters of discretion as well as matters of law. The traditional status and purpose of a writ of habeas corpus can be maintained in cases like this without making it a device for obtaining a new trial of a discretionary matter.

(c) Remand. If the person detained is not ordered discharged and not admitted to bail, a final order shall be made dismissing the proceeding, and, if he was actually produced in court, remanding him to the detention from which he was taken, unless the person then detaining him was not entitled to do so, in which case he shall be remanded to proper detention.

Notes

This subdivision covers section 1252, part of section 1256 and the second sentence of section 1262 of the civil practice act. It is not necessary to repeat the grounds upon which a remand is required, as does present section 1252, because present section 1231 and proposed section 7.3(a) cover the same subject by stating when the writ shall not be issued. Language has been simplified, but no change in meaning is intended.

7.11. Appeal.

Appeal may be taken from an order refusing to grant a writ of habeas corpus or from a final order made upon the return of such a writ. A person to whom notice is given pursuant to section 7.9(a) is a party for purposes of appeal. The attorney-general may appeal in the name of the people in any case where a district attorney might do so. Where appeal from an order admitting a person to bail is taken by the people, his release shall not be stayed thereby.

Notes

This section is derived from present sections 1274 and 1275 and the last sentence of section 1258. It permits any party to appeal any adverse final order, including an order refusing to release the prisoner except on bail.

The third sentence of the proposed section is based upon the final sentence of section 1258 of the civil practice act. The last sentence of the proposed section embodies present section 1275.

Present section 1276—originally enacted as an amendment to the habeas corpus laws of New York in 1873 (N.Y. Laws 1873, c. 663, §1)—is omitted. It seems to require a judge who has refused to discharge a prisoner committed on a bailable offense to fix such bail upon the application of the prisoner, where the latter has perfected or intends to take an appeal from the judge's order. There is no reason to make bail in such a case mandatory after it has been once refused, and a judge hearing the return of a writ of habeas corpus finds the refusal lawful. See proposed section 7.10(b) and notes.

7.12. Redetention after discharge.

A person discharged upon the return of a writ of habeas corpus shall not be detained for the same cause, except by virtue of a subsequent lawful mandate.

Notes

This section replaces the first paragraph and the four numbered subdivisions of section 1269 of the civil practice act. The purport

of the present provision is aptly stated in 21 Carmody-Wait, Cyclopedia of New York Practice 109 (1956):

> Discharge is merely from custody and not from the penalty; it does not operate as an acquittal, and is not in itself a bar to a subsequent indictment or other appropriate civil or criminal proceedings. If a better jurisdictional foundation can be laid, the fact that the old one was found to be defective in a habeas corpus proceeding will not, in itself, prevent reimprisonment.

Subdivisions 1 and 2 of present section 1269 each permit commitment on an order subsequent to release if the order is lawful. They might be read as applying only to commitments prior to trial. So read, they might be interpreted as an attempt to exclude the rearrest where double jeopardy could be claimed. Ample protection against rearrest in such situations, however, is found in the Code of Criminal Procedure. See, *e.g.*, N.Y. Code Crim. Proc. §§332(3), 334(4), 340, 341, 354(2), 442(2). These subdivisions thus appear to serve no purpose.

Subdivision 3 of section 1269 has the same effect in civil actions and proceedings as do subdivisions 1 and 2 in criminal actions, and serves no need not met by the proposed provision. Subdivision 4 does contain a limitation on rearrest. Apparently it applies to discharges after arrest as a provisional remedy. A further arrest after discharge is possible only as part of final process or as mesne process in another action or proceeding begun after the first was discontinued. Problems of arrest as a provisional remedy are treated in the provisions limiting that remedy. See proposed title 71.

So far as habeas corpus is concerned, sufficient protection is provided by a requirement that a subsequent commitment be based on a subsequent lawful order. The proposed section provides this as the sole criterion. The term "detention" is intended to include both the magistrate's commitment contemplated by section 208 of the Criminal Code and imprisonment after conviction.

The last paragraph of present section 1269 has been deleted. An aggrieved party's right to compensation for his wrongful detention may be satisfied in an action for false imprisonment. That part of the last paragraph making a wilful violation of the section a misdemeanor is already provided for in section 1788 of the Penal Law. The latter provision, however, should be amended to delete mention of the writ of certiorari and to remove its provision for a civil action to recover forfeitures against those violating section 1269 of the civil practice act, as follows (brackets indicate deletions):

> § 1788. Re-confining person discharged upon writ of habeas corpus.
>
> A person, who either solely, or as a member of a court, or in the execution of a judgment, order or process, knowingly recommits, imprisons or restrains of his liberty, for the same

cause, any person who has been discharged from imprisonment upon a writ of habeas corpus [, or certiorari] is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars or by imprisonment not exceeding six months, or both[; and in addition to the punishment prescribed therefor, he forfeits to the party aggrieved, one thousand two hundred and fifty dollars to be recovered in a civil action].

ARTICLE 12. INTEREST

INTRODUCTION

Existing interest provisions of the civil practice act have, for the most part, been simplified and retained in this article. They have been somewhat expanded in scope by codification of existing case law. Also, a number of distinctions in the treatment of different types of actions have been eliminated.

In cases of injury to property rights the courts have drawn a much-criticized distinction between actions in which interest is to be given as of right and those in which its award is discretionary. Proposed section 12.1(a) establishes a uniform rule, allowing interest as of right in all property damage cases. Based upon a decision on this matter reached by the Temporary Commission on the Courts, the draft of this article leaves untouched the present law which does not permit pre-verdict interest in personal injury cases. See notes to proposed section 12.1(a).

Section 480-a of the civil practice act has been deleted. The apparent purpose of this provision is to set a specific time from which a recovery upon a life insurance policy will bear interest —the date of receipt by the company of completed proof of death of the insured. The transfer of this specialized provision to the Insurance Law is recommended. *Cf.* N.Y. Deced. Est. Law §132. Present section 480-a should be modified so that it allows interest only for the period up to verdict, thereby permitting the same compounding of pre-verdict interest as will occur in other types of actions by operation of proposed section 12.2. There also appears to be no reason for continuing to limit the terms of the provision to companies doing business within the state. See N.Y. Ins. Law §59-a; *cf.* notes to proposed section 3.2. Accordingly, the Insurance Law should be amended to include a new section 166-b, as follows:

> 166-b. Interest in actions upon policies of life insurance.
>
> In any action brought to recover upon a policy of life insurance, interest upon the principal sum recovered by the plaintiff, from the date of the receipt by the company of the completed proof of death of the insured, shall be added to and be a part of the total sum awarded.

Section 132 of the Decedent Estate Law, which also requires the awarding of interest to the time of judgment, should be similarly modified. In addition, the last sentence of that provision should be deleted, since the procedure it outlines is covered by proposed section 12.1(b). The provision should be amended as follows (brackets indicate deletions, italics indicate insertions):

> The damages awarded to the plaintiff may be such a sum as the jury upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person

or persons, for whose benefit the action is brought. In every such action now or hereafter pending, in addition to any other lawful element of the damages recoverable, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by a husband or wife or next of kin or for the payment of which any such person is responsible, also shall be deemed proper elements of damage. If the decedent leaves surviving a father and a mother, the death of such father prior to the verdict shall not affect the amount of damages recoverable. [When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment.] *Interest upon the principal sum recovered by the plaintiff, from the date of the decedent's death, shall be added to and be a part of the total sum awarded.* [The inquisition, verdict, report or decision may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits.]

The second sentence of section 481 of the civil practice act, providing that judgments directing the repayment of money bear interest from the time the money was paid out, unless otherwise expressed, has been deleted. Neither commentators nor case law offer an adequate explanation of the purpose or scope of the provision. See N.Y. Code Remed. Justice §1211, revisors' note (1876) (referring to the "supposed meaning" of the predecessor of the present provision). Moreover, in awarding interest on money to be repaid, courts have not found it necessary to rely upon section 481 or its predecessor. See, *e.g., Manufacturers Trust Co.* v. *Gray,* 278 N.Y. 380, 387–88, 16 N.E.2d 373, 376 (1938) (relying upon section 480 under a theory of implied contract); *Leary* v. *Corvin,* 181 N.Y. 222, 230, 73 N.E. 984, 986 (1905); *LaVin* v. *LaVin,* 277 App. Div. 896, 98 N.Y.S.2d 191 (2d Dep't 1950).

TABLE OF SECTIONS IN ARTICLE 12

SECTIONS—ARTICLE 12. INTEREST

12.1. Interest to verdict, report or decision.

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a

contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

Notes

This subdivision establishes a single rule for the awarding of interest in all contract and property damage cases. The provision for contract actions is a simplification of the second sentence of present section 480, with no change in meaning intended.

The provision for property damage actions is new, and is adopted from a 1950 proposal of the Law Revision Commission. N.Y. Law Rev. Comm'n Rep. 95, 97 (1950). It abolishes the distinction between property damage actions in which interest is granted as of right and those in which it is granted in the discretion of the trier of fact. The distinction is commonly stated as one between negligence and non-negligence cases, with interest a matter of right in the latter type of action only. The Court of Appeals has sharply criticized the present law, terming it "manifestly unsound, because interest is essential to complete indemnity in both classes of cases." *Flamm* v. *Noble,* 296 N.Y. 262, 268, 72 N.E.2d 886, 888 (1947). See also *Wilson* v. *City of Troy,* 135 N.Y. 96, 104–105, 32 N.E. 44, 46 (1892); Committee on State Legislation, Bulletin No. 3, 100–101 (Association of the Bar of the City of New York 1957); Committee on State Legislation, Bulletin No. 6, 299–301 (Association of the Bar of the City of New York 1956); Committee on State Legislation, Bulletin No. 1, 21–22 (Association of the Bar of the City of New York 1955); Committee on State Legislation, Bulletin No. 2, 103–104 (Association of the Bar of the City of New York 1954); Committee on State Legislation, Bulletin No. 1, 15–16 (Association of the Bar of the City of New York 1953); Committee on State Legislation, Bulletin No. 2, 53–57 (Association of the Bar of the City of New York 1950).

In addition to its failure to assure complete indemnification to an injured party, the distinction between "as of right" and "discretion" cases has been criticized as an uncertain one; there is doubt, for example, about cases of trespass to real property. See N.Y. Law Rev. Comm'n Rep. 95, 124–25 (1950).

The artificiality of the present law is demonstrated by the fact that interest may apparently be recovered as of right in certain cases of negligent injury to property because the action can be considered one in contract under section 480 of the civil practice act. See *Flamm* v. *Noble, supra* at 267, 72 N.E.2d at 887; *A. L. Russell, Inc.* v. *City of New York,* 138 N.Y.S.2d 455, 457–58 (Sup. Ct. 1954);

Squibb & Sons Inter-American Corp. v. *Springmeier Shipping Co.*, 194 Misc. 813, 814, 87 N.Y.S.2d 876, 878 (Sup. Ct. 1949).

Finally, there is serious dispute about the present state of the law. Three decisions have relied upon the dictum in *Flamm* v. *Noble* to hold interest recoverable as of right in cases of negligent injury to property rights. *Harmon & Regalia, Inc.* v. *City of New York*, 286 App. Div. 825, 141 N.Y.S.2d 877 (1st Dep't 1955); *A. L. Russell* v. *City of New York*, 138 N.Y.S.2d 455 (Sup. Ct. 1954); *Barry* v. *Doctor's Hospital, Inc.*, 137 N.Y.L.J. no. 91, p. 7, col. 6 (N.Y.C. Ct. 1957). Concurrently, other decisions have held interest in such cases to be discretionary only, usually citing the same *Flamm* decision as authority. *Keilson* v. *City of New York*, 126 N.Y.S.2d 606, 607 (N.Y.C. Munic. Ct. 1953); *Hamburger* v. *Met. Dist.*, 135 N.Y.L.J. no. 70, p. 10, col. 4 (N. Y. C. Ct. 1956); *Cocchiarella* v. *Hi-Hat Distributors, Inc.*, 126 N.Y.L.J. p. 1427, col. 3 (N.Y.C. Ct. 1951). See also *Stein Hall & Co.* v. *Sealand Dock and Terminal Corp.*, 2 M.2d 727, 733, 149 N.Y.S.2d 537, 543 (Sup. Ct. 1955). A compounding of this confusion results from a 1955 Second Circuit Court of Appeals decision, where Judge Learned Hand, in a dictum reviewing the effect of the *Flamm* case, stated: "[A]nd, although, as the plaintiff says, that was only a dictum, the lower courts of that state have taken it as authoritative, and so must we." *Newburgh Land & Dock Co.* v. *The Texas Co.*, 227 F.2d 732, 735 (2d Cir. 1955). The proposed subdivision is designed to bring a measure of certainty to this area.

Interest on damages for personal injuries involves difficult policy considerations because it often includes compensation for future loss and damages of a speculative nature. In view of the Temporary Commission on the Courts' conclusion not to recommend legislation allowing interest in personal injury cases, the advisory committee has not considered changing the present status of the law. See N.Y. Temp. Comm'n on the Courts Rep. IV 48, Leg. Doc. 6(c) (1957); see also Institute of Judicial Administration, Recovery of Interest as Damages in Personal Injury Cases 15–18 (March 4, 1957); *but cf.* Committee on State Legislation, Bulletin No. 3, 169–71 (Association of the Bar of the City of New York 1959).

Where a suit combines causes of action for property damage and personal injury, the plaintiff should request separate verdicts on each cause of action. Otherwise, there will be no basis upon which to compute interest for any property damage award, and the right to such interest will be waived. See *Helman* v. *Markoff*, 255 App. Div. 991, 8 N.Y.S.2d 448 (2d Dep't 1938), *aff'd*, 280 N.Y. 641, 20 N.E.2d 1012 (1939).

The proposed subdivision contemplates the award of interest on compensatory damages only. Since punitive damages, which may be awarded in certain tort actions, are intended only to impose punishment upon a defendant, interest on such damages for the period before verdict is unnecessary to assure full compensation to an injured party. See 2 Clark, New York Law of Damages 83 *et seq.* (1925). Once the punitive damages have been awarded,

however, they become a debt due the plaintiff, and interest will be earned under proposed sections 12.2 and 12.3.

The committee has adopted a proposal to make the award of interest in equity actions discretionary. See N. Y. Law Rev. Comm'n Rep. 101, 114–16 (1950). Such discretion is presently exercised in tort actions arising in equity (*e.g.*, *Ellis* v. *Kelsey*, 241 N.Y. 374, 379–80, 150 N.E. 148 (1925); *Frey Realty Co.* v. *Ten West 46th Street Corp.*, 1 M.2d 371, 145 N.Y.S.2d 670 (Sup. Ct. 1955)), whereas in actions based upon a contract, the second sentence of section 480 of the civil practice act is held to make the award of interest at the legal rate mandatory. See *Frey Realty Co.* v. *Ten West 46th Street Corp.*, *supra* at 372, 145 N.Y.S.2d at 672.

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

Notes

Reference to the date from which interest is to be measured is new. The date the cause of action accrued in the time normally used in computing interest. See, *e.g.*, *Greater New York Coal & Oil Corp.* v. *Philadelphia & Reading Coal & Iron Co.*, 278 N.Y. 270, 272, 15 N.E.2d 801, 802 (1938); *Aronowsky* v. *Goldberger-Raabin Co.*, 250 App. Div. 731, 293 N.Y. Supp. 527 (2d Dep't 1937); *E. R. Squibb & Sons Inter-American Corp.* v. *Springmeier Shipping Co.*, 194 Misc. 813, 815, 87 N.Y.S.2d 876, 878 (Sup. Ct. 1949); *Freedman* v. *Hart & Early Co.*, 162 Misc. 487, 488, 293 N.Y. Supp. 525, 526–27 (N.Y.C. Ct. 1935). Where this date is a matter of conjecture, the courts normally award interest from the time of commencement of the action. *Aronowsky* v. *Goldberger- Raabin Co.*, *supra*; *Leehoke Corp.* v. *Plastoid Corp.*, 193 Misc. 208, 83 N.Y.S.2d 672 (Sup. Ct. 1948), *aff'd without opinion*, 276 App. Div. 903, 94 N.Y.S.2d 903 (1st Dep't 1950); *Freedman* v. *Hart & Early Co.*, *supra*; *Sacks-Sons Luggage Corp.* v. *Louis DeJonge & Co.*, 135 N.Y.L.J. no. 85, p. 11, col. 6 (Sup. Ct. 1956). The proposed subdivision encompasses these rules, but also permits the awarding of interest from any earlier date at which it can be ascertained that the cause of action had already accrued. This provision is based upon the method of computing interest employed by the court in *Mathis* v. *Matthews*, 39 N.Y.S.2d 242, 244 (Sup. Ct. 1943). It is intended

to insure fuller idemnification of an injured party wherever possible. In the *Mathis* case, plaintiff secured damages for breach of a contract to construct a building resulting from a failure to do so in a good, workmanlike manner. Since the date of breach could not be determined, the court awarded interest from the day after completion of the work, stating that the breach must have occurred at least by that time.

The proposed subdivision offers a method for arriving at a fair award of interest in cases involving items of damage arising after the accrual of the cause of action. It avoids both the under-indemnification of a successful claimant by an award which computes interest from the time of commencement of suit, as well as the granting of a "windfall" to such a party by an award of interest from the first accrual of a cause of action. Where there are various items of damage, alternative methods of computation are provided: each item may be separately computed or a constructive single date utilized.

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

Notes

Under present practice interest for the period prior to verdict, report or decision may in the first instance be awarded by the trier of fact. Where a jury fails to award interest in a case in which it accrues as of right, the court may do so. *Mayaguez Drug Co.* v. *Globe & Rutgers Fire Ins. Co.*, 260 N.Y. 356, 183 N.E. 523 (1932). The failure of the civil practice act to place the responsibility for fixing interest solely upon either the trier of fact or the court frequently leaves unsettled whether a jury verdict includes interest; the courts will add interest to a verdict only when it is clear that the verdict does not already include it. See, *e.g.*, *Mayaguez Drug Co.* v. *Globe & Rutgers Fire Ins. Co., supra; First Int'l Pictures, Inc.* v. *F. C. Pictures Corp.*, 262 App. Div. 21, 22, 27 N.Y.S.2d 816, 818 (4th Dep't 1941); *Gottesman* v. *Havana Importing Co.*, 72 N.Y.S.2d 426, 428 (Sup. Ct. 1947); *McQuade* v. *Monroe*, 135 N.Y.L.J. no. 97, p. 10, col. 4 (N.Y.C. Ct. 1956). The cases have sought to minimize this problem by creating a rebuttable presumption that interest was not included in a verdict where no instruction was given to do so. *Mathis* v. *Matthews*, 39 N.Y.S.2d 242 (Sup. Ct. 1943); *Sacks-Sons Luggage Corp.* v. *Louis DeJonge & Co.*, 135 N.Y.L.J. no. 85, p. 11 col. 6 (Sup. Ct. 1956); *Richard Silk Co.* v. *Bernstein*, 130 N.Y.L.J. 1159, col. 2 (Sup. Ct. 1953).

Normal procedure is to instruct a jury that interest must be added to damages awarded in certain types of actions. At least one trial judge, however, instructs juries not to consider the question of interest at all. *Kaufman* v. *Farah*, 131 N.Y.L.J. no. 122, p. 6, col. 7 (Sup. Ct. 1954); *Milco Garage Corp.* v. *Wendy Garage Inc.*, 131 N.Y.L.J. no. 62, p. 8, col. 7 (Sup. Ct. 1954). In order to avoid later confusion as to whether a verdict contains interest, the jury is advised that "the law will take care of that subject [interest] by awarding interest on the recovery from the time plaintiff was entitled to the money." *Milco Garage Corp.* v. *Wendy Garage Inc., supra.* The proposed subdivision, by placing the responsibility for adding interest to a verdict solely upon the clerk of the court, seeks to overcome the above difficulties. The jury is required only to fix a date. Should the plaintiff fail to request an instruction that the date from which interest is to accrue be specified in the verdict, he will be deemed to have waived his right to a jury trial on this question and the court will fix the date. Where the demand for the addition of interest comes at a time before the jury has been discharged, however, the interest date question should be submitted to it.

A motion to add interest to an award under the proposed subdivision may be made at any time prior to execution of judgment in the action. See *McLaughlin* v. *Brinkerhoff*, 222 App. Div. 458, 226 N.Y. Supp. 623 (1st Dep't 1928), *distinguishing Urband* v. *Lubell*, 245 N.Y. 156, 156 N.E. 649 (1927).

A referee may correct his omission to specify the date from which interest is to be computed, since the proposed act and rules permit post-trial motions addressed to him. See notes to proposed section 14.1.

12.2. Interest from verdict, report or decision to judgment.

Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

Notes

This section is a simplification of the first sentence of section 480 of the civil practice act. No change in meaning is intended.

12.3. Interest upon judgment.

Every money judgment shall bear interest from the date of

of its entry.

Notes

This section is derived from the first sentence of section 481 of the civil practice act. The distinction between courts of record and not of record has been omitted. Interest is not presently permitted in a court not of record upon a judgment "directing the payment of money" although it is permitted in judgments "for a sum of money." Apparently the distinction intended is between awards in equity and at law. Since courts not of record have, at most, a limited equity jurisdiction, the present verbiage serves little purpose.

12.4. Rate of interest.

Interest shall be at the legal rate.

Notes

This section codifies present New York law. Sections 480 and 481 of the civil practice act contemplate the award of interest at the legal rate. 3 Bender, New York Practice 523, 525 (Warren ed. 1954). Under section 370 of the General Business Law this rate is six per cent. The committee considered changes in interest rate a substantive matter beyond its competence.

Specific sections providing for rates other than the legal rate would govern. See, *e.g.*, N.Y. Gen. Munic. Law §3-a (three per cent maximum for recoveries against a municipal corporation, except in actions to recover damages for wrongful death or in condemnation proceedings, where the maximum rate is four per cent); N.Y. Pub. Housing Law §157(5) (three per cent maximum for recoveries against a housing authority, except in actions to recover damages for wrongful death or in condemnation proceedings, where the maximum rate is four per cent); N.Y. Unconsol. Laws, McK. §2501, C.L.S. c. 195, §1 [Public Corporation Law] (four per cent maximum for recoveries against a public corporation).

The proposed section is not intended to disturb the decision in *Moscow Fire Ins. Co.* v. *Heckscher & Gottlieb*, 260 App. Div. 646, 23 N.Y.S.2d 424 (1st Dep't 1940), *aff'd*, 285 N.Y. 674, 34 N.E.2d 377 (1941), where the court held that the six percent interest rate on judgments did not apply in a case where the defendant was prevented from paying a judgment by court order. The court awarded interest at the rate the money involved had actually earned during the period that the defendant was prevented from paying the judgment. See also N.Y. Civ. Prac. Act §§136, 530(4).

ARTICLE 13. ENFORCEMENT OF MONEY JUDGMENTS

INTRODUCTION

This article contains provisions defining the terms used in the enforcement rules and the property which is subject to enforcement of money judgments, provisions creating and affecting liens and priorities between creditors and certain provisions affecting jurisdiction and property rights. The remaining provisions concerning enforcement of money judgments are contained in the rules of proposed title 61.

Proposed section 13.1 sets forth the basic definitions which are utilized for the purposes of attachment as well as for the enforcement of money judgments. See proposed section 15.4. Sections 13.2, 13.3 and 13.4 create a system of liens and priorities to replace the chaotic structure that presently exists, especially with respect to personal property. The personal property system is admittedly new, but it has been designed with the practical problems that arise in collecting judgments in mind.

Proposed sections 13.5 and 13.6 are designed to consolidate the present provisions in the civil practice act relating to the exemption of property from application to the satisfaction of a judgment. These provisions are contained in present sections 513, 664–678, 687-a(8), 792 and 1196. No substantial changes are intended.

There have been a number of recent substantive amendments of these sections. The most antiquated provisions were altered in 1946 (N.Y. Laws 1946, c. 135), on the recommendation of the Judicial Council (11 N.Y. Jud. Council Rep. 261 (1945)), and other provisions were modernized in 1957 and 1958, N.Y. Laws 1957, c. 412, 512; N.Y. Laws 1958, c. 311. A thorough reconsideration of the content of the exemption provisions is nevertheless still desirable. The exemptions are archaic in many cases and they are not adequately designed to protect the valid interests of either debtors or creditors. The extent to which they are outdated is indicated by the table appended to this article which sets forth the enactment date of each exempt item of personal property. The committee recognizes, however, that exemptions represent important substantive policies; that they are the result of legislative compromise; that they reflect the diverse pulls of various groups within the state; and that they have recently been amended. Accordingly, it is foregoing any attempt at revision of the substance of the present provisions. It suggests, however, that further study and revision by the legislature and interested groups within the state is needed.

The great number of exemption provisions in the Consolidated Laws relate to very limited situations involving special classes of persons and property. There appears to be no particular virtue in consolidating them with the more general civil practice act exemptions. See, *e.g.*, N.Y. Banking Law §407 (savings and loan associations); *id.* §461 (credit unions); N.Y. Canal Law §34 (materials and equipment of contractors with superintendent of public works);

N.Y. Educ. Law §524 (state teachers' retirement system benefits); N.Y. Emp. Liab. Law §12 (compensation benefits); N.Y. Munic. Law §205(4) (payments to representatives of deceased volunteer firemen); N.Y. Ins. Law §98(3) (insurance deposits); *id.* §166 (proceeds of certain insurance contracts); N.Y. Lab. Law §595(2) (unemployment insurance benefits); N.Y. Membership Corp. Law §162 (soldiers' monument corporations); N.Y. Mental Hygiene Law §§172, 173, 174 (state hospital retirement system benefits); N.Y. Pub. Auth. Law §210(1) (property of Bethpage Park Authority); N.Y. Pub. Housing Law §158 (real property of housing authority); N.Y. Pub. Serv. Law §61(13-a) (liability policy or bond of omnibus corporation); N.Y. Retirement & Soc. Sec. Law §110 (state employees' retirement system benefits); N.Y. Soc. Welfare Law §137 (welfare benefits); N.Y. Village Law §199-e (police pension fund benefits); N.Y. Vol. Fireman's Benefit Law §23 (disability payments to volunteer firemen); N.Y. Workmen's Comp. Law §33 (workmen's compensation benefits); N.Y. Unconsol. Laws, McK. §10204, C.L.S. c. 137, §4 (certain veterans' bonus payments); *cf.* N.Y. Membership Corp. Law §190 (donations of historic interest to historical society).

The principal exemption provisions in the civil practice act are in the article dealing with execution. N.Y. Civ. Prac. Act §§664–678. They are referred to there as exemptions "from levy and sale by virtue of an execution." With the development of additional procedures by which a judgment debtor's assets could be applied to the satisfaction of a judgment, it was considered necessary to insert separate provisions specifying that property which is exempt from execution is also exempt from other enforcement procedures. See N.Y. Civ. Prac. Act §792(a) (supplementary proceedings); *id.* §1196 (judgment creditor's action); *cf. id.* §687-a(8) (levy upon intangible assets). A change in phraseology from "exempt from execution" to "exempt from application to the satisfaction of a money judgment," permits the deletion of these separate provisions.

The sole function of present section 664 is to state that the general exemption provisions in the civil practice act do not repeal the special exemption provisions in the consolidated laws. Since a contrary interpretation would seem inconceivable, this section has been omitted. Section 101 of the General Construction Law, providing that "The Consolidated Laws shall not be construed to . . . affect any provision of the . . . civil practice act . . . unless expressly so stated" was intended to prevent inadvertent changes in the general practice as a result of the reconsolidation of our statutes. See 2 Report of Board of Statutory Consolidation 2157 (1907). It was not designed to make inoperative specific procedural provisions of the Consolidated Laws.

Section 669 of the civil practice act, dealing with exhibits at an exhibition, has also been omitted. It involves a special situation and is repeated verbatim in section 250 of the Personal Property Law.

The exemption provision in section 513 of the civil practice act has also been deleted. It provides that a judgment debtor's interest

in a contract for the purchase of real property "cannot be levied upon or sold by virtue of an execution. . . ." Section 687-a(8)(a) explicitly refers to section 513 as an exemption and provides that the interest may not be reached by the execution procedure against intangibles provided for in section 687-a. To the extent that these sections indicate that such an interest may not be reached by a judgment creditor, however, they are misleading. Although the exemptions from execution are expressly made applicable to judgment creditor's actions by section 1196, section 1192, in the same article, provides that the interest "exempted" by section 513 may be reached by a judgment creditor's action. Moreover, the interest may be attached under section 913, if attachment is otherwise warranted, and then applied to the satisfaction of a judgment under section 969. The significance of section 513 is therefore only to limit the judgment creditor's choice of the procedure which he may pursue. New York is virtually the only state which imposes this limitation by statute, although a number of states have reached the same result on the basis of the common law rule that an equitable interest is not subject to execution and that the interest of a vendee under an executory contract for the purchase of real property is such an "equitable" interest. See Annot., 1 A.L.R.2d 727, 730 (1948). Michigan has enacted a statute expressly subjecting such an interest to execution (Mich. Comp. Law §623.82 (1948)), and a great many other states have subjected such an interest to execution without an explicit statute. See Annot., *supra* at 734. There is no apparent reason for requiring a judgment creditor to bring a separate judgment creditor's action in order to have this type of asset applied to the satisfaction of his judgment or differentiating between creditors who have attached the asset and those who have not.

Section 13.7 contains the basic provision for enforcement against the state, its officers and agencies, and section 13.8 contains limitations upon enforcement after the death of a judgment debtor. Section 13.9 provides for the discharge of a garnishee's obligation to the judgment debtor to the extent of payments made to the judgment creditor.

Section 13.10 continues the present grant of jurisdiction to inferior courts to punish for contempt in connection with enforcement, while section 13.11 provides for immunity of testimony given on an enforcement examination.

TABLE OF SECTIONS IN ARTICLE 13

SECTIONS—ARTICLE 13. ENFORCEMENT OF MONEY JUDGMENTS

13.1. Definitions.

(a) Money judgment; judgment creditor; judgment debtor; garnishee; real property.

1. A money judgment is an interlocutory or final judgment, or any part thereof, for a sum of money or directing the payment of a sum of money.

2. A judgment creditor is a person in whose favor a money judgment is entered or a person who becomes entitled to enforce it.

3. A judgment debtor is a person other than a defendant not summoned in the action, against whom a money judgment is entered.

4. A garnishee is a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which the judgment debtor has an interest.

5. Real property includes chattels real.

Notes

The definitions in subparagraphs 1, 4 and 5 of this subdivision are applicable to both enforcement and attachment. See proposed section 15.4.

The definition of "money judgment" in subparagraph 1 replaces such provisions as those of present sections 505(2) and 644, which deal with enforcement of that part of a judgment which directs the payment of money, those of present sections 649, 658 and 778 which prescribe for the enforcement of parts of a multiple judgment, and those of present sections 504(1) and 642, which prescribe the same enforcement for judgments for a sum of money as for judgments directing the payment of a sum of money. See also introduction to proposed title 60.

Since proposed rule 60.1 specifies that an order directing the payment of money is enforceable as a judgment and proposed rule 27.9 provides that a special proceeding terminates in a judgment, rather than order, the enforcement of money orders is identical under the proposed rules to that of money judgments.

The definition of a "judgment creditor" in subparagraph 2 of this subdivision is derived from section 7(5) of the civil practice act. It expressly includes both the "original" judgment creditor and any assignee or representative who may thereafter become entitled to enforce the judgment. Present section 654, which provides that the personal representatives of a deceased judgment creditor may issue execution, has been deleted as unnecessary. Its provision that, in such a case, the execution must be indorsed with the name and address of the person issuing it is also unneces-

sary in view of the expansion in proposed rule 50.10(a) of the requirements of sections 534 and 539 of the civil practice act for the filing of authority to enforce a judgment. Moreover, deletion of section 654, removes the anomalous requirement that an assignee of a deceased judgment creditor must indorse the execution: section 650 makes no such requirement for the assignee of a live judgment creditor. Even if this distinction were justifiable, it assumes that an assignee would always know that his assignor has died.

The definition of a judgment debtor in subparagraph 3 of the proposed subdivision is new. It replaces the provision in section 222-a of the civil practice act prohibiting execution on the individual property of a partner not summoned in a partnership action, and the similar provisions in sections 1199 and 1200 for execution upon a judgment for a joint liabliity and in section 778 for supplementary proceedings upon such a judgment. See proposed subdivision (c) and notes.

The definition of "garnishee" in subparagraph 4 of this subdivision is also new. While the term "garnishee" is already used in the civil practice act—for example, in section 684—it has the narrow meaning of an employer of the defendant. The broader definition of the proposed subdivision is widely used in the enforcement and attachment provisions of many jurisdictions and is often used in the decisions of this state. See, *e.g.*, *Cotnareanu* v. *Chase Nat'l Bank*, 271 N.Y. 294, 300–301, 2 N.E.2d 664, 667 (1936). Utilizing it in the act and rules makes it possible to eliminate much verbiage in the civil practice act where various and complicated terms are presently used. See, *e.g.*, N.Y. Civ. Prac. Act §922 ("the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein"). Where certain particular property is involved, the express designation of the proper garnishee in proposed subparagraph (d) would supersede the general definition.

The inclusion in the term "real property" of chattels real is an extension of the express inclusion in sections 509, 510(1) and 512 of the civil practice act. The provision avoids the ambiguity created by section 708 which provides that a lease for less than five years is not treated as real property for the purpose of sale and redemption, despite its treatment in sections 509, 510(1) and 512 with real property for the purpose of liens. Deletion of this distinction is made possible by the abolition both of redemption and of priority of execution between real and personal property. See introduction to proposed title 61.

(b) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred

within or without the state, to or from a resident or nonresident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be legally assigned accruing within or without the state.

(c) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which may be legally assigned, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

(d) Proper garnishee for particular property or debt.

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consist of a right or interest to or in a decedent's estate or any other property or fund held or con-

trolled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee.

Notes

The definitions in these subdivisions are based upon the provisions of sections 913 through 917, which are contained in the attachment article of the civil practice act. The subdivisions also replace parts of sections 686 through 688 in the execution article. Its definitions are applicable to both enforcement and attachment. See proposed section 15.4.

Negotiable documents of title have been added to subparagraph 4 of proposed subdivision (d), although the attachment article of the present act deals only with negotiable instruments and stock certificates and the execution article recognizes only negotiable instruments. *But cf.* N.Y. Civ. Prac. Act §799-a(b). Under the Consolidated Laws, however, property covered by a negotiable document of title may not be attached or levied upon under an execution unless the document is seized, or its negotiation enjoined. See N.Y. Pers. Prop. Law §120 (negotiable document of title must be surrendered to bailee in possession of goods or negotiation enjoined before goods may be attached or levied upon); *id.* §210 (same for carrier and negotiable bill of lading); N.Y. Gen. Bus. Law §110 (same for warehouseman and negotiable warehouse receipt); *cf.* N.Y. Pers. Prop. Law §121 (general provisions for aiding creditor to levy upon negotiable document of title owned by debtor); *id.* §211 (same for negotiable bill of lading); N.Y. Gen. Bus. Law §111 (same for negotiable warehouse receipt). Although these provisions do not expressly permit levy by service upon the holder, the proposed provision would apply the same rule to negotiable documents as is utilized for corporate stock or negotiable instruments. Indeed, the provisions of section 917 of the civil practice act for levying under an attachment upon a negotiable stock certificate, by delivering a copy of the warrant to the holder, thus enjoining transfer, under subdivision 2, or by seizure of the certificate, under subdivision 3, are reiterated in section 174 of the Personal Property Law.

The scheme of the execution article of the civil practice act with respect to levy upon intangibles is similar to that of the attachment article. Thus, section 687 permits levy and sale under an execution of any document or instrument, "whether negotiable or otherwise" by seizure of the instrument, and section 687-a(1) permits levy upon a debt by service upon the debtor. Negotiable instruments are excepted from the provisions of section 687-a(1), so that the only method of levy upon negotiable instruments would be seizure under section 687. Similarly, a non-negotiable instrument may be seized under section 687 or the debt it represents may be levied upon by serving the debtor under section 687-a(1). This is substantially the result obtained under section 917(2) of the attachment article.

Under the proposed section, however, these alternative methods of levying upon a non-negotiable instrument or document are eliminated and a levy must be made by serving the person indebted or the person holding the property represented by the document. See proposed section 13.1(a)(4). Seizure of a non-negotiable instrument under the proposed rules would not operate as a levy upon the debt or property it represents.

Proposed subdivision (b) includes a provision derived from present section 687-a(1) that in order to levy upon a debt not yet due it must be one which will become due "certainly or upon demand of the judgment debtor." The present provision must be read with present section 684 which permits a levy upon wages not yet due and not certain to become due, and the proposed provision with proposed rule 61.5, which replaces section 684. See notes to proposed rule 61.5(b).

The second sentence of proposed subdivision (c) replaces part of the last sentence of section 222-a and part of the first sentence of section 1199 of the civil practice act. See proposed rule 61.9(a) and notes.

13.2. Priorities and liens upon personal property.

(a) Priority and lien on docketing judgment. After a money judgment has been docketed with the clerk of the county in which the judgment debtor then resides or, if the judgment debtor is a corporation or partnership, with the clerk of the county in which it then has its principal place of business in the state or, if the judgment debtor is then a

non-resident, with the secretary of state, no transfer of a debt owed to the judgment debtor or of an interest of the judgment debtor in personal property, against which debt or property the judgment may be enforced, is effective against the judgment creditor except

1. a transfer or the payment of the proceeds of a judicial sale in satisfaction of a judgment previously so docketed; or

2. a transfer or the payment of the proceeds of a judicial sale in satisfaction of a judgment not previously so docketed, where an action or proceeding to set the transfer or payment aside or recover the proceeds has not been commenced within sixty days after the transfer or payment; or

3. a transfer for value in the ordinary course of business or at a judicial sale; or

4. a transfer for value not in the ordinary course of business, where the judgment debtor, at the time of the transfer, no longer resides, or, if the judgment debtor is a corporation or partnership, no longer has its principal place of business, in a county where the judgment is docketed; or

5. a transfer after the death of the judgment debtor; or

6. when the judgment debtor is the state, an officer, department, board or commission of the state, or a municipal corporation.

Notes

This subdivision is new. It is designed to replace the present system of liens and priorities affecting personal property in pro-

cedures to enforce money judgments. Results under the present structure are extremely uncertain, unnecessarily complex and virtually devoid of rational justification, and different and conflicting rights may be obtained by different creditors upon their commencement of the various enforcement procedures. See *Liens and Priorities Affecting Personal Property in New York Procedures for the Enforcement of Money Judgments* (hereinafter referred to as *Liens and Priorities)* at pp. 727–795 *infra.* While the present rules are largely judge-made on a case-by-case basis, there are a number of scattered provisions in sections 679, 680, 682, 683, 687-a(2), 794(3), 807 and 808 of the civil practice act which affect liens and priorities and are replaced by subparagraphs 1, 2, 3 and 4 of the proposed subdivision.

Priority among creditors, under this subdivision, will be based in the first instance upon the order in which judgments upon their claims are docketed rather than upon the subsequent commencement of an enforcement procedure. This is the present rule with regard to real property and is similar to the rule with regard to priority among creditors of a decedent's estate. See notes to proposed section 13.8; N.Y. Civ. Prac. Act §510; N.Y. Surr. Ct. Act §212(3); *cf.* Ala. Code, tit. 7, §588 (1940); Miss. Code Ann. §1555 (1942).

The purported rationale of the present priority rules is that the commencement of an enforcement procedure is an indication of "diligence" which should be rewarded. Since the test of "diligence" is mere commencement of enforcement procedure, however, a creditor who serves a supplementary proceeding subpoena upon the debtor and takes no further action may have priority over other judgment creditors who go to great expense to discover and secure the application of the debtor's assets to the specification of their judgments. Unfortunately, under present law, a judgment creditor may have no way of knowing whether another creditor has priority before he undertakes expensive enforcement procedures. By utilizing the order of docketing as determining priority, this difficulty has been avoided. A similar provision is contained in present section 807(2), which relates to the manner by which a receiver's title becomes superior to that of a subsequent bona fide purchaser of the judgment debtor's personal property.

Under the proposed subdivision, a subsequent judgment creditor may easily determine his priority status by checking the records in the county in which the judgment debtor resides. Some difficulty arises when the judgment debtor moves to a new county. While refiling after change of residence is not required for chattel mortgages or supplementary proceeding receiverships (N.Y. Lien Law §§232, 235; N.Y. Civ. Prac. Act §807(2)) and the refiling requirement of conditional sales agreements (N.Y. Pers. Prop. Law §74) is limited by a "reservation of property in the seller" which continues until ten days after he receives *notice* of the removal, subparagraph 4 of the proposed subdivision would require a creditor to refile in order to maintain his priority. In this connection, it

should be noted that in Alabama and Mississippi, priority only extends to the property within the county in which the judgment is docketed. Such a rule in New York, however, would present numerous difficulties. See *Liens and Priorities* at p. 786 *infra*.

The proposed subdivision does not prohibit junior judgment creditors from pursuing enforcement procedures. Prompt action is frequently essential in this area and if a creditor is in a position to take such action, he should be permitted to do so, even if another creditor has priority over him. Where a sheriff receives two or more executions before the sale, he would be required by proposed rule 61.14 to distribute the proceeds resulting from any levy in the order in which the judgments were docketed as prescribed in this subdivision. The sheriff is not required to hold the proceeds for the senior judgment creditor who does not have an execution outstanding. Where a creditor recovers the debtor's assets, however, subparagraph 2 requires him to turn over so much of them as would satisfy the judgments of creditors with priority over him unless the latter fail to assert their priority within sixty days. The considerations warranting the requirement of prompt assertion of priority after a transfer to another creditor are discussed in *Liens and Priorities* at pp. 786–791 *infra*.

With regard to liens—*i.e.*, the relation between creditors, on the one hand, and purchasers or transferees of the debtor's assets, on the other—this subdivision distinguishes between purchasers in the ordinary course of business and all other transferees. While this distinction is new to the enforcement provisions, it appears as a basic distinction in the Bulk Sales Act (N.Y. Pers. Prop. Law §44), the Uniform Conditional Sales Act (*id.* §69) and the Uniform Trust Receipts Act. *Id.* §58-a. Under present enforcement lien rules, there are numerous instances in which a judgment creditor's claim is superior even to that of a bonda fide purchaser in the ordinary course of business, while in other instances, it is inferior even to that of a gratuitous transferee. Clearly, a judgment debtor should not be able to defeat his judgment creditors by giving away his assets without consideration. Even where value is paid, however, if the transfer is not in the ordinary course of business, it is not an excessive burden to require that the potential purchaser takes subject to the rights of creditors whose judgments have been docketed against the seller. The conversion of assets into cash outside of the ordinary course of business may be a prelude to an effort to defraud creditors, and, in any event, the judgment creditor rather than the debtor should be permitted to appraise the fairness of the purchase price, in light of the possible proceeds of a sheriff's sale. The purchaser, however, is not required to search beyond the judgment docket in the county in which the seller resides, or, if it is a partnership or corporation, where it has its principal place of business, at the time of the sale.

The purchaser in the ordinary course of business, even if he knows of the judgment or of a restraining notice, ordinarily has reason to believe that the debtor is continuing in business with the acquiescence of his creditors. Where the purchaser has reason

to believe that the seller intends to defraud his creditors, the transaction may be set aside under section 276 of the Debtor and Creditor Law. See also N.Y. Pers. Prop. Law §40.

Subparagraph 5 of the proposed subdivision excepts from the priority system any transfer that takes place after the judgment debtor's death, so that priorities between creditors of an estate may be handled primarily in the Surrogate's Court. See notes to proposed section 13.8; N.Y. Civ. Prac. Act §478; N.Y. Surr. Ct. Act §212(3).

Subparagraph 6 exempts the personal property of the state, an officer or agency of the state, or a municipal corporation, from any lien or priority. See notes to proposed sections 13.3(a)(5) and 13.7.

(b) Divesting priority by demand. A judgment creditor is divested of priority over another judgment creditor sixty days after he is served by the other judgment creditor with a demand that he satisfy his judgment, unless, within the sixty days, the judgment creditor so served institutes a special proceeding against the judgment creditor serving the demand. Service of the demand shall be made in the same manner as a summons or by registered or certified mail, return receipt requested. Upon such proceeding, if it is shown that the petitioner's failure to satisfy the judgment is justified, the court may order his priority continued to a specified date. If the court finds that the petitioner has unreasonably failed to apply specific property or debts to the satisfaction of his judgment, it may divest him of priority as to such property or debts. Any judgment creditor may join in the proceeding; the court may order that notice of the proceeding be given to any person.

Notes

This subdivision is new. It is designed to give a judgment creditor sufficient security to enable him to enter into a payment

arrangement with the debtor while avoiding the possibility that the satisfaction of the judgments of junior judgment creditors might be indefinitely delayed by the failure of a senior judgment creditor to take prompt measures to secure the satisfaction of his judgment. See *Liens and Priorities* at pp. 789–791 *infra.*

In order for a junior creditor to gain priority over his senior, he need only serve him with the required demand and await the expiration of sixty days. It is then up to the senior creditor to take action to collect his judgment within the sixty days or to bring the matter before the court. Failing to do either, he would lose his priority over the demanding creditor. Of course, he could then serve a demand and limit the newly-gained priority over him to sixty days. This "leap-frog" structure will also permit a creditor who is junior to several creditors to serve demands upon each of them, gaining priority over all of them, but not disturbing the relative priority between them.

If the matter is brought before the court, two basic alternatives are permitted by the subdivision, each appropriate in particular situations.

The first alternative may be utilized without regard to particular assets. The court is given authority to fix a definite time within which the senior judgment creditor must complete his enforcement procedures before losing his priority. The time will vary depending upon such factors as the size of the judgment, how long it has been outstanding, whether the senior judgment creditor has been making a bonda fide effort to satisfy his judgment, and any special circumstances which may be shown, such as the disappearance of the judgment debtor or his lack of sufficient assets to satisfy the judgment. Where special circumstances subsequently arise, the senior judgment creditor may secure the modification of the order pursuant to proposed rule 61.18. In any case, the burden will be upon him to justify his inability to satisfy the judgment. This alternative should prove most useful where senior judgments are for relatively small sums. Even where they are substantial, however, the procedure would serve, at the least, to compel diligent efforts on the part of the senior judgment creditor. The proceeding may be brought either immediately after the demand is served or towards the expiration of the sixty-day period; the extent of the court's inquiry and its decision may depend upon whether the creditor has undertaken any discovery or enforcement steps. *Cf. DiCorpo* v. *DiCorpo,* 33 Cal. 2d 195, 200 P. 2d 529 (1948).

The second alternative, divestment of priority with regard to particular property, will be used in situations where a junior judgment creditor has discovered assets of the debtor which the senior judgment creditor is not pursuing. Where the senior judgment creditor is satisfied with a payment arrangement with the debtor, and is not interested in attempting to recover possible assets in the possession of garnishees, it is anticipated that this subdivision may encourage him to waive priority with regard to those assets, since he may be able to retain his priority over the asset in which he is interested by doing so.

There is no requirement of an election between alternatives. The court may divest the senior judgment creditor of priority with regard to particular property and also require him to satisfy his judgment promptly. Similarly, the appointment of a receiver, for which a proceeding may be brought under subdivision (c), may be in addition to, or in lieu of, other relief.

Where there are several creditors, the court may order any or all of them notified of the proceeding, and they may join in the proceeding. Thus, more than one creditor may be divested of priority in the manner prescribed in the proposed subdivision.

(c) Proceeding for extending receivership. A judgment creditor may bring a special proceeding against another judgment creditor having priority over him, for a judgment divesting the respondent of his priority over the petitioner unless the respondent consents to the extension of a receivership to satisfy judgments to include his judgment. Any judgment creditor may join in the proceeding; the court may order that notice of the proceeding be given to any person.

Notes

This subdivision represents an alternative to the demand procedure of subdivision (b) and permits a junior creditor to utilize a receivership in a situation where the best hope of all creditors rests with a long-term payment arrangement based upon the judgment debtor's continuation in business or some other such factor. The receivership scheme will enable all judgment creditors to participate in determining the amount of payment and the other enforcement measures to be undertaken. See proposed rule 62.11(b). The receivership will also be useful where there are two classes of assets available to be reached by the senior judgment creditor but only one which could be reached by junior judgment creditors. Thus, if after the senior judgment was docketed but before the docketing of any junior judgment, the judgment debtor transferred assets otherwise than in the ordinary course of business, the senior creditor would be able to have the assets applied to the satisfaction of his judgment but no other judgment creditor would be able to do so. If the senior creditor decides not to pursue those assets but attempts to secure the satisfaction of his judgment from property of the debtor which could be reached by the junior creditors, he may deplete that property and prevent the satisfaction of their judgments. The second alternative in sub-

division (b) would be of no assistance to junior judgment creditors since they could not recover the property even if they had priority. Where a receiver is appointed, however, the junior creditors could require the receiver to attempt to recover those assets.

Since the junior judgment creditors could be required to share in the expense of a suit to set aside the conveyance, the possible detriment to the senior creditor is minimized.

Under the present supplementary proceeding receivership rule, a creditor with priority may wait until it is apparent that the receiver will secure sufficient assets of the judgment debtor to satisfy at least the expenses of the receivership before extending the receivership to his proceeding and asserting priority. The proposed subdivision affords a junior judgment creditor a method for avoiding this problem.

13.3. Priorities and liens upon real property.

(a) Priority and lien on docketing judgment. No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after filing of the judgment-roll, and from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned, except

1. a transfer or the payment of the proceeds of a judicial sale in satisfaction either of a judgment previously so docketed or of a judgment where a notice of levy pursuant to an execution thereon was previously so filed; or

2. a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor's interest in the property; or

3. a transfer to a purchaser for value at a judicial sale; or

4. when the judgment was entered after the death of the judgment debtor; or

5. when the judgment debtor is the state, an officer, department, board or commission of the state, or a municipal corporation.

Notes

This subdivision replaces parts of sections 478, 509, 510(1), 512 and 514 of the civil practice act. It is designed to conform to proposed section 13.2(a) relating to liens and priorities upon personal property.

Subparagraph 1 retains the basic priority by docketing system of present sections 509 and 510(1). It includes the "temporary lien" of present section 512 and proposed rule 61.12.

The ten-year period of the opening paragraph of this subdivision may be extended under the provisions of proposed subdivision (b), released under the provisions of proposed section 13.4, or revived under the provisions of proposed rule 61.15.

Subparagraph 2 of the proposed subdivision is derived from present section 514 with no change intended. Subparagraph 3 is new and protects the title of a purchaser at a judicial sale. Transfer of the *proceeds* of the sale, however, would not be effective as to a senior judgment creditor. See notes to proposed rule 61.14. Subparagraph 4 is based upon the second sentence of present section 478, which declares that a judgment entered against a party after his death is not a lien on his realty.

Subdivision 1 of section 510 of the civil practice act, which provides that a docketed judgment is a lien on real property, contains an exception for judgments against municipal corporations. Despite this, an execution against municipal corporations is permitted (*Kelly* v. *Yonkers*, 242 App. Div. 798, 274 N.Y. Supp. 781 (2d Dep't 1934)), but an early case indicates that property of a municipality held for public use may not be levied upon thereunder. See *Darlington* v. *Mayor*, 31 N.Y. 164, 193 (1865).

Since no lien upon real property of a municipality is created by docketing, it is not clear whether such property could be sold under an execution. Ordinarily, no levy is needed on real property in order for it to be sold under an execution, since it is subject to the lien of the judgment. Section 512 of the civil practice act, which provides for a levy upon real property, might be a means to sell municipal real property, but it is only operative after ten years from the filing of the judgment-roll—*i.e.*, the duration of the usual judgment lien—has elapsed. Nevertheless, section 512 does not require an expired judgment lien; it apparently is effective

even if the judgment was never a lien because it was not docketed in the county in which the property is located during the first ten years.

In the usual case of a judgment against a municipal corporation, the practical problems of enforcement are few. Moreover, there are other statutes which govern the issuance of executions upon, as well as the method of payment of, such judgments. See, *e.g.*, N.Y. Town Law §§65(2), 106, 176(30); N.Y. Village Law §89(62); N.Y. Second Class Cities Law §206 (execution may issue only under certain conditions); N.Y.C. Admin. Code §394a–2.0 (execution may issue only after ten days' notice to comptroller).

While there is no express provision in the civil practice act, a judgment against the state or its officers and agencies would also appear not to create a lien upon state property. Subparagraph 5 of the proposed subdivision makes this explicit. An identical provision is included as subparagraph 6 of subdivision (a) of proposed section 13.2, since docketing of a judgment creates a lien on personal property under that section.

(b) Extension of lien. Upon motion of the judgment creditor, upon notice to the judgment debtor, the court may order that the lien of a money judgment upon real property be effective after the expiration of ten years from the filing of the judgment-roll, for a period no longer than the time during which the judgment creditor was stayed from enforcing the judgment. The order shall be effective from the time it is filed with the clerk of the county in which the property is located and an appropriate entry is made upon the docket of the judgment.

Notes

The first sentence of this subdivision is based upon section 515 of the civil practice act.

Section 515 provides for an extension of the ten-year lien period which is inoperative against "a purchaser, creditor or mortgagee in good faith." Apparently, this limitation derives from the lack of filing or recording requirements, for it would be impossible to tell from an examination of the judgment docket whether, because of an extension, a lien is still in force, despite the expiration of ten years from the filing of the judgment-roll.

The only real purpose of a real property lien is to secure the judgment creditor until he is able to apply personal property of

the debtor to the satisfaction of the judgment. Extension of the lien to compensate for a period when the creditor is stayed from such enforcement seems a justifiable objective. The extended lien, however, should be as effective as during the original period. The first sentence of this subdivision therefore provides for an extension of the lien by court order, which order is filed and recorded, as prescribed in the last sentence, to make it possible for bona fide purchasers to rely upon the judgment docket.

13.4. Release of lien or levy upon appeal.

Upon motion of the judgment debtor, upon notice to the judgment creditor and the sureties upon the undertaking, the court may order that the lien of a money judgment, or that a levy made pursuant to an execution issued upon a money judgment, be released as to all or specified real or personal property upon the ground that the judgment debtor has given an undertaking upon appeal sufficient to secure the judgment creditor.

Notes

Sections 516 through 518 of the civil practice act provide for "suspension" of the lien upon real property where the judgment creditor is stayed from enforcing his judgment. In contrast to the provisions of section 515, "suspension" under sections 516 through 518 does not extend the ten-year period. The latter sections are only operative where, on an appeal from a money judgment, an undertaking sufficient to stay enforcement without a court order has been given. In such a case, the court, in its discretion may exempt certain affected property, or all of it, from the operation of the lien "as against judgment creditors and purchasers and mortgagees in gooth faith." The judgment then "ceases to be a lien" unless, upon affirmation or appeal, or dismissal of the appeal, the lien is restored under section 519.

It is difficult to justify the provisions of section 519 for "restoration" of the lien. Indeed, the "suspension" of sections 516 through 518 should be a complete release of the lien for, by the very terms of section 516, it is only applicable to money judgments in situations where the judgment creditor has been secured by an undertaking. Under section 594 of the civil practice act (proposed rules 80.9(a)(2) and 80.9(a)(3)) the undertaking required for a stay without a court order must be to the effect that if the judgment is affirmed or the appeal dismissed, the appellant will

pay the judgment. This is the same condition specified for restoring the lien under section 519. If the judgment creditor is protected by the undertaking, however, there is no need to restore the lien.

Accordingly, the proposed section provides for the release of the lien upon the giving of the required undertaking. It is not limited to release against purchasers in good faith, but operates as a complete release.

The proposed section thus more pointedly indicates that the effect of the present provision on suspension of the lien is to permit a "bonding" of the lien by the undertaking upon appeal. No "bonding" is permitted unless the debtor takes an appeal, for his method of releasing the lien in any other case would be to pay the judgment.

Because proposed section 13.2 establishes a lien on personal property, effective against a purchaser not in the ordinary course of business upon docketing of the judgment, proposed section 13.4 extends the provisions of present sections 516–518 to personalty. It also replaces the provisions of present section 689 for a release of a levy.

The order releasing a lien under this section may be utilized pursuant to proposed rule 50.9(b) to amend the judgment docket.

13.5. Personal property exempt from application to the satisfaction of money judgments.

(a) Woman's and householder's exemption. The following personal property when owned by a woman or householder is exempt from application to the satisfaction of a money judgment except where the judgment is for the purchase price of the exempt asset or was recovered by a domestic, laboring person or mechanic for work performed by him in such capacity:

1. All stoves kept for use in the judgment debtor's dwelling house and necessary fuel therefor for sixty days; one sewing machine with its appurtenances.

2. The family Bible, family pictures, and school books used by the judgment debtor or in the family; and other books, not exceeding in value fifty dollars, kept and used as part of the family or judgment debtor's library.

3. A seat or pew occupied by the judgment debtor or the family in a place of public worship.

4. Domestic animals with the necessary food for those animals for sixty days, provided that the total value of such animals and food does not exceed four hundred and fifty dollars. All necessary food actually provided for the use of the judgment debtor or his family for sixty days.

5. All wearing apparel, household furniture, one mechanical, gas or electric refrigerator, one radio receiver, crockery, tableware and cooking utensils necessary for the judgment debtor and the family.

6. A wedding ring; a watch not exceeding in value thirty-five dollars.

7. Necessary working tools and implements, including those of a mechanic, farm machinery, team, professional instruments, furniture and library, not exceeding in value six hundred dollars, together with the necessary food for the team for sixty days, provided, however, that the articles specified in this subparagraph are necessary to the carrying on of the judgment debtor's profession or calling.

Notes

This subdivision is derived from present sections 665 and 665-a. The modifications are designed merely to clarify meaning and eliminate repetitive language. No change in substance is intended.

The sole function of present section 665-a is to provide that section 665 is applicable to women. The simple insertion of the term "or woman" achieves the same purpose.

The reference to the continuation of the exemptions while the property is being transported from one residence to another has been deleted as unnecessary.

The contents of subparagraph 8 of present section 665 have been placed in the opening paragraph of the proposed subdivision. Subparagraph 8 does not contain an enumeration of exempt properties as do the other seven subparagraphs but provides exceptions to the entire section. The modification in the language of present subparagraph 8(b) is designed to make it clear that the exemption exception, where the judgment was for the purchase money of an exempt asset, relates only to that asset and not to all of the other exempt properties.

The language in present subparagraph 8(a) has been changed from "a judgment recovered wholly upon one or more demands for work performed in the family as a domestic or work performed by a laboring person or mechanic," to "where the judgment . . . was recovered by a domestic, laboring person or mechanic for work performed by him in such capacity." The clause "in the family," qualifying the "work performed as a domestic" exception, has been deleted. It was apparently not considered essential to add the qualification to the "work performed by a laboring person or mechanic" exception (11 N.Y. Jud. Council Rep. 261, 267 (1945)), and there appears to be no reason for retaining it in the "domestic" situation. While the present use of the terms "by a" rather than "as a" in the "laboring person or mechanic" exception may be construed as indicating that it is applicable in an action by a contractor or manufacturer for work performed by his employees, it is extremely doubtful that this was intended. The proposed subdivision is designed to avoid this type of misunderstanding. It should be noted that the exemption exception for laboring persons in the New York City Municipal Court Code, section 139, is much more limited. The judgment cannot exceed one hundred dollars and the action must have been "brought within three months after the cause of action accrued." In recommending the adoption of the "laboring person" exception, the Judicial Council made no reference to the Municipal Court Code provision.

The amount of food for a team in proposed subparagraph 7 is reduced from that necessary for ninety days to that necessary for sixty days to conform to the food for other domestic animals and for human beings in proposed subparagraph 4.

No other changes have been made in the present language, despite the fact that many of the provisions are inconsistent, illogical and antiquated. See introduction to this article. Some of the more flagrant defects are set forth to emphasize the need for revision:

Subparagraph 1—the "stove" exemption was enacted in 1824 and may have been intended to apply to a heating unit; in present unit. A "sewing machine," under modern living conditions, is usage, of course, "stove" is usually understood to refer to a cooking

frequently not as much a necessity as a washing machine. No limitation on the value of either the stove or the sewing machine exists.

Subparagraph 2—no limit attaches to the value of "family pictures" or "school books," nor is it clear what "school books" includes.

Subparagraph 3—ownership of pews, common in 1824 when this exemption was enacted, is virtually non-existent today.

Subparagraph 4—it has already been observed that the present provisions provide food for a team for ninety days, while limiting food for the family and domestic animals to sixty days. Proposed subparagraph 7 makes the sixty-day requirement uniform.

Subparagraph 5—this listing omits many essentials, such as medical appliances—*e.g.*, artificial limbs, crutches, eyeglasses, hearing aids, wheel chairs (possibly "furniture") and dentures. It also sets no limit on value other than the loose standard of what are "necessary." The furniture or the radio apparently may be elaborate, expensive installations, yet no television set or musical instrument is exempt. Moreover, while a mechanical, gas or electric refrigerator is exempt, an old-fashioned ice box is apparently not.

Subparagraph 6—while the "watch" may not exceed $35.00 in value, the "wedding ring" may apparently be of any value. The provision is obviously intended to protect the debtor's own wedding ring, or that of his wife or mother, but it would seem to permit all of a debtor's assets to be converted into an expensive wedding band, purchased solely as a means of insulating assets from creditors.

Subparagraph 7—the provision for a "team" dates from 1842; although "farm machinery" was added in 1946, the subparagraph contains little other recognition of modern farming and transportation methods. *Cf.* N.Y. Surr. Ct. Act §200(3) ("the farm machinery, one motor vehicle and one tractor").

(b) Male non-householder's exemption. The following personal property when owned by a male person who is not a householder is exempt from application to the satisfaction of a money judgment except where the judgment is for the purchase price of the exempt asset or was recovered by a domestic, laboring person or mechanic for work performed by him in such capacity:

1. A seat or pew occupied by the judgment debtor in a place of public worship.

2. All wearing apparel necessary for the judgment debtor.

3. A wedding ring; a watch not exceeding in value thirty-five dollars.

4. Necessary working tools and implements, including those of a mechanic, farm machinery, team, professional instruments, furniture and library, not exceeding in value four hundred and fifty dollars, together with the necessary food for the team for sixty days, provided, however, that the articles specified in this subparagraph are necessary to the carrying on of the judgment debtor's profession or calling.

Notes

This subdivision is derived from section 666 of the civil practice act. The proposed modifications are identical to those made in proposed subdivision 13.5(a). Similar comment may also be made as to the need for revision. Apparently the contemplation of the statute is that a non-householder lives with a householder. Thus, no separate exemptions appear for his books, furniture, utensils, appliances or food. Yet, unless he is a member of the householder's "family," the exemptions for the householder do not cover him. Moreover, a male non-householder would most likely be a person who has never married, but he too may own an exempt wedding ring. If he is well-advised, he too will invest his liquid assets in an expensive wedding ring. While this provision thus serves to encourage matrimony, it seems otherwise difficult to justify.

(c) Exemption of cause of action and damages for taking or injuring exempt personal property. A cause of action to recover damages for taking or injuring personal property exempt from application to the satisfaction of a money judgment, is exempt from application to the satisfaction of a money judgment. A money judgment and its proceeds arising out of such a cause of action is exempt for one year after the collection thereof, from application to the satisfaction of a money judgment.

Notes

This subdivision is derived, with only minor language changes, from section 668 of the civil practice act.

(d) Trust exemption. Any property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

Notes

This subdivision is based upon section 687-a(8)(b) and part of sections 792(b) and 1196 of the civil practice act. While those sections specify "any money, thing in action or other property held in trust," the term "property" alone would cover the first two categories also. The exemption relates only to the principal of the trust. The income is treated in subdivision (e)(1).

(e) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. Income or other payments from a trust the principal of which is exempt under subdivision (d).

2. Earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment.

3. Payments pursuant to an award in a matrimonial action, for the support of a wife, where the wife is the judgment debtor, or for the support of a child, where the child is the judgment debtor. Where the award was made by a court of this state, determination of the extent to which it is unnecessary shall be made by that court.

Notes

This subdivision is derived from parts of sections 792 and 793 of the civil practice act and is designed to replace present sections 687-a(8)(c), 687-a(8)(d) and part of present section 1196. No change in substance is intended.

Although portions of income described in this subdivison may presently be reached under the garnishment procedure described in section 684 of the civil practice act without a preliminary determination of the reasonable requirements of the judgment debtor, proposed rule 61.5 contemplates the elimination of the garnishment procedure. Sections 792 and 793 of the civil practice act require a determination of "reasonable requirements" before such income may be reached. See notes to proposed rule 61.5.

Subparagraph 1 is derived from part of the first sentence of present section 793. The term "or other payments" has been added to cover payments of principal made from the trust.

Subparagraph 2 is derived from sections 687-a(8)(c), 792(c) and 793 of the civil practice act. As previously noted, the availability of earnings not required for the reasonable requirements of the debtor is specified in the latter two sections, which are in the supplementary proceedings article, but not in section 687-a(8)(c), in the execution article, which provides for a levy upon debts. Section 687-a(8)(c) must be read with section 684, however, since the latter section provides for a levy upon earnings pursuant to garnishee execution.

Subparagraph 3 is based upon parts of present sections 687-a(8)(d), 792(d) and 793. Section 792(d) expressly provides for a determination of the extent to which such payments are unnecessary pursuant to section 793, and since section 687-a(8)(d) contains no such exception, and neither it nor section 684 would apparently permit a levy, this income would not be available under present law without such a determination. The requirement of section 792(d) that the creditor's claim antedate the award has been deleted since provisions for outstanding debts are usually taken into consideration upon awarding alimony and since the court which made the award is required to determine the amount which should be applied to the judgment.

(f) Exemptions to members of armed forces. The pay and bounty of a non-commissioned officer, musician or private in the armed forces of the United States or the state of New York; a land warrant, pension or other reward granted by the United States, or by a state, for services in the armed forces; a sword, horse, medal, emblem or device of any kind presented as a testimonial for services rendered in the armed forces of the United States or a state; and the uniform, arms and equipments which were used by a person in the service, are exempt from application to the satisfaction of a money judgment.

Notes

This subdivision is derived from section 667 of the civil practice act. The only modification is the substitution of the phrase "armed forces" for the phrase "military or naval service." Since the term "military" apparently does not include "naval," it may also be construed as not including the air force.

The term "musician" is undoubtedly archaic; the modern equivalent is apparently "warrant officer." Similarly, while it is doubtful whether a "bounty," "land warrant," "sword" or "horse" are still awarded, the provision operates to protect previous awards; this language, dating from 1864 and 1876, has therefore been left intact.

13.6. Real property exempt from application to the satisfaction of money judgments.

(a) Exemption of homestead. A lot of land, with one or more buildings thereon, not exceeding in value one thousand dollars, owned and occupied as a residence by a householder or a woman, and designated for that purpose, is exempt from application to the satisfaction of a money judgment; unless the judgment was recovered wholly for a debt or debts contracted before the designation of the property, or for the pur-

chase money thereof. But no property designated as an exempt homestead shall be exempt from taxation or from sale for nonpayment of taxes or assessments.

Notes

This subdivision is derived from sections 671 and 673 of the civil practice act. The phrase "or a woman" replaces section 673, which merely provides that the householder's homestead exemption is applicable to women. In view of the limit in value to a dwelling worth no more than one thousand dollars and the registration requirement in the next section, this exemption, as presently formulated, provides protection more theoretical than real. At the time of its original enactment, of course, one thousand dollars was a realistic limitation.

(b) Designation of exempt homestead. In order to designate property to be exempted as a homestead, a conveyance thereof, stating in substance that it is designed to be held as a homestead, exempt from application to the satisfaction of a money judgment, must be recorded, as prescribed by law; or a notice containing a full description of the property and stating that it is designed to be so held must be subscribed by the owner, acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated, and must be recorded in the office of the clerk of that county, in a book kept for that purpose, and styled the "homestead exemption book."

Notes

This subdivision is derived, with only minor language changes, from section 672 of the civil practice act.

(c) Homestead exemption after owner's death. The homestead exemption continues after the death of the person in

whose favor the property was exempted for the benefit of the surviving spouse and surviving children until the majority of the youngest surviving child and until the death of the surviving spouse.

Notes

This subdivision is the same as present section 674 except that it has been simplified by substituting the words "surviving spouse" for "widow" and "widower." The last paragraph of section 674, dealing with the requirement of continued occupancy by a survivor, has been combined with section 675 in proposed subdivision (d).

(d) Suspension of occupation as affecting homestead. The homestead exemption ceases if the property ceases to be occupied as a residence by a person for whose benefit it may so continue, except where the suspension of occupation is for a period not exceeding one year, and occurs in consequence of injury to, or destruction of, the dwelling house upon the premises.

Notes

This subdivision combines the last paragraph of present section 674 with present section 675, with some simplification of language. See notes to proposed subdivision (c).

(e) Exemption of homestead exceeding one thousand dollars in value. The exemption of a homestead is not void because the value of the property designated as exempt exceeds one thousand dollars but the lien of a judgment attaches to the surplus.

Notes

This subdivision embodies the first two sentences of section 676 of the civil practice act with some simplification of language. The third sentence of section 676 has been combined with section 677 in proposed subdivision (f), which describes the procedure to be

followed by a judgment creditor who wishes to secure an immediate sale of the homestead.

(f) Sale of homestead exceeding one thousand dollars in value. A judgment creditor may bring a special proceeding in the county in which the homestead is located, upon notice to the judgment debtor and such other persons as the court may require, for the sale, by sheriff or receiver, of a homestead exceeding one thousand dollars in value. The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold. Money, not exceeding one thousand dollars, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, unless, before the expiration of the year, he causes real property to be designated as an exempt homestead, in which case, the exemption ceases with respect to so much of the money as was not expended for the purchase of that property; and the exemption of the property so designated extends to every debt against which the property sold was exempt. Where the exemption of property sold as prescribed in this subdivision has been continued after the judgment debtor's death, or where he dies after the sale and before payment to him of his proportion of the proceeds of the sale, the court may direct that portion of the proceeds which represents his interest to be invested for the

benefit of the person or persons entitled to the benefit of the exemption, or to be otherwise disposed of as justice requires.

Notes

This subdivision is derived from section 677 and the last sentence of section 676 of the civil practice act.

The first sentence of the proposed subdivision changes the method by which a sale of the homestead may be obtained. Under the last sentence of section 676, the judgment creditor is required to commence a judgment creditor's action for this purpose. The judgment creditor's action referred to is apparently not the statutory procedure provided for in sections 1189 to 1196 of the civil practice act, since section 1191 provides that the action there contemplated may only reach personal property. The reference would therefore seem to be to an action under the general equity powers of the court. See 13 Carmody-Wait, Cyclopedia of New York Practice 748–775 (1954). In any event, there would seem to be no reason for compelling a judgment creditor to bring a separate action and to issue an execution under which the property may not be levied upon or sold, but which must be returned unsatisfied before the action may be brought. Under the proposed procedure, this requirement is eliminated. The court is given discretion to determine whether the sale should be conducted by a receiver or by the sheriff.

The remainder of the proposed subdivision is identical to section 677 of the civil practice act.

(g) Exemption of burying ground. Land, set apart as a family or private burying ground and heretofore designated, as prescribed by law, in order to exempt the same, or hereafter designated for that purpose, as prescribed in this subdivision, is exempt from application to the satisfaction of a money judgment, upon the following conditions only:

1. A portion of it must have been actually used for that purpose.

2. It must not exceed in extent one-fourth of an acre.

3. It must not contain at the time of its designation, or at any time afterwards, any building or structure, except one or

more vaults or other places of deposit for the dead, or mortuary monuments.

In order to designate land to be exempted as presribed in this subdivision, a notice containing a full description of the land to be exempted and stating that it has been set apart for a family or private burying ground must be subscribed by the owner; acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the land is situated; and recorded in the office of the clerk or register of that county, in the proper book for recording deeds, at least three days before the sale of the land by virtue of a procedure to secure its application to the satisfaction of a judgment.

Notes

This subdivision is derived, with only minor language changes, from section 670 of the civil practice act. It should be noted that present and proposed provisions provide that the exemption notice may be filed after execution has been issued at least three days before sale. The rule with respect to homesteads involving recoveries in actions other than for debts is unclear under present section 671 and proposed subdivision (a). It should also be noted that a quarter of an acre of choice burial ground could be worth substantially more than the one thousand dollar limit for homesteads.

(h) Cancellation of exemption of real property. The owner of real property exempt as presribed in this section may subscribe a notice, at any time, and personally acknowledge the execution thereof before an officer authorized by law to take the acknowledgment of a deed, to the effect that he cancels all exemptions from application of the property, or a particular part thereof, fully described in the notice, to the satisfaction of

a money judgment. The cancellation takes effect when such a notice is recorded as prescribed in this section for recording a notice to effect the exemption so cancelled. Any other release or waiver, hereafter executed, of an exemption of real property allowed by this article, or of an exemption of a homestead, or a private or family burying ground, allowed by the provisions of law heretofore in force, is void; provided, however, that nothing herein contained shall be so construed as to prevent a husband and wife from jointly conveying or mortgaging property so exempt.

Notes

This subdivision is derived, with only minor language changes, from section 678 of the civil practice act.

13.7. Enforcement involving the state.

Except as expressly provided and except that an execution shall not be issued against the state, all procedures for the enforcement of money judgments are applicable to the state, its officers, agencies and subdivisions.

Notes

The provision in this section that an execution shall not be issued against the state states the substance of present section 659. The remainder of this section, to the extent that it concerns supplementary proceedings, is derived from part of the first sentence of present section 811. The rest of section 811 has been deleted by the advisory committee. Its purpose is apparently to avoid giving the Supreme Court jurisdiction over claims against the state, which would ordinarily have to be brought in the Court of Claims. The omission of these provisions will be further considered in the light of recently proposed constitutional amendments affecting the jurisdiction of the Supreme Court and of the Court of Claims.

It should be noted that the state may be "involved" in enforcement both as a debtor and as a third party. In the former case,

express exceptions to this section are made in proposed section 13.2(a)(6) and 13.3(a)(5). See notes to proposed section 13.3(a)(5) In the latter case, exceptions are made in proposed rule 61.5(b).

13.8. Enforcement after death of judgment debtor; leave of court; extension of lien.

Except as otherwise expressly provided, after the death of a judgment debtor, an execution upon a money judgment shall not be issued against any debt owed to him or any of his property, nor shall any other enforcement procedure be undertaken with respect to such debt or property, except upon leave of the surrogate's court which granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor. If such letters have not been granted within eighteen months after the death, leave to issue such an execution or undertake such enforcement procedure may thereafter be granted, upon motion of the judgment creditor upon such notice as the court may require, by any court from which the execution could issue or in which the enforcement procedure could be instituted. A judgment lien existing against real property at the time of a judgment debtor's death shall expire two years thereafter or ten years after filing of the judgment-roll, whichever is later.

Notes

This section replaces the last paragraph of present section 655 and all of present section 656.

Execution upon a judgment entered in the name of a deceased judgment debtor—*i.e.*, where the judgment was entered, or the verdict or decision made, while he was still alive—should be distinguished from execution upon a judgment against an executor or administrator. In the latter case, while section 151 of the Decedent

Estate Law, like section 656 of the civil practice act, requires leave of the Surrogate's Court, the definition of proposed section 13.1(a)(3) indicates that the executor or administrator—*i.e.*, the estate—is the "judgment debtor."

At common law, when a judgment debtor died, the judgment had to be "revived" by a writ of scire facias, by which the persons who became interested in the decedent's property were ordered to show cause why the creditor should not have execution; the purpose of this procedure was to insure notice to those who would be in a position to allege satisfaction of, or a defect in, the judgment, since the debtor was no longer able to contest the execution and the rights of the new owners of the property were affected thereby.

When the Field Code was enacted, the revisors replaced the procedure by writ of scire facias with a statutory remedy as follows:

> §329. In case of the death of the judgment debtor after judgment, the personal representatives, heirs, devisees, or legatees of the judgment debtor, or the tenants of real property owned by him and affected by the judgment, may be summoned to show cause, why the judgment should not be enforced, against the estate of the judgment debtor in their hands respectively. [N.Y. Laws 1848, c. 379, §329.]

This language clearly contemplated enforcement against both real and personal property, since real property would be in the "hands" of heirs, devisees or tenants and personal property would be in the "hands" of personal representatives and legatees. In 1849, section 329 was amended and renumbered 376, to read as follows:

> §376. In case of the death of a judgment debtor after judgment, the heirs, devisees, or legatees, of the judgment debtor, or the tenants of real property owned by him and affected by the judgment, may, after the expiration of three years from the time of granting letters testamentary, or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively; and the personal representatives of a deceased judgment debtor may be so summoned, at any time within one year after their appointment. [N.Y. Laws 1849, c. 438, §376.]

Since real property is considered to vest upon death in the heir or devisee, executions against real property were thus delayed three years. In the case of personal property, however, the use of the word "legatees" in the first part of the amended section and "personal representatives" in the latter part implies that executions were to be delayed three years if the property was already in the "hands" of the legatees, but only one year if it had not yet been distributed. The purpose of the delay was apparently to allow time for procedures in the Surrogate's Court. See, *e.g.*, N.Y. Surr. Ct. Act §233 (proceeding to sell real property may be brought during the same period as that specified as a delay in section 656 of the civil practice act); *cf.* N.Y. Civ. Prac. Act §12

(extension of statutes of limitation for same period where person liable dies without the state); *id.* §21 (same extension measured from death of a person liable who dies within the state). In any case, it remained clear that the rule applied to personal property.

Despite this replacement of scire facias, provisions regulating the writ remained in the Revised Statutes, and, as pointed out by Throop, "[t]o what extent those provisions continued in force, and applicable to the new remedy, was a question not settled by judicial construction, when this Code [of Civil Procedure] was enacted." N.Y. Code Civ. Proc. c. XV, art. 3, preliminary note (Throop ed. 1881).

In 1850, a provision was enacted and placed in the Revised Statutes. It covered much the same area as section 376 of the 1849 Code and read:

> Notwithstanding the death of a party after judgment, execution thereon against any property, lands, tenements, real estate, or chattels real, upon which such judgment shall be a lien, either at law or in equity, may be issued and executed in the same manner and with the same effect as if he were still living, except that such execution can not be issued within a year after the death of the defendant, nor in any case unless upon permission granted by the surrogate of the county who has jurisdiction to grant administration or letters testamentary on the estate of the deceased judgment debtor, which surrogate may, on sufficient cause shown, make an order granting permission to issue such execution as aforesaid. [N.Y. Laws 1850, c. 295, §1.]

This provision was apparently derived from section 832 of the Field Code, as reported complete in 1850, which was derived, in turn, from the Revised Statutes. See N.Y. Rev. Stat. pt. 3, c. VI, tit. 5, §27 (1829). The Field Code provision, however, required permission of the Surrogate only within the first year; its predecessor in the Revised Statutes simply provided for the one-year delay. Moreover, section 832 of the 1850 Field Code was not intended to supersede section 329 of the 1848 Code. The latter, without the 1849 amendments, was repeated as section 1214 in the 1850 report.

The phrase which modified the described property in the provision enacted in 1850, "upon which such judgment shall be a lien," and the other language chosen, implies that the provision was limited to real property executions. Indeed, the act of 1850 is entitled "An Act to provide for the enforcement of judgment liens against the real estate and chattels real of deceased judgment debtors."

Faced with these three provisions—the scire facias provisions whose applicability was "not settled," the Field Code provision of section 376 and the 1850 provision—the drafters of the Code of Civil Procedure chose the last. In explanation, Throop notes that the 1850 provision "rendered practically useless [section 376 of the Field Code] and the entire system of proceeding thereunder." N.Y. Code Civ. Proc. c. XV, art. 3, preliminary note (Throop ed. 1881). The 1850 provision which required the Surrogate's approval was adopted, but approval of the enforcement court was added to cover the provisions of section 376. *Id.* §1380, note. As so expanded, the provision was considered "so ample, that . . . [section 376 of the Field Code] and the corresponding sections of the [Revised Statutes were] . . . repealed, without providing any substitutes therefor." *Id.* c. XV, art. 3, preliminary note; *cf. Wallace* v. *Swinton,* 64 N.Y. 188, 194–95 (1876); *Marine Bank of Chicago* v. *Van Brunt,* 49 N.Y. 160, 163–64 (1872).

Present sections 656 and 657 of the civil practice act are direct descendents of the 1850 provision, since the double approval was removed in 1940. N.Y. Laws 1940, c. 32. Despite Throop's assertion that they are "ample"—and that the former provision was "practically useless"—the present provisions are misleading and incomplete. The phrase "upon which such judgment shall be a lien" has had to be read out by judicial construction with respect to at least one application of the section so that leave of court was held to be necessary as to an execution against realty upon which the judgment was no longer a lien because ten years had elapsed since filing of the judgment-roll. *Atlas Refining Co.* v. *Smith,* 52 App. Div. 109, 64 N.Y. Supp. 1044 (4th Dep't 1900); see notes to proposed rule 61.12; *cf. Kenny* v. *Geoghegan,* 9 N.Y. Civ. P. 378 (N.Y. C. Ct. 1886). As has been demonstrated above, it seems only historical accident that these sections (and, by implication, the last paragraph of section 655) do not apply on their face to all executions, whether or not a lien and whether against real or personal property.

Accordingly, the first sentence of proposed section 13.8 has been designed to expressly require leave of court for all executions. The time delay period has been omitted; since the matter is one to be decided by the Surrogate's Court, there seems no reason to foreclose even consideration of the matter by the Surrogate. Moreover, the proposed provision includes other enforcement procedures, such as restraining notices or subpoenas, which may be necessary to the security of the creditor, but which should be under the control of the Surrogate. In effect, the proposed provision reinstates the original Field Code provision with leave of the Surrogate's Court required to revive the judgment.

Of necessity, the creditor would be delayed until letters are granted. If letters are not granted by eighteen months after death, the second sentence of the proposed section permits recourse to an enforcement court. This provision is derived from subdivision 4 of present section 656. Since the creditor will therefore be delayed no longer than eighteen months after death, the last sentence of the proposed section extends any real property lien for two years after death, even if ten years have expired since the judgment-roll was filed. This sentence is derived from the last phrase of present section 656(3) and the last sentence of present section 656(4). Contrary to the extension provided by proposed section 13.3(b), no order need be filed, since the fact of a debtor's death would be known to a prospective purchaser who may be examining the docket.

The present time delay periods are confusing. When the Code of Civil Procedure was drafted, the one-year-after-death delay of the 1850 provision was utilized. Subsequently, in 1879, so much of the "practically useless" Field Code section 376 was reinserted as required a three-year delay after granting of letters, but the amendment was limited to a case where the lien was created by docketing. N.Y. Laws 1879, c. 542; see N.Y. Code Civ. Proc. §1380, note (Throop ed. 1881). The 1879 amendment also added the extension of lien provision. Since it is not clear whether a judgment can create a lien in any other way than by docketing (the "temporary lien" of present section 512 is created after execution has been issued), the 1879 amendment, which survives today as an eighteen-month delay and two-year extension in subdivision 3 of section 656 of the civil practice act, apparently supersedes the one-year delay, which survives in subdivision 1 of section 656, rendering the latter meaningless.

It should also be noted that without reference to the extension of lien provision in the predecessor of section 656, one court held that the counterpart of the extension of lien provision from which proposed section 13.3(b) was derived extends the lien of a judgment, because the creditor was stayed by the other provisions in the predecessor of section 656 from enforcing his judgment. *Matter of Holmes*, 131 N.Y. 80, 84–85, 29 N.E. 1003, 1005 (1892).

Despite the inadequacies of present section 656, it has caused little difficulty in practice, primarily because it is seldom utilized. If a judgment debtor dies, the usual practice is for the judgment creditor to file a claim in the Surrogate's Court and there is no necessity for seeking execution. The Surrogate's Court Act provisions are not without doubt, however, but, unless an estate is insolvent, questions of priority or lien do not arise.

Under section 212(3) of the Surrogate's Court Act, judgments are given preference in payment over other debts of the decedent "according to the priority thereof." This "priority" has been held to be the chronological order of docketing, regardless of whether a lien on real property was ever created. *Matter of Townsend*, 83 Hun 200, 31 N.Y. Supp. 409 (Gen. T. 2d Dep't 1894) (judgment over ten years old and therefore no longer a lien has "priority" over judgment less than ten years old which is a lien); *Ainslie* v. *Radcliffe*, 7 Paige 439 (N.Y. Ct. Ch. 1839) (same); *Matter of Paige's Estate*, 146 Misc. 885, 262 N.Y. Supp. 870 (Surr. Ct. 1933) (Municipal Court judgments for which no transcripts filed and which therefore never were liens have "priority" over subsequently-docketed City Court judgment which was a lien because a transcript had been filed); *cf. Matter of Murray's Estate*, 157 Misc. 549, 283 N.Y. Supp. 975 (Surr. Ct. 1935) (new judgment has "priority" as of date of original judgment sued upon); *Matter of Taylor's Estate*, 178 Misc. 217, 33 N.Y.S.2d 584 (Surr. Ct. 1942) (judgment awarded before death but entered and docketed after death, which in accordance with civil practice act section 478 "does not become a lien upon the real property or chattels real of the decedent; but . . . establishes a debt to be paid in the course of administration," has priority as a judgment over other debts). *But see Matter of Wakefield's Estate*, 146 Misc. 58, 260 N.Y. Supp. 633 (Surr. Ct. 1932) (Justice Court judgment not entitled to preference because transcript, which was not filed until after death, could create no lien).

This priority between judgments therefore differs from the priority which the creditors would have had if the debtor was living: in the case of real property, present section 510(1) allows the judgment creditor who dockets in the county where the property is located priority over a judgment which was previously docketed elsewhere; in the case of personal property, present section 679 prescribes priority in the order in which executions are delivered to the sheriff, regardless of when the judgment was docketed. See also N.Y. Civ. Prac. Act §§509, 648.

The judgment creditor with a lien on real property of a decedent thus appears to have no advantage over one without such a lien, at least in the priority of payment under section 212(3) of the Surrogate's Court Act.

Subdivision 1 of section 234 of the Surrogate's Court Act specifies as one of the purposes for which real property may be sold, "the payment of the debts of the decedent, including judgment or other liens, excepting mortgage liens, existing thereon at the time of his death." While this seems to limit judgment creditors to those having liens existing on the particular property to be sold, the word "debts," at least in modern usage, would include all judgments. *But see Matter of McGee*, 65 App. Div. 460, 73 N.Y. Supp. 64 (2d Dep't 1901) (judgment which was not a lien on particular realty was "not properly payable out of the proceeds of the sale" of that realty); *Matter of Stowell*, 15 Misc. 533, 534–35, 37 N.Y. Supp. 1127, 1128 (Surr. Ct. 1896) ("By the terms of the original statute the disposition of real estate was authorized through proceedings in probate courts solely for the payment of the *debts* of decedents; by a subsequent provision this remedy was extended to funeral expenses, and by the amendment of 1894 it was so extended as to authorize the proceeding for the payment of judgment liens existing at the time of the decedent's death.") Moreover, subdivision 7 of section 234 of the Surrogate's Court Act, which was added in 1936 (N.Y. Laws 1936, c. 200), specifies that real property can be sold "[f]or any other purpose deemed by the surrogate to be necessary." It would thus appear that a judgment creditor with a lien has little advantage over one without a lien in securing a sale of realty to pay his judgment.

Despite the *McGee* case dicta, the proceeds of a sale of realty are apparently distributed in accordance with the rules of Surrogate's Court Act section 212 for payment of debts (*cf. Matter of Tierney's Estate*, 88 Misc. 347, 151 N.Y. Supp. 972, 976 (Surr. Ct. 1914)), which, as previously noted, give a creditor with a lien no priority of payment. Apparently, however, if the creditor were not paid, his lien would survive the sale, as it would a sale made by the judgment debtor while living, and he could thereafter levy upon the property in the hands of the purchaser, who would have taken subject to his lien, by leave of court under section 656 of the civil practice act, which is replaced by proposed

section 13.8. That the creditor's lien survives would seem to be indicated by the extension provisions previously discussed and by the provisions of section 512 of the civil practice act. See proposed rule 61.12 and notes. For an extended discussion of the nature of a judgment lien on real estate see *Hulbert* v. *Hulbert,* 216 N.Y. 430, 111 N.E. 70 (1916). If the creditor were paid, either from other personal assets or from the proceeds of the sale, of course, his judgment would be satisfied and the purchaser would take free of his lien.

Until 1928, section 234 of the Surrogate's Court Act contained the following paragraph:

> No mortgage, lease or sale shall be ordered for the purpose of any of the foregoing payments, if there be personal property applicable to the full payment and discharge thereof.

In 1929, the paragraph was deleted (N.Y. Laws 1929, c.229, §8), but was later restored in the same year with the addition of the words "within the state of New York" after the words "personal property." N.Y. Laws 1929, c.519. In 1930, the paragraph was again deleted (N.Y. Laws 1930, c.174, §11), this time with a recitation that the omission was made "pursuant to the intention of the legislature to . . . remove the present distinctions, as far as possible, between real and personal property in their treatment as asserts of an estate." *Id.,* §20.

Despite this history, the courts have continued to apply the rule that a sale of real property will not be ordered if personal property is adequate, basing their reasoning on a clause in section 238 of the Surrogate's Court Act which deals with the order of sale of several parcels of realty. See, *e.g., Matter of Bate's Estate,* 167 Misc. 641, 4 N.Y.S.2d 444 (Surr. Ct. 1938). Thus it would appear unlikely that an execution against real property would be permitted pursuant to section 656 of the civil practice act, if the estate has sufficient personalty to pay the judgment. And, as previously noted, if there are sufficient assets, the priority of payment would be immaterial.

Proposed section 13.3(a)(5) specifically exempts transfers after death from that section's provisions, so that the personal property lien and priority there created would not survive and creditors would be subject to the priorities specified in section 212 of the Surrogate's Court Act for the payment of their judgments.

It should be noted that a judgment docketed after the death of the judgment debtor would appear to create no lien on realty since the property vests in the heirs or devisees immediately upon death. See *Matter of Wakefield's Estate, supra; cf.* N.Y. Civ. Prac. Act §512; proposed rule 61.12 and notes.

It should also be noted that there is authority in New York that the death of a judgment debtor after execution has been issued will not affect the validity of the execution. *Wood* v. *Morehouse,* 45 N.Y. 368 (1871). In the *Wood* case, however, real property was involved and there was no necessity for a levy, as would be the case with personal property. Moreover, the sheriff in the *Wood* case had already commenced sale proceedings.

Subdivision 5 of present section 656 has been omitted. Its statement that, during the eighteen-month delay prescribed by subdivision 3 of that section, recourse may be had to section 234 of the Surrogate's Court Act for the disposition of the decedent's real property for the payment of his debts, is unnecessary. As previously noted, moreover, the Surrogate's Courts are reluctant to permit disposition of real property to pay debts, unless personality has been exhausted; and the proposed section omits the delay period of present section 656(3).

Subdivision 6 of present section 656 has also been omitted. It permits an execution, without leave of court, where property has been conveyed in fraud of creditors. It apparently applies only where the conveyance has been adjudged fraudulent. *Matter of Homes,* 131 N.Y. 80, 85, 29 N.E. 1003, 1005 (1892); *cf.* N.Y. Debt. & Cred. Law §278(1)(b) (creditor may disregard such a conveyance and levy on the property). Further, it would seem that the conveyance must have been "declared fraudulent while the grantor is still alive." *Aetna Casualty & Surety Co.* v. *Amling,* 122 N.Y.S.2d 156, 159 (Sup. Ct. 1953). It is difficult to see the necessity for this subdivision, since upon such an adjudication, the conveyance would be set aside and the creditor would thereafter be in the same position as if it had not been executed or delivered.

The provisions of present section 657 regulate the proceedings in the Surrogate's Court and are therefore more appropriate in the Surrogate's Court Act. It is recommended that they be so transferred, as section 212-a, to read as follows:

> §212-a. Leave to issue execution against decedent's property.
>
> For the purpose of procuring a decree from the surrogate's court granting leave to issue executions against a decedent's property, a judgment creditor shall present to the surrogate's court a written petition, duly verified, setting forth the facts and praying for such a decree, and that the person whose interest in the property will be affected by a sale by virtue of the execution and the executor or administrator of the judgment debtor may be cited to show cause why it should not be granted. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. Such citation must be served either personally or in such manner as the surrogate by order may prescribe, or as is otherwise provided by law; and, upon the return thereof, he must make such a decree in the premises as justice requires.

13.9. Discharge of garnishee's obligation.

A person who, pursuant to an execution or order, pays or delivers to the judgment creditor or a sheriff or receiver money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment

debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

Notes

This section is based up section 794(3) and parts of sections 684(2) and 687-a(2) of the civil practice act.

Sections 684(2) and 687-a(2) provide that payments by a garnishee to a sheriff pursuant to an execution issued under those sections constitutes a bar to suit by the judgment debtor for the amounts paid. Section 794(3) provides that a payment to the judgment creditor pursuant to a permissive or mandatory order discharges the indebtedness of the garnishee to the extent of the payment. There is no similar provision with regard to the delivery of property pursuant to an order under section 796 or pursuant to an execution.

The provision in present section 794(3) that a discharge is not effective "against a transferee from the judgment debtor in good faith and for a valuable consideration of whose rights the third party had actual or constructive notice prior to the entry of the order" has been deleted. The proposed rule refers only to the discharge of obligations to the judgment debtor; a garnishee's obligation to other persons is not affected. Where a garnishee has the notice contemplated, he is to that extent, no longer indebted to the judgment debtor but to a third person. If the garnishee receives notice of the transfer after the entry of the order, section 794(3) would still permit him to discharge his indebtedness by paying the creditor of the transferor—which appears to be a harsh result to the "transferee in good faith and for a valuable consideration"; the same result would obtain even where the transfer was made before the order was entered and, while the garnishee was notified thereafter, the garnishee had no notice of the entry of the order when he received notice of the transfer. It should be noted that the discharge provisions in sections 684(2) and 687-a(2) do not contain the transferee exception.

For a discussion of the inconsistency between present section 799-a, which renders an assignment from the judgment debtor ineffectual with respect to the rights of a judment creditor who has served a restraining notice on the person in possession of property or the person who owes the debt, and present section 794(3), see *Liens and Priorities* at p. 776 *infra*.

13.10 Power of court to punish for contempt.

Every court in which a special proceeding to enforce a money judgment may be instituted, shall have power to punish a contempt of court committed with respect to an enforcement procedure.

Notes

This section is derived from the last sentence of section 801 of the civil practice act which purports to give to the City Court of Buffalo the same power as a court of record with respect to punishment for contempt. It is required in section 801 because the City Court of Buffalo is the only court which is not of record in which supplementary proceedings pursuant to section 777 may be brought. Since proposed rule 61.1(a) continues the City Court of Buffalo as one of the courts in which supplementary proceedings may be brought, proposed section 13.10 continues the power granted by section 801 to any court specified in proposed rule 61.1(a). The provision has been made generally applicable to permit it to encompass any other courts not of record in which supplementary proceedings may be authorized at some future date.

There is some doubt of the validity of this provision, as it may be an unconstitutional grant of equity power to an inferior court. See N.Y. Const. art. VI, § 18. Indeed, there is doubt as to whether certain inferior courts, even those of record, can be granted power to entertain supplementary proceedings. See notes to proposed rule 61.1(a). The advisory committee does not consider it within its power to pass on this question and therefore continues the jurisdiction for supplementary proceedings, and to punish for contempt, presently granted.

It should be noted that any constitutional doubts would be resolved if the proposed amendment, replacing article VI of the Constitution, is passed. See Sen. Int. 1650, Pr. 4319. Section 11(c) of the proposed new article provides that the county courts "shall exercise such equity jurisdiction as may be provided by law" and section 15(b) contains an identical provision for courts of city-wide jurisdiction. Section 16(d), in turn, provides that district courts shall not have greater jurisdiction than city courts, and section 17(a) provides that town, city and village courts shall not have greater jurisdiction than district courts. It would therefore be possible under these provisions for the Legislature to grant equity jurisdiction to each of these inferior courts.

13.11. Privilege on examination; immunity.

The court may confer immunity upon any witness in accordance with the provisions of section two thousand four hundred forty-seven of the penal law for testimony or evidence in an enforcement procedure relating to disposition of property in which the judgment debtor has an interest, or relating to his or another person's claim to be entitled, as against the judgment creditor or a receiver, to hold property derived from or

through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor; provided, however, that no immunity shall be conferred except upon twenty-four hours' prior written notice to the appropriate district attorney having an official interest therein.

Notes

This section is derived from section 789 of the civil practice act, which was amended in 1953. N.Y. Laws 1953, c. 892. The language has been somewhat simplified but the substance of the provision remains unchanged.

The court's intervention may be secured, pursuant to proposed rule 61.18, where matter sought is not privileged in the sense of this section but would cause undue hardship or embarrassment.

DERIVATION OF CIVIL PRACTICE ACT PERSONAL PROPERTY EXEMPTIONS FROM EXECUTION

Civil Practice Act Section	Exempt Property	Enacted By	Remarks
665(1)	stoves kept for use	N. Y. Laws 1824, c. 238	
665(1)	necessary fuel therefor for 60 days	N.Y. Rev. Stat. pt. 3, c. 6, tit. 5, §22 (1829)	
665(1)	one sewing machine with its appurtenances	N.Y. Laws 1860, c. 152	
665(2)	family bible	N. Y. Laws 1824, c. 238	
665(2)	family pictures	N.Y. Rev. Stat. pt. 3, c. 6, tit. 5, §22 (1829)	
665(2)	school books used by or in the family	N.Y. Laws 1824, c. 238	
665(2)	other books not exceeding value of $50	N.Y. Rev. Stat. pt. 3, c. 6, tit. 5, §22 (1829)	replacing value limitation of $25. N.Y. Laws 1824, c. 238
665(3), 666(1)	seat or pew in place of worship	N.Y. Laws 1824, c. 238	
665(4)	all necessary food for family for 60 days	N.Y. Laws 1946, c. 135	replacing specific items with no time limit. N.Y. Rev. Stat. pt. 3, c. 6, tit. 5, §22 (1829)
665(4)	domestic animals	N.Y. Laws 1946, c. 135	replacing specific items. N.Y. Laws 1815, c. 227
665(4)	food for animals for 60 days	N.Y. Laws 1946, c. 135	replacing necessary food for them with no time limit. N.Y. Laws 1824, c. 238
665(5), 666(2)	wearing apparel	N.Y. Laws 1815, c. 227	
665(5)	household furniture	N.Y. Laws 1842, c. 157	replacing specific items. N.Y. Laws 1815, c. 227
665(5)	one mechanical, gas or electric refrigerator	N.Y. Laws 1957, c. 412	
665(5)	one radio receiver	N.Y. Laws 1957, c. 412	
665(5)	crockery, tableware & cooking utensils	N.Y. Laws 1946, c. 135	replacing specific items. N.Y. Laws 1815, c. 227
665(6), 666(3)	a wedding ring	N.Y. Laws 1942, c. 311	
665(6), 666(3)	a watch, not exceeding value of $35.	N.Y. Laws 1942, c. 311	
665(7), 666(4)	tools and implements, including those of a mechanic	N.Y. Laws 1946, c. 135	changed from "tools and implements of any mechanic." N.Y.Rev.Stat.pt.3, c. 6, tit. 5, §22 (1829)
665(7), 666(4)	farm machinery	N.Y. Laws 1946, c. 135	
665(7), 666(4)	team	N.Y. Laws 1842, c. 157	

DERIVATION OF CIVIL PRACTICE ACT PERSONAL PROPERTY EXEMPTIONS FROM EXECUTION—Concluded

Civil Practice Act Section	Exempt Property	Enacted By	Remarks
665(7), 666(4)	professional instruments, furniture and library	N.Y. Laws 1866, c. 782	
665(7), 666(4)	food for team for 90 days	N.Y. Laws 1866, c. 782	
667	pay and bounty of non-commissioned officer, musician or private	N.Y. Laws 1864, c. 578	
667	a land warrant, pension, or other reward	N.Y. Laws 1876, c. 448	
667	a sword, horse, medal, emblem or device presented as a testimonial	N.Y. Laws 1864, c. 578	
667	uniforms, arms and equipments	N.Y. Laws 1876, c. 448	

ARTICLE 15. PROVISIONAL REMEDIES

INTRODUCTION

In addition to a dozen rules of civil practice, there are 176 sections of the civil practice act relating to provisional remedies. The bulk of these are contained in articles 46 through 60. Article 61, disposition of property in litigation, although included in the part of the civil practice act that relates to provisional remedies, is of more general application; its subject matter is treated in proposed title 121. Although replevin actions present some problems similar to those found in attachment, the requirments of proof and the forms of judgment have roots in the old forms of action, which make difficult any complete assimilation into provisional remedies; they are treated separately both in the civil practice act and in the proposed act and rules. On the other hand, article 11, notice of pendency, which is found among the general practice provisions of the present act, contains provisions so functionally similar to those of the traditional provisional remedies that it will be treated as a provisional remedy in the proposed act and rules.

Only those provisions creating or limiting the remedies and affecting property interests or fundamental public policy are placed in the proposed act. It is recommended that some be transferred to the Consolidated Laws and the remaining sections dealing with procedural details have been simplified and consolidated into proposed rules.

Present section 915-a, which deals with attachment of a partnership interest before judgment, is one of the sections which should be transferred to the Consolidated Laws. The wording of its second sentence was modeled upon the wording of section 54 of the Partnership Law which specifies the powers of a court when a charging order is sought after judgment. See 7 N.Y. Jud. Council Rep. 432–33 (1941). Section 54, in turn, is identical with section 28 of the Uniform Partnership Act.

There seems no valid reason why a court's power to appoint a receiver or make inquiry upon attachment should be treated in the civil practice act while the identical power after judgment should be in the Partnership Law. Accordingly, it is recommended that subdivision 1 of section 54 of the Partnership Law be amended to include the provision now in civil practice act section 915-a as follows (brackets indicate deletions, italics indicate insertions):

> 1. On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon [; and]. *Upon such application or upon the granting of an order attaching the interest of the debtor partner before judgment, the court* may then or later appoint a receiver of his share of the profits,

and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

Since the first sentence in present section 915-a is redundant in view of subdivision 7 of present section 916 (see also proposed section 15.3), section 915-a may be omitted entirely from the proposed rules and act.

An interest in a partnership should be distinguished from specific partnership property which, under section 51(2)(c) of the Partnership Law, can only be attached when there is a claim against the partnership . A partner's interest in the partnership, which is the subject of present sections 915-a and 916(7), is defined in section 52 of the Partnership Law as his share of the profits and surplus.

It is also recommended that sections 876-a and 882-a of the civil practice act be transferred to the Consolidated Laws. They are highly specialized provisions dealing with injunctions in labor disputes, and do not belong in a general practice act. They are more appropriate in the Labor Law as a new article 20-A. Similarly, sections 977-a, 977-b and 977-c, dealing with receiverships in special cases should be transferred to the Consolidated Laws or considered elsewhere in the proposed act and rules. See introduction to proposed title 74.

Section 825, which provides that a court acquires conditional jurisdiction upon the granting of a provisional remedy has been treated in the proposed act and rules relating to commencement and limitation of actions. See proposed section 5.3(b)(2) and notes.

The major changes in provisional remedies are found in the proposed rules, although the scope of arrest and attachment have been altered by sections of this article. For reasons noted below, use of arrest has been severely restricted; attachment, on the other hand, has been expanded.

TABLE OF SECTIONS IN ARTICLE 15

SECTIONS—ARTICLE 15. PROVISIONAL REMEDIES

15.1. Kinds of provisional remedies; when remedy available to defendant.

The provisional remedies are arrest, attachment, injunction, receivership and notice of pendency. On a motion for a provisional remedy, the plaintiff shall state whether any other provisional remedy has been secured or sought in the same action against the same defendant, and the court may require the plaintiff to elect between those remedies to which he would otherwise be entitled. A cause of action contained in a counterclaim or cross-claim, and a judgment demanded thereon, shall entitle the defendant to the same provisional remedies to which he would be entitled if he were the plaintiff, the party against whom the judgment is demanded were the defendant and the cause of action were contained in a camplaint.

Notes

The first sentence of this section is new. *Cf.* N.Y. Civ. Prac. Act §814. Notice of pendency has been included in the provisional remedies. See introduction to article 15. The second and third sentences of this section are based upon sections 823 and 824 of the civil practice act, respectively. No change of substance is intended.

15.2. Grounds for arrest.

An order of arrest as a provisional remedy may only be granted where the plaintiff has demanded and would be entitled to a judgment requiring the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt and where the defendant is not a resident of the state or is about to depart therefrom, by reason of which non-

residence or departure there is a danger that such judgment or order will be rendered ineffectual.

Notes

This section retains the present counterpart of the *ne exeat* writ: civil arrest based upon extrinsic facts under section 827 of the civil practice act.

The arrest presently authorized by section 826 of the civil practice act, based upon the nature of the action, has been abolished. See introduction to proposed title 71.

The provision of present section 827 that the order "is always in [the court's] discretion" is included in proposed rule 71.1. Although the word "may," in contrast to "shall," is used throughout the proposed act and rules to indicate an optional or discretionary rule, the advisory committee deemed this situation to be of sufficient importance to warrant express reiteration of the court's discretion.

The phrase "and would be entitled to" in the proposed section is derived from present section 877, which relates to injunctions. It is utilized for each of the provisional remedies in the proposed act and rules with the intent of restating the present law that a bare demand for relief unsupported by a sufficient cause of action is not enough. *Cf.* N.Y. Civ. Prac. Act §833.

15.3. Grounds for attachment.

An order of attachment may be granted in any action, except an action for a separation, divorce or annulment, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. the defendant, with intent to defraud his creditors, has has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts.

Notes

This section is derived from section 902 and part of section 903 of the civil practice act. The remaining portions of section 903 are either omitted or treated in the proposed rules.

The limitation to an action for money only in section 902 is altered to make attachment available in cases where forms of relief in addition to a money judgment are sought. See generally Note, *Attachment in New York—A Cumbersome Legal Tool?*, 6 Syracuse L. Rev. 308, 312–15 (1955). The attachment provisions of the vast majority of states are in harmony with this broadening of attachment; by permitting a single action for all relief between parties without forfeiture of the ability to attach, it expresses the same policy as modern liberal joinder provisions. The term "money judgment" is defined in proposed section 13.1(a)(1). See proposed section 15.4.

For policy reasons, this broadening of the availability of attachment does not encompass matrimonial actions, which have been expressly excluded. Further consideration will be given to the application of provisional remedies when the act and rules governing matrimonial actions are considered.

The words "order of attachment" are utilized in this article and in the proposed rules in place of the present phrase "warrant of attachment." Although originally a writ issued by the court, the warrant of attachment is today clearly an order of the court. Indeed, the civil practice act has been gradually amended to state that a warrant is "granted" rather than "issued." See N.Y. Laws 1941, c. 253, *amending* N.Y. Civ. Prac. Act §§912, 920. No reason appears why the word "warrant" should be retained for attachment while "order" is used for each of the other provisional remedies. Using the word "order" for all of the remedies eliminates the need for much needless language in sections referring to more than one provisional remedy. See, *e.g.*, N.Y. Civ. Prac. Act §§820, 823; see also *id.* §§814–819, 821, 822.

Since an application for an order is a motion (N.Y. Civ. Prac. Act §113; proposed rule 33.1), the application for an order granting a provisional remedy is designated a motion in the proposed act and rules. See proposed rule 72.2. The rules of title 33 applicable to motions generally would thus govern unless they are inconsistent with specific provisions of article 15 or title 72.

Subparagraph 1 of this section is derived from subparagraph 1 of section 903 of the civil practice act. Under modern conditions, this ground of attachment may operate differently upon corporations than upon natural persons. With respect to the latter, present permanent location is the controlling factor; with respect to the

former, place of incorporation may determine. But a foreign corporation authorized to do business in New York, having its principal offices here and doing virtually all of its business here, is in no different position than a local resident who was born elsewhere. See Note, 6 Syracuse L. Rev. 308, 315 (1955).

While there is no direct authority, it is therefore possible that the courts would not treat a corporation doing a systematic and regular business in the state as a foreign corporation, regardless of the place of its incorporation. This is in accordance with the rule in most jurisdictions (see Annot., 114 A.L.R. 1378 (1938)) and the treatment of corporations in other areas of New York law. See *Comey* v. *United Surety Co.*, 217 N.Y. 268, 111 N.E. 832 (1916); *McConnell* v. *Caribbean Petroleum Co.*, 278 N.Y. 189, 195, 15 N.E.2d 573, 575(1938); *Webster* v. *Columbian Nat. Life Ins. Co.*, 131 App. Div. 837, 116 N.Y. Supp. 404 (1st Dep't), *aff'd*, 196 N.Y. 523, 89 N.E. 1114 (1909); *Gaunt* v. *Nemours Trading Corp.*, 194 App. Div. 668, 186 N.Y. Supp. 92 (1st Dep't 1921); *Standard Marine Ins. Co.* v. *Verity*, 243 App. Div. 639, 276 N. Y. Supp. 801 (2d Dep't 1935). If attachment is viewed as a method of acquiring jurisdiction, as contrasted to a method of assuring a plaintiff that he will be able to collect his judgment, attachment of the property of foreign corporations otherwise subject to the court's jurisdiction is unnecessary. There is little reason to believe that a plaintiff is less apt to collect a judgment against a foreign corporation doing business here than against a domestic corporation. Granting an order of attachment is discretionary and the court should consider whether it is actually needed in the case of a foreign corporation.

To some extent, subparagraph 1 of present section 903 may represent a legislative judgment that the property of foreign corporations and non-residents would be difficult to reach on execution. If that be so, the provisions should be retained for the security of plaintiffs whether or not they serve any function in facilitating acquisition of jurisdiction.

Unless the local property of foreign corporations not doing business here were made subject to attachment, the plaintiff could only secure an attachment if he could show that the corporation was about to remove, secrete or dispose of property, or had already done so. See proposed subparagraph 3. The advisory committee believes that such a burden may be unwarranted in many cases. Moreover, as already indicated, the courts are likely to limit the provision of proposed subparagraph 1 to foreign corporations not doing business here. Accordingly, proposed subparagraph 1 retains the "foreign corporation" ground of subparagraph 1 of present section 903. In effect, a presumption that a "foreign" corporation is about to remove property is created.

With respect to natural persons, the dual role of attachment—acquiring jurisdiction and securing the enforcement of the judgment—must also be the basis of an analysis of the "non-resident" ground for attachment. Both considerations are not always borne in mind. For example, the word "resident" in subparagraphs 1 and 7 of present section 903 has given the courts a great deal of difficulty.

Subparagraph 7 would be meaningless if temporary absence from the state were sufficient to make one "not a resident" under subparagraph 1. See *Bonwit Teller, Inc.* v. *Morris*, 202 Misc. 629, 116 N.Y.S.2d 84 (Sup. Ct., App. T. 1952). Yet temporary absence with intent to avoid service of a summons is clearly a ground for attachment under subparagraph 2 of present section 903. Indeed, concealment within the state with like intent is also a ground under subparagraph 2. This provision, and that of subparagraph 7 that attachment may be granted against a resident absent for six months if an agent for service has not been designated or cannot be served, leads inevitably to the conclusion that at least one of the purposes of the present section is to permit attachment wherever personal service cannot be made despite diligent effort, except that a resident absent for a short period with no intent to avoid service should not be harassed by attachment of his property.

To further explore the jurisdictional function of attachment against non-residents, the grounds for attachment under these subparagraphs of present section 903 should be read with the present provisions for service of a summons. Where an attachment has been granted, section 232(3) of the civil practice act permits service by publication, and section 233 permits personal service without the state, against the defendants specified in section 232-a. Foreign corporations are thus subject to attachment under section 903(1) and then to service without the state or by publication under section 232-a(1). Non-residents are covered by sections 903(1) and 232-a(5). See also N.Y. Civ. Prac. Act §232-a(2). Residents who have departed or concealed themselves with intent to avoid service are covered by sections 903(2) and 232-a(7). Finally, residents absent for more than six months, where an agent has not been designated or cannot be served, are covered by sections 903(7) and 232-a(8).

There is no logical reason for the lack of attachment provisions parallel to the other service provisions of section 232-a, especially since attachment is a prerequisite to service by publication, or by personal service without the state in lieu of publication, except in marital, land or interpleader actions. It is anomalous not to permit jurisdiction to be acquired by attachment where, as in section 232-a(3), a dissolved domestic corporation cannot be served, or where, as in section 232-a(4), the domestic status or name of a corporation cannot be ascertained, or where, as in section 232-a(6), the defendant's residential status cannot be ascertained, or where, as in section 232-a(9), an infant's or incompetent's representative cannot be served.

From a jurisdictional standpoint, subparagraph 7 of present section 903 presents further difficulties. If jurisdiction is sought over an absent resident, where no intent to avoid service can be shown as to his departure, it may be impossible to serve him before the applicable statute of limitation runs. If he is absent more than sixty days but less than four months, an attempt to serve him under sections 17 or 18 of the civil practice act will fail to satisfy the statute since he cannot be served within sixty days by personal

service and, except in a land, marital or interpleader action, service by publication under section 232 is impossible because no attachment can be granted. After four months' absence, the statute will be tolled under section 19, and after six months' absence, subparagraph 7 of section 903 would permit an attachment, and hence service by publication.

Moreover, subparagraph 7 of present section 903 is needlessly limited to adults, a limitation which has been deleted in the proposed section. *Cf.* N.Y. Civ. Prac. Act §§232-a(8), 232-a(9).

Attachment for jurisdictional purposes of the property of a New York domiciliary is never necessary if his whereabouts are known, since personal service of a summons is possible under the 1941 amendment to section 235 of the civil practice act. See also proposed rule 25.3. Moreover, under proposed rule 25.2(b)(2), personal service can be made upon an absent resident by leaving the summons at his residence with a person of suitable age and discretion. *Cf.* N.Y. Civ. Prac. Act §231.

Proposed subparagraph 2 thus defines the jurisdictional basis of attachment more directly, permitting an attachment whenever personal service cannot be obtained after diligent effort. Protection from harassment of a temporarily absent resident non-domiciliary is afforded in two ways. First, the court has discretion to refuse to grant the order unless special circumstances, such as the imminent bar of a statute of limitation or the absentee's intent to avoid service, are shown. Second, the language of proposed rule 72.13 permits an attachment unnecessary for the security of the plaintiff to be vacated where the appearance of the defendant has obviated the need for it as a jurisdictional device.

In the case of a natural person, a presumption that the local property of a non-resident is less likely to be available to satisfy a judgment than that of a resident, appears to be reasonable. As already indicated, the temporary absence of a resident is not enough to make subparagraph 1 of section 903 operative, but the rule is not so clear as to whether temporary presence in the state makes the subparagraph inoperative. Although sufficient for jurisdictional purposes, temporary presence of the defendant does not, of itself, indicate that his property is significantly more likely to be available for satisfaction of a judgment than if he had never entered the state.

The emphasis of the courts construing subparagraph 1 of section 903, however, has generally been on the use of attachment as a method of acquiring jurisdiction. The unusal definition of residence appearing in the cases is: "Residence as used in the attachment statute is not legal domicile, but actual place of abode or living, either of a temporary or permanent character, *at which service of process may be lawfully made.*" *Zenatello* v. *Pons,* 235 App. Div. 221, 225, 256 N.Y. Supp. 763, 766 (1st Dep't 1932) (emphasis supplied); see also *Hanover Bank* v. *Stebbins,* 69 Hun 308, 310, 23 N.Y. Supp.) 529, 530 (Sup. Ct. 1893); *Salim* v. *Krieg,* 182 Misc. 721, 723, 49 N.Y.S.2d 694, 697 (County Ct. 1944); *Wolf* v. *Minton,* 37 N.Y.S.2d 294, 295 (Sup. Ct. 1942).

Thus, where a traveling orchestra leader maintained a suite at a New York hotel for a period of one and one-half months, it was held that he was a resident under section 903, and a warrant of attachment was vacated. *Loew's Inc.* v. *Dorsey,* 197 Misc. 1069, 97 N.Y.S.2d 315 (Sup. Ct. 1950). Similarly, an alien actually living in the state, without any determination to reside anywhere else, is a resident. *Heidenbach* v. *Schland,* 10 How. Pr. 477 (N.Y.Sup. Ct. 1854).

While some courts have suggested that mere bodily presence or temporary sojourn is sufficient to classify a person as a resident under this section (see *Bonwit Teller, Inc.* v. *Morris, supra; Loew's Inc.* v. *Dorsey, supra*), this wholly jurisdictional view is not supported by all the opinions. Thus, in *Rudis Corp.* v. *Farid Sons, Ltd.,* 3 M. 2d 861, 157 N.Y.S.2d 44 (N.Y. Munic. Ct.), *aff'd* 3 M. 2d 862, 157 N.Y.S.2d 1023 (Sup. Ct., App. T. 1956), the court held that a resident and domiciliary of Pakistan who, as a temporary visitor to this country, had maintained a room in a New York hotel for one and one-half months was *not* a resident under section 903. Similarly, in *Equitable Trust Co.* v. *Sala,* 102 Misc. 429, 169 N.Y. Supp. 930 (Sup. Ct. 1918), a Spanish citizen who had spent approximately half of the preceding five years in New York living as a transient in hotels was held not to be a resident.

Since the latter cases, at least, seem to imply a security purpose to the applicable language of subparagraph 1 of section 903, subparagraph 1 of the proposed section retains and clarifies it as "not a resident or domiciliary."

Subparagraphs 3 and 4 of the proposed section are based upon subparagraphs 2 and 3 of present section 903, with no change intended.

Subparagraphs 4, 5 and 6 of present section 903 have been deleted. After extended consideration of the matter, the advisory committee concluded that the fact that the action is based upon fraud—especially alleged, but not proved, fraud—should not be a ground for attachment. Attachment has been limited to those cases in which the plaintiff is unable to acquire jurisdiction in any other way and those cases where it is probable, by reason of the fraud of the defendant or otherwise, that a judgment cannot be enforced. Thus, fraud in secreting or disposing of property will create a right to attachment, but fraud in inducing the contract sued upon will not.

Subparagraph 4 of present section 903 is limited to false statements in writing in a credit transaction. While it is not expressed that the liability must have arisen as a result of the credit transaction, this was probably the legislative intent. With respect to subparagraph 5 of present section 903, no case arising under it has been discovered and there is little textual discussion of its application. See 7 N.Y. Jud. Council Rep. 413 n. 85 (1941). It is limited to "a private person or corporation," but the quoted words are obsolete. They were not intended as a limitation; rather, they were intended to broaden a limited provision for they performed the useful function of distinguishing the application of the deceit provision from that of the peculation provision before the two

were severed in 1941. See *id.* at 405, 408, 409, 411–14. It has been implied that subparagraph 5 is required because of the limitation of subparagraph 4 to credit transactions. See *id.* at 408, 409, 413 n. 85; *cf. American European Export Co.* v. *John E. Safran Co.*, 68 N.Y.S.2d 174 (Sup. Ct. 1947).

Section 904 of the civil practice act has also been deleted. It grants a right to attachment to the state or a state agency where the action is for peculation. Inasmuch as the civil action for peculation is based upon facts that are ordinarily sufficient to constitute a criminal violation, this ground of attachment serves little purpose. Its abolition accords with the abolition of peculation as a ground for civil arrest and with the general scheme of the proposed arrest and attachment provisions, eliminating their function as punishment and confining their operation to security for the plaintiff.

15.4. Property or debt subject to attachment; proper garnishee.

Any property or debt against which a money judgment may be enforced as provided in section 13.1 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 13.1; for the purpose of applying its provisions to attachment, references to a "judgment debtor" in section 13.1 shall be construed to mean "defendant."

Notes

The first sentence of the proposed section is in accord with the first paragraph of present section 912. The phrase in the latter section "unless by law specifically made subject to attachment notwithstanding such exemption [from execution]," has been deleted. The phrase was intended to cover debts and causes of action, which could be attached under subdivisions 3 and 4 of section 916, but could not be levied upon by virtue of an execution at the time the phrase was included in section 912. For a history of this phrase and the attempts to clarify its meaning, see 7 N.Y. Jud. Council Rep. 428–29 (1941). The phrase has been unnecessary since 1952, however, when debts and causes of action were made subject to execution. N.Y. Laws 1952, c. 835; see Carmody, New York Practice 899–900 (7th ed., Forkosch 1956); N.Y. Law Rev. Comm'n Rep. 373–395 (1952).

Because of the deletion of the phrase quoted above, a vendee's interest in a contract for the purchase of real estate could not be attached under the proposed section (*compare* N.Y. Civ. Prac. Act §513, with *id.* §913; *cf. Higgins* v. *McConnell*, 130 N.Y. 482, 29 N.E. 978 (1892)) were it not for the fact that the present exemption from execution of such an interest has also been deleted by proposed article 13. See introduction to proposed article 13.

The remaining provisions of the proposed section save repetition of the complex rules which serve to determine not only which property may be levied upon, but how the levy is made. This section also creates a desirable uniformity which does not presently exist between attachment and enforcement.

15.5. Title to attached property.

Any estate or interest in personal property which has been levied upon but is not in the possesion of the sheriff, acquired in good faith, for value and without knowledge of the levy, shall not be divested, but the proceeds thereof shall be subject to the levy.

Notes

This section is derived from the last sentence of the third paragraph of present section 917(2). Since it affects property rights, it is included in the act rather than in the rules.

Under the proposed rules as well as under present section 917(2), a garnishee, served with an order of attachment, is forbidden to transfer the defendant's property even if it is not manually seized by the sheriff. However, this section defines the rights of the innocent purchaser, where the garnishee sells in violation of the rules. See 7 N.Y. Jud. Council Rep. 436–37 (1941).

Real property is excepted because, under present section 917(1), a notice of attachment of realty is filed and indexed in the same manner as a lis pendens. Thus, a purchaser is held to have notice and knoweldge of the attachment.

15.6. Priority of attachment.

Where two or more orders of attachment against the property of the same defendant are delivered to the same sheriff, the sheriff shall first levy pursuant to the order of attachment first delivered.

Notes

This section is new and replaces sections 680, 681, and 682 of the civil practice act, which are made applicable to attachment by section 960. No lien is acquired under the proposed rules by

delivery to the sheriff. For a discussion of the change made in this section and in the priority between attachments and executions, see notes to proposed rule 61.14.

15.7. Grounds for preliminary injunction and temporary restraining order.

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

Notes

The first sentence of this section is derived from section 877 and subdivision 1 of section 878 of the civil practice act. Subdivision 2 of section 878 has been omitted. Since it is proposed in section 15.3 that the provisional remedy of attachment no longer be limited to actions for money only, attachment is the more appropriate remedy to prevent a removal or disposition of property. Service of an attachment order would have the same effect as an injunction. See proposed rule 72.5(b); *cf.* N.Y. Code Civ. Proc. §604, note (Throop ed. 1881): ". . . the remedy by attachment seems to be ample [to protect a simple contract creditor]. Indeed, the entire subdivision [2 of civil practice act section 878] ought to be confined strictly to exceptional cases. . . ."

The concept in present section 878(1) of threatening to procure or suffer an act to be done has been omitted; it is sufficiently covered by the phrase "threatens . . . to do."

The last sentence of present section 877 is omitted as wholly unnecessary; it "should have been stricken out by the amendatory act of 1877, as all the provisions of this article which referred to it were stricken out." N.Y. Code Civ. Proc. §603 note (Throop ed. 1881).

The second sentence of this section is based upon section 882 of the civil practice act. For a discussion of the terminology used in the proposed act and rules, see introduction to proposed title 73.

This section is placed in the act with the parallel sections for other provisional remedies since it sets forth the grounds for a preliminary injunction or restraining order; the bulk of the present sections on injunction as a provisional remedy are incorporated in proposed title 73.

15.8. Notice of pendency; constructive notice.

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment or order demanded would affect the title to, or the possession, use or enjoyment of, real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he was a party.

Notes

Proposed section 15.8 is placed in the act rather than the rules because it limits the common law doctrine and states the conditions under which interests in real property may be affected. See introduction to proposed title 75. It is derived from the first two sentences of section 121 of the civil practice act, the class of action in which a notice may be filed is taken from present section 120, and it also replaces the last sentence of present section 122. The

significant language of the second sentence of section 121 has been included although it is partially repetitious to make it clear that a conveyance subsequently recorded although previously executed is subject to the notice. The third sentence of section 121 and the remainder of sections 120 and 122 are treated in the rules.

County clerks in New York index notices of pendancy in one of two ways: in counties where a block index is maintained—notably in New York city—notices are indexed to the blocks in which the property is located; in other counties, they are indexed in an alphabetical file against the defendants' names. Section 919 of the County Law authorizes the use of block indexes, and in 1956, at the suggestion of the clerk of New York county, the lis pendens provisions of the civil practice act were amended to reflect this alternative indexing method. See N.Y. Laws 1956, c. 793; N.Y. Leg. Ann. 5(1956). The proposed section therefore continues the present provision that a block index filing is notice to a purchaser from, or incumbrancer against, all defendants named in the notice.

Although the present statute requires a county clerk to index a notice of pendency filed with him, the notice is effective under the literal wording of section 121 to bind purchasers from a defendant specified as one against whom the notice should be indexed whether or not it is actually indexed against that defendant. In the case of a county clerk who maintains a block index, however, the section appears to require that the indexing entry be actually made in order for the notice to be effective. In either case, the notice is effective from the date of filing. It seems apparent that the distinction is inadvertent and the proposed section, for the protection of prospective purchasers, requires that the notice be properly indexed in either case.

Moreover, by specifying that only a properly indexed notice is effective, the proposed section eliminates the need for the last sentence of present section 122, which deals with erroneous or omitted designations and indexing. Under the last sentence of section 122, a new entry made pursuant to a corrected notice would not relate back to the date of filing of the original; this sound rule would also result under the proposed section. There does not seem to be a need to expressly deal with the related problem of the last sentence of present section 122 of erasing an entry from a name or block to which it has been erroneously indexed. The clerk can always withdraw or cancel a notice at the request of the party who filed it. If there is serious dispute as to the propriety of an entry, however, it is a matter for the court to decide, upon a motion for cancellation of the notice, and the county clerk should not be permitted to determine what is "proper proof" of an error.

Inclusion of actions in the Federal courts in the proposed section is discussed in the introduction to title 75.

TITLE 1. SCOPE OF RULES

INTRODUCTION

This title contains the same provisions for applicability of the rules of civil practice as does proposed section 1.1 for applicability of the civil practice law.

Under section 1.2(b) of the proposed civil practice law, the rules and law are made equally applicable to actions and special proceedings.

RULES—TITLE 1. SCOPE OF RULES

1.1. Applicability.

These rules govern the civil procedure in all courts of the state and before all judges except where the procedure is regulated by inconsistent statute or special rules adopted in conformance thereto.

Notes

This rule is new. There is no equivalent in the present rules of civil practice. No change in applicability of the rules in the various courts of the state is made by the proposal. See *Applicability of the Civil Practice Act* at pp. 557–572 *infra*.

The rule parallels the second sentence of proposed section 1.1 of the civil practice law and is motivated by the same considerations.

Power to adopt and amend the rules and power of courts to adopt rules is covered by the proposed constitutional provisions granting rule-making power, at pp. 457–59 *infra*, and the proposed amendments to the Judiciary Law at pp. 459–463 *infra*. See *Applicability of the Civil Practice Act* at p. 572 *infra*; Rule-Making Power at pp. 825–896 *infra*.

TITLE 27. SPECIAL PROCEEDINGS

INTRODUCTION

This title is new. It provides a uniform summary mode of procedure for every special proceeding, which would be applicable to all aspects of procedure except where, by express provision applicable in a specific special proceeding, other procedure is provided. Under proposed section 1.2(b) of the civil practice law, procedure not specifically covered by this title or by other statute or rule, would be the same as in an action.

In most proceedings, continuity with the present practice is maintained. Much of the procedure is similar to that on a motion, and where such similarity exists, an effort has been made to conform to the provisions of proposed title 33. The major innovations in title 27 are those provisions giving the court more control than under present law over such elements of practice as discovery, addition of parties and severance; such control is desirable to preserve the summary nature of the proceeding. In addition, because it is essentially similar in function to a traditional judgment, the final determination in a proceeding is a judgment, rather than a final order.

The primary object of this title is to assemble in one place the generally applicable rules of procedure governing a special proceeding. Under present law, such rules are repeated many times; there are procedural provisions for each special proceeding treated in the civil practice act and there are numerous separate statutes containing procedural provisions scattered throughout the Consolidated Laws. These provisions contain needless minor variations. It is contemplated that eventually provisions duplicating those in this title will be removed from such statutes and that, as far as is justified by the nature of the proceeding, conflicting provisions will be brought into conformity with this title. Often a simple cross-reference to this title would suffice. Moreover, the existence of a uniform body of rules would greatly simplify the task of the Legislature should it see fit to create a new special proceeding or to make any special proceeding procedure applicable to all or certain actions.

A discussion of the present practice in special proceedings, the problems posed thereby and possible solutions is contained in *Special Proceedings* at pp. 653–695 *infra*.

TABLE OF RULES IN TITLE 27

RULES—TITLE 27. SPECIAL PROCEEDINGS

27.1. Parties.

The party commencing a special proceeding shall be styled the petitioner and any adverse party the respondent. After a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court.

Notes

The first sentence of this rule is based upon a similar provision governing actions in the first sentence of section 191 of the civil practice act. *Cf.* proposed rule 23.1(a). It establishes uniform terminology for the designation of parties in a special proceeding, which avoids the confusing variety of terminology now in use and, at the same time, is distinct from that employed in an action. The terms adopted are those now used in practice in the greatest number of special proceedings.

The petitioner and respondent in a special proceeding would correspond to the plaintiff and defendant in an action. Party provisions of title 23 of the proposed rules are intended to be applicable to special proceedings, except that, because a special proceeding is brought before the court immediately, parties may not be added or interpleaded without leave of court, and such leave is also required for third-party practice and intervention. The court in a special proceeding is thus given the degree of control over parties necessary to preserve the summary nature of the proceeding, but it is still able to utilize the party devices of title 23 to prevent an undesirable multiplicity of suits. Requiring a court order in every instance is not unduly burdensome; even if none were required for this purpose, it would almost always be necessary to secure an order extending the time of the hearing or giving the additional party time to plead.

It is possible that there will be no adverse party in a special proceeding. See, *e.g.*, N.Y. Civ. Prac. Act art. 82 (proceeding for dis-

position of real property of infant or incompetent). See *Special Proceedings* at p. 657 *infra*. For this reason the term "any adverse party" rather than "the adverse party" is used in the proposed rule. See also proposed rules 27.2(b) and 27.3.

27.2. Notice of petition; service; order to show cause.

(a) Notice of petition. A notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition.

Notes

A notice of petition accomplishes the purposes of both a summons and a notice of motion. As in the case of a summons, the special proceeding is commenced and jurisdiction is acquired over the respondent by service of the notice of petition. See proposed section 3.4. As in the case of a notice of motion, a notice of petition must fix the return date and be accompanied by any supporting affidavits. See proposed rule 33.5(a). There is no demand for relief in the notice of petition, however, because the demand is made in the petition—the equivalent of the complaint in an action—which is to be served with the notice.

(b) Time for service of notice of petition and answer. A notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least eight days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least one day before such time. An answer shall be served at least five days before such time if a notice of petition served at least ten days before such time so demands; whereupon any reply shall be served at least two days before such time.

Notes

This subdivision is based on the provisions controlling motions. See proposed rule 33.5(b); N.Y. Civ. Prac. Act §117; N.Y. R. Civ. P. 60, 64. Since the primary function of a special proceeding is summary disposition, most statutes governing special proceedings provide for short notice. In this respect, a special proceeding is analogous to a motion. Although there is considerable variation, the time periods of the motion provisions are those most frequently employed. See, *e.g.*, N.Y. Civ. Prac. Act §§1289, 1461, 1463, 1469-b.

Considerable flexibility will be achieved through the court's discretionary power to adjourn the hearing, to allow added time to plead and to require additional proof. The court may also vary the time of service by use of an order to show cause. See proposed rule 27.2(d).

Affidavits with attached exhibits may be submitted with the petition or answer to facilitate a summary determination on the pleadings and papers in a manner similar to that on a motion for summary judgment. See proposed rules 31.2(a) and 27.7(b).

(c) Manner of service. A notice of petition shall be served in the same manner as a summons in an action.

Notes

This subdivision is derived from rule 21 of the rules of civil practice. Similar provisions are contained in many of the statutes governing particular special proceedings. See, *e.g.*, N.Y. Civ. Prac. Act §§1289, 1309, 1421, 1469-d. Such service is required in order to obtain original jurisdiction.

The restriction of rule 21 to the provision for "personal" service of a summons has been eliminated. If personal service cannot be effected, there is no reason why service by mail or by publication should not be allowed, as in an action. See proposed rules 25.4 and 25.5. The court may make additional provisions as to the manner of service in an order to show cause as long as the mode of service gives sufficient notice to meet the demands of due process. See proposed rule 27.2(d).

(d) Order to show cause. The court may grant an order to show cause to be served, in lieu of a notice of petition, at a time and in a manner specified therein.

Notes

This subdivision is based upon proposed rule 33.5(e), which applies to motions. See N.Y. R. Civ. P. 60. Service of an order to show cause is equivalent to service of a notice of petition for the purposes of the jurisdictional requirements of proposed section 3.4. An order to show cause permits the court to make provisions for special problems that may arise as to time, service and parties, and at the same time grant such provisional relief as may be necessary. Both the affidavits upon which the order to show cause was granted and the petition should be served with the order to

show cause, in order to insure notice to the defendant not only of the claims against him but of the reason for proceeding by order to show cause.

27.3. Pleadings.

There shall be a petition, which shall comply with the rules for a complaint in an action, and an answer where there is an adverse party. There may be such other pleadings as are authorized in an action. Where there is no adverse party the petition shall be accompanied by an affidavit stating the result of any prior application for similar relief.

Notes

Under the proposed rule, title 26 governs pleadings in a special proceeding as well as in an action. The provisions as to a complaint will apply to a petition. Under present law, pleading provisions are not generally applicable to special proceedings, although pleadings analogous to those in an action are frequently prescribed in particularly special proceedings. See *Special Proceedings* at pp. 665, 669 *infra*.

Failure of parties to comply with minimum pleading requirements has made formulation of issues difficult and caused unnecessary problems in some cases. See, *e.g., Matter of Meyer*, 7 A.D. 2d 60, 180 N.Y.S. 2d 918 (1st Dep't 1958). Although a statute could vary the nature of pleadings in a particular special proceeding or abolish them altogether, the general requirements for pleadings in a special proceeding are similar to those for an action, since both fulfill the purpose of framing issues and of notifying the opponent of the nature of claims and defenses.

Affidavits containing evidentiary matter would be served with the pleadings in a special proceeding. Thus, should no trial be necessary, the case could be summarily determined, as on a motion for summary judgment in an action.

To insure that the summary nature of special proceedings is not interfered with by the joinder of claims and the interposition of counterclaims or cross-claims, the court is given broad severance powers. See proposed rule 27.4.

The third sentence of the proposed rule is based upon a similar provision as to *ex parte* motions in proposed rule 33.8. See N.Y. R. Civ. P. 61. An *ex parte* application under present law is sometimes designated a special proceeding by statute, but the general definition of a special proceeding in present law does not include them, as does proposed article 1. There would, of course, be no responsive pleading where there was no adverse party.

27.4. Severance.

The court may at any time order a severance of a particular claim, counterclaim or cross-claim, or as to a particular party, and order that, as to such claim or party, the special proceeding continue as an action or as a separate special proceeding.

Notes

Provisions as to joinder of claims, counterclaims and cross-claims, under present law applicable generally only to an action, are applicable under proposed section 1.2(b) to special proceedings. See also *Special Proceedings* at pp. 661, 664 *infra*. It is essential, therefore, that the court have broad powers of severance where the joinder or interposition of such claims would interfere with the summary nature of the special proceeding. The provisions of proposed rules 23.2 (c) and 24.3 as to severance and separate trials provide appropriate power. See also proposed rule 27.1 and notes. *Cf.* N.Y. Civ. Prac. Act §§85, 96, 258, 262, 443, 474, 475, 702. This rule gives the court the additional power to sever as to a claim or party and require the severed portion to proceed as an action or as a separate special proceeding. This power is especially important if two claims are governed by different statutes. *Cf.* proposed section 1.2(c).

27.5. Motions.

Motions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time.

Notes

This rule shortens the time for notice of pre-hearing motions, so that they may be heard at the hearing on the petition. Otherwise, the general motion practice rules apply to special proceedings. Certain specific motions, however, are not adapted for use in special proceedings. There is no need, for example, for a motion for summary judgment, since, under proposed rule 27.7(b), the court must make a summary determination upon the pleadings and papers where it is possible to do so. This is the equivalent of a motion for summary judgment in an action.

27.6. Disclosure.

Disclosure shall be obtained only by leave of court.

Notes

This rule is contrary to present law. See N.Y. Civ. Prac. Act §308; N.Y. R. Civ. P. 121; *but see Special Proceedings* at p. 665 *infra*. It is also contrary to the provisions covering actions in the proposed rules, which allow all disclosure to be obtained on notice. Proposed rule 34.2(b).

The requirement of an order for disclosure is designed to preserve the summary nature of a special proceeding. To allow disclosure on notice before the hearing, even with the five-day notice provided for in present rule 121, would almost certainly extend the eight-day notice of petition period. Since a hearing always involves the possibility of a summary determination, the policy of proposed rule 31.4(c), staying disclosure upon service of a notice of motion for summary judgment, applies here. In the event that the court orders a trial, it could include a provision for disclosure in its order.

27.7. Hearing.

(a) Furnishing of papers; filing. Upon the hearing, each party shall furnish to the court all papers served by him. The petitioner shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved. Where such papers are in the possession of an adverse party, they shall be produced by such party at the hearing on notice. The court may require the submission of additional proof. All papers furnished to the court shall be filed.

Notes

This subdivision is based upon proposed rule 33.5(d) as to motions. *Cf.* N.Y. R. Civ. P. 65. The hearing in a special proceeding closely resembles the hearing on a motion and the reasons for the provisions of the motion rule apply here. The rule will facilitate the submission to the court upon the hearing of all relevant documentary evidence necessary for a summary determination. It is contemplated that where additional proof is required, the court may adjourn the hearing or allow the submission of such proof after the hearing. *Cf.* proposed rule 31.2(c).

The final sentence expresses the present practice in special proceedings and on motions. N.Y. Civ. Prac. Act §101; N.Y. R. Civ. P. 71; see proposed rule 33.11(a).

(b) Summary determination. The court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment under subdivisions (d) and (e) of rule 31.2.

Notes

This subdivision requires the equivalent of a summary judgment in every case. Since there is no necessity of a motion for such relief, the provision of proposed rule 31.2, except as specifically retained, would be inapplicable to special proceedings.

The last sentence of this subdivision, by allowing partial determination, affords an opportunity for the summary disposition of as great a portion of the case as possible. If a trial is necessary, an ordering limiting issues for trial in the nature of a pre-trial order is permitted. Such order should be based upon an examination of the papers and a conference similar to a pre-trial conference. See proposed title 35.

27.8. Trial.

If triable issues of fact are raised they shall be tried forthwith and the court shall make a final determination thereon. If issues are triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issues. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury.

Notes

In the event of partial summary determination under proposed rule 27.7(b), the issues remaining would be tried under this rule. The court could make an order in the nature of a pre-trial order which would specify the issues to be tried, define the scope of trial and remove from the case facts which are not in dispute or which are incontrovertible. Unlike proposed rule 33.9 which requires the court to specify the issues to be tried, proposed rule 27.7(b) is permissive.

Thus limited, the trial should proceed forthwith, *i.e.*, at the earliest possible date. It is contemplated that special proceedings would be given preference on trial calendars, depending upon their nature. The provisions of this rule for demand of a jury, based upon the language of proposed rule 33.9 as to the trial of an issue of fact raised on a motion, are applicable only where there is a right to trial by jury. See, *e.g.*, notes to proposed rule 111.4(e).

27.9. Judgment.

The court shall direct that a final judgment be entered determining the rights of the parties to the special proceeding.

Notes

Under this rule the final determination in a special proceeding is made in the form of a judgment rather than a final order. A judgment in a special proceeding is, for all purposes, the same as a judgment in an action. The provisions of the proposed law and rules as to the form, entry, filing, docketing, satisfaction, interest, lien effect and enforcement of a judgment are therefore applicable. See proposed articles 12 and 13 and proposed titles 50, 60, and 61. The disposition of motions, however, may be by order, if the court considers it necessary.

Provisions previously drafted will be conformed to this changed terminology. It is intended that, until existing statutes are conformed in terminology, a "final order" required in a special proceeding should be treated as if it were a judgment.

The function of a final order and a judgment under present law are identical. Both finally determine a judicial proceeding, fix the rights of the parties, and either grant or deny the relief applied for. In several respects, however, they are treated differently under present law. See *Special Proceedings* at pp. 661, 666–67, 670 *infra; The Enforceability of Judgments and Orders by Contempt and Execution* at pp. 717–725 *infra.* No justification has been found for such difference in treatment. The difference is essentially a formal one. The important elements of docketing and enforcement are equally available in special proceedings and actions, although different procedures and modes of enforcement may be required for final orders in special proceedings. See *ibid;* introduction to proposed title 60. There is no reason why two court directions having identical functions and essentially enforceable in the same manner, should be treated differently because one is made in an action and another in a special proceeding. See preliminary note to proposed section 16.3. The reason for distinguishing a special proceeding from an action is simply to provide for a summary mode of procedure in certain cases. The form and effect of the final determination bears no relationship to the summary nature of the proceeding.

TITLE 31. ACCELERATED JUDGMENT

INTRODUCTION

Title 31, which was published in the First Preliminary Report, was designed to consolidate most of the methods of proceeding to judgment in an action without a trial. See N.Y. Temp. Comm'n on the Courts Rep. III 81–113, Leg. Doc. 6(b) (1957). Proposed rule 31.13, to be added to that title, clearly provides such a method. Where facts are not in dispute, it offers an efficient and economical way to resolve controversies.

ADDITION TO TABLE OF RULES IN TITLE 31

ADDITION TO RULES—TITLE 31.

ACCELERATED JUDGMENT

31.13. Action on submitted facts.

(a) Commencement. An action, except one for an annulment, divorce or separation, may be commenced by filing with the clerk of a court a submission of the controversy, acknowledged by all parties in the form required to entitle a deed to be recorded. The submission shall consist of a case, containing a statement of the facts upon which the controversy depends, and a statement that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties. If made to the supreme court, the submission shall specify the particular county clerk with whom the papers are to be filed.

Notes

This subdivision is derived from section 546 and 547 of the civil practice act, with some simplification of the language of the present provisions. This procedure should be distinguished from that prescribed in proposed rule 26.15 (see N.Y. Civ. Prac. §218-a; N.Y. R. P. 118), under which an action may be commenced and issue joined

without pleadings, by filing an agreed statement of the claims and defenses between the parties. Under the latter rule, the pleading stage of the action alone is omitted; the questions of fact and of law still remain to be tried. Under the instant rule, on the other hand, the parties must agree as to the facts upon which the controversy depends and, apart from the possibility of drawing inferences of fact from the facts stated under subdivision (b) (4), nothing remains for the court but the determination of any issues of law presented by the agreed facts.

The proposed subdivision is not limited to "parties of full age," as is section 546. Thus, actions by or against infants may be presented for judgment on submitted facts. *Cf.* proposed rule 91.1. There is no reason to make the procedure unavailable in these cases, for the court can insure the protection of the infant's interests. On its face, section 546 would seem to be applicable to all types of controversies, but courts have indicated that it does not apply to matrimonial cases. See, *e.g., Fraioli* v. *Fraioli,* 1 A.D.2d 967, 150 N.Y.S.2d 665 (2d Dep't 1956). This exception has been explicitly stated in the proposed subdivision.

This subdivision makes two other changes in existing law. First, the affidavit presently required has been eliminated and replaced by the statement specified in the next to last sentence of the subdivision. *Cf.* proposed rule 26.15. Second, the submission, if presented to the Supreme Court, is required to specify the particular county where the papers are to be filed. Under section 547, if the submission does not designate the county clerk with whom the papers are to be filed they may be filed with any such clerk.

(b) Subsequent proceedings. Subsequent proceedings shall be had according to the civil practice law and rules except that

1. an order of arrest or attachment or a preliminary injunction shall not be granted;

2. the controversy shall be determined on the case alone;

3. if the submission is made to the supreme court it shall be heard and determined by the appellate division but the parties may stipulate that it shall be heard and determined by special term or, that it be referred, with his consent, to a specified judge or referee;

4. on such a submission the court, judge or referee may find facts by inference from the facts stipulated; and

5. if the statement of facts in the case is not sufficient to enable the court to render judgment the submission shall be dismissed or the court shall allow the filing of an additional statement.

Notes

This subdivision is taken from section 548 and the last sentence of section 547 of the civil practice act. The portion of section 548 relating to the judgment-roll has been placed in proposed rule 50.7, relating to judgment-rolls generally; but the requirement that the copy of the judgment must be certified has been dropped.

Subparagraph 3 contains a new provision permitting parties to stipulate to have the case determined by a judge, a referee or a special term rather than the Appellate Division. This additional flexibility gives some of the advantages of arbitration and may make the procedure more desirable from a litigant's point of view.

The second sentence and part of the last sentence of present section 548, relating to costs, have been omitted. The matter of costs is stated in the second sentence of section 548 to be "always in the discretion of the court." The limitation in that sentence that costs "cannot be taxed for any proceeding before notice of trial" is unnecessary, since no such proceedings are contemplated by this procedure. Deletion of the prohibition of costs on dismissal, contained in the last sentence of section 548, permits such costs to be left to the discretion of the court.

Subparagraph 4 is new. It is designed to overcome the rule that the courts, upon a submission of a controversy, may not draw any inferences from the facts stated except those that follow as a matter of law. See, *e.g., Lafrinz* v. *Whitney,* 233 N.Y. 107, 134 N.E. 852 (1922); *People* v. *Hewson,* 224 N.Y. 136, 120 N.E. 115 (1918); *Gorman's Restaurant* v. *O'Connell,* 275 App. Div. 166, 88 N.Y.S.2d 230 (1st Dep't), *aff'd,* 299 N.Y. 733, 87 N.E.2d 454 (1949). This rule is rigorously applied, and excludes the power to find any additional fact "even if the submitted facts logically and reasonably admit of further important inferences which a trier of the fact might very well draw." *Cohen* v. *Manufacturers Safe Deposit Co.,* 297 N.Y. 266, 269, 78 N.E.2d 604, 606 (1948). In the *Cohen* case, for example, the court refused to determine the right to possession of some currency that the plaintiff found in a booth within the defendant's safe deposit vault, although the defendant's control over the vault was clearly indicated by the facts submitted. See *id.* at 272–74, 78 N.E.2d at 608–09 (dissenting opinion of Thacher, J.); *cf. Capasso* v. *Square Sanitarium, Inc.,* 285 App. Div. 1131, 140 N.Y.S.2d 781 (1st Dep't 1955); *Graham* v. *East 88th Street Corp.,* 282 App. Div. 754, 122 N.Y.S.2d 634 (1st Dep't 1953). This is undoubtedly a major factor hampering the usefulness of the action on submitted facts today.

TITLE 33. MOTIONS AND ORDERS

INTRODUCTION

This title applies to motions and orders generally; its rules would be superseded by any specific rules that apply to particular motions or orders.

Motions and orders are treated separately in the present civil practice act and rules (N.Y. Civ. Prac. Act §§113–119, 127–132; N.Y. R. Civ. P. 60–67, 70–75) and motions alone were covered in the Second Preliminary Report of the advisory committee. N.Y. Temp. Comm'n on the Courts Rep. II 180–190, Leg. Doc. 13 (1958). It has since been decided that both should be treated together, as they were in the Field and Throop Codes.

Every motion is an application for an order and every order (except the "final order" in a special proceeding) is the determination of a motion. The two must ordinarily correspond in such matters as venue, what judges may act and whether in court or at chambers. *Cf. The Distinction Between Action by a Court and by a Judge in New York* at pp. 587–88 *infra* (hereinafter referred to as *Court-Judge Study*). Yet the present civil practice act and rules (N.Y. Civ. Prac. Act §§113–119, 127–132; N.Y. R. Civ. P. 60–67, 70–75) treat these matters partly in the motion provisions and partly in the order provisions. *Compare* N.Y. Civ. Prac. Act §§115, 116, *with id.* §§128, 129; *compare id.* §130, *with* N.Y.R. Civ. P. 63. In the corresponding proposed rules—33.2 through 33.4—reference is made only to the motions and it is understood that the resulting order is covered too.

None of the provisions in proposed title 33 in the Second Preliminary Report require change except rule 33.2. That rule and the notes to it have now been incorporated into rule 33.3(a) of this draft. The remaining rules are simply renumbered as indicated in the appropriate places in this draft; they have not been reprinted here.

The major change made by the proposed rules in this draft is the abolition of the present distinction between motions made to a court and those made to a judge out of court or at chambers, and of the corresponding distinction between court and judge orders. The reasons for the change and its consequences are discussed in detail in the *Court-Judge Study*. Proposed rule 33.2 allows motions to be made to and orders to be made by either a court or judge. It is left open, however, to local court rules to regulate the times and places of making motions according to local needs; and a judge is not required to hear motions when not sitting as a court if he determines that the applicant will not be prejudiced thereby. The proposed rules also require that orders made by a court and by a judge be the same in form (proposed rule 33.10) and that all orders be entered. Proposed rule 33.11. Under present law only court orders are entered.

The confusing provisions governing the reciprocal powers of Supreme Court justices and County Court judges to make orders in cases pending in each other's courts (N.Y. Civ. Prac. Act §§77, 130) have been omitted in favor of an approach which permits a

county judge to make any order in a Supreme Court action where a Supreme Court justice is not available in the county, with certain specified exceptions; a Supreme Court justice is given equally broad powers in County Court actions. Proposed rules 33.3(c), 33.4(b).

The proposed rules cover all motions and orders in an action or special proceeding but they do not cover the "final order," analogous to a judgment, which terminates all special proceedings. General rules governing special proceedings are contained in proposed title 27. See especially proposed rule 27.9, denominating the present "final order" a "judgment."

A problem that relates both to this title and to special proceedings concerns the abolition of the distinction between court and judge action. Many special proceedings differ little from motions and many are authorized to be heard by a judge out of court. Yet others, such as an article 78 (proposed title 111) proceeding, may resemble more closely an action with issues, pleading, trial, etc., and be unsuited to out of court disposition. See *People ex rel. Lower v. Donovan*, 135 N.Y. 76, 31 N.E. 1009 (1892); see also *Special Proceedings* at p. 668 *infra*.

TABLE OF RULES IN TITLE 33

RULES—TITLE 33. MOTIONS AND ORDERS

33.2 [This rule appears as proposed rule 33.1 at pages 180–81 of the Second Preliminary Report.]

33.2. Motion to court or judge.

Motions may be made to and orders made by the court or a judge thereof. The word "court," as used in any provision of the civil practice law or rules of civil practice authorizing a motion or order, shall be deemed to refer to the court or a judge thereof. A judge may refuse to hear a motion made to him out of court and require it to be made in court if it appears that the applicant will not be prejudiced. A statute, a rule of civil practice or a rule of court may require motions to be made in, and orders made by, the court or a particular part thereof.

Notes

This rule abolishes the distinction between a court and a judge in the area of motions and orders. See, generally, *Court-Judge Study* at pp. 577–648 *infra,* outlining the development of the distinction and its consequences, the present breakdown between court and judge authority in the civil practice act and rules, and the various changes and proposals for change that have been made in this state.

The distinction is presently embedded throughout the civil practice act and rules. Section 115 of the act states, in effect, that all motions and applications in an action or proceeding must be made to a court, except (1) a motion for an additional extension of time to plead, on two days' notice, may be made to a judge; or (2) any motion or application may be made to a judge out of court where the defendants have defaulted in appearing or where they consent to having it made out of court, or where it is otherwise authorized by law. The phrase "where it is otherwise authorized by law" is by far the most important exception, for such specific authorization appears throughout the civil practice act and rules in the form of provisions authorizing motions to, or orders by, "a judge" (sometimes referred to as judge "at chambers" or "out of court") or "a court or a judge thereof." See *Court-Judge Study* at pp. 587–598, 615–648 *infra.* Section 116 makes an exception for the first judicial district, allowing a motion which elsewhere must be made in court to be made to a judge out of court, except for a new trial on the merits.

Section 128, added in 1911, and section 129, added as new when the civil practice act was adopted, purport to abolish this distinction. However, the phrasing of section 129, and the fact that section 115 and the specific "court or judge" references throughout the act and rules were not repealed, leave it unclear whether the court-judge provisions do not still prescribe the proper procedure, precatory though it may be. See *Court-Judge Study* at pp. 598–604 *infra;* 2 Bender, New York Practice 24, 52 (Warren ed. 1954); Carmody, New York Practice 69 (7th ed., Forkosch 1956); *Helfgott* v. *Tannen,* 208 Misc. 335, 141 N.Y.S.2d 307 (Sup. Ct. 1955). The proposed rule is designed to make it clear that any motion may be made to, and the order made by, the court or a judge thereof, with the exceptions stated. The word "motion" in this rule covers all applications in an action or proceedings even though some, such as an application for an order to show cause, are not called "motions" in common usage. In the interest of simplicity, the word "court" alone will be used in the proposed act and rules where a motion or order is authorized, but by virtue of the instant rule, this will be taken to mean a court or judge. The drafts contained in prior printed reports will be conformed to this provision. See, for example, the word "only" in proposed rule 34.2(c) on page 122 of the First Preliminary Report.

This approach has been consistently advocated by procedural reformers in this state beginning with the authors of the Field Code, who were "unable to perceive any good reason, against allowing special motions to be heard before a judge at any time, when not otherwise employed." First Report of the Commissioners on Practice and Pleadings 252 (1848); see also Report of the Commissioners on Practice and Pleadings 36 (§57) (1850); 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 19, 39 (1915); *Court-Judge Study* at pp. 604–607 *infra.*

It was decided not to use language such as "the courts shall always be open for the transaction of business," which appears in section 14 of the civil practice act proposed by the Board of Statutory Consolidation. See also Fed. R. Civ. P. 77(a); N.J. R. Civ. P. 1:28–4; *Court-Judge Study* at pp. 605–607 *infra.* Since the actual sittings of court in this state vary widely the Board's rule went on to define a "stated term of court" as "the period designated for the term and during which the court is actually sitting." It is difficult to see what such a provision would add to the proposed rule.

In allowing motions to be made either to a court or judge, the proposed rule replaces sections 115, 116, 128 and 129 of the civil practice act.

The next to last sentence of the proposed rule is new. It takes the place of the last sentence of civil practice act section 65, which presently requires a Supreme Court justice "at all reasonable times, when not engaged in holding court" to "transact such judicial business as may be done out of court." Since under the proposed rule all

motions may be handled out of court, it seems desirable to give judges greater discretion to refuse to hear such motions.

The last sentence will permit rules in specific areas—such as in the First Department—requiring motions to be made at special parts. Where judges are assigned to special motion parts which are always in session there is no need to burden other judges with motion practice.

33.3. Where motion made, in supreme court action or proceeding.

(a) Generally. A motion in an action or proceeding in the supreme court shall be made in the county where the action or proceeding is triable. If no justice is available within that county, the motion may be made in another county within the judicial district where the action or proceeding is triable or in a county adjoining the county where it is triable.

Notes

This provision replaces proposed rule 33.2 of title 33 as it appeared in the Second Preliminary Report (hereinafter referred to as the first proposal). It differs from the first proposal in three respects.

First, since under this draft motions may be made to a court or a judge, the requirement that they be made at a motion term, presently contained in subdivision 4 of rule 63, is omitted. This requirement is left to local rules.

Second, motions in a county other than the one where the case is triable are allowed only if no justice is available in that county. Application to a justice out of court in the same county is to be preferred to application to a term in another county. This additional limitation will not apply, however, if the motion may not be made to a judge because it is within one of the exceptions to proposed rule 33.2—*i.e.*, if statute, rule of civil practice or rule of court requires it to be made to a court or a part thereof. If a judge exercises his discretion under proposed rule 33.2 to refuse to hear the motion out of court, he would not be "available" within the meaning of this subdivision. However, under proposed rule 33.6, if the motion is *ex parte*, the refusal would have to be specified in the subsequent application. Thus, if a judge refuses to grant an order out of court on the ground that the application should be made to the court at a regular term, the moving party may be inhibited from shopping around for a more amenable judge.

Third, this subdivision applies to all motions, whether on notice or *ex parte*. The first proposal was limited to motions on notice, like present rule 63 of the rules of civil practice from which it was

derived. *Ex parte* motions, the notes stated, could be made anywhere in the state. This provision is retained as to *ex parte* motions by subdivision (b) but only if no justice is available in a county specified in this subdivision. See notes to subdivision (b). Since this subdivision applies to all motions it refers to a motion being "made" rather than "noticed to be heard" as the first proposal did. Motions on notice are made where they are noticed to be heard; *ex parte* motions are made where the motion papers and proposed order are submitted.

In other respects this subdivision is derived from rule 63 of the rules of civil practice and differs from it in the same way as the first proposal. Except for its special provisions for the first and eighth districts, present rule 63 permits a moving party to choose among all the counties in the judicial district of, and all the counties adjoining, the county where the action is triable. The rule thus permits motions to be made during any period when a motion term is appointed to be held in any of the alternative counties.

Subdivision 2 of present rule 63 contains two exceptions for the first district and one for the eighth district. By virtue of the first district exceptions, motions in actions triable in the first district may not be made outside the district and motions in actions triable outside the district may not be made within it. Because the proposed subdivision requires resort to a justice in the county where the action is triable, and since there are continuous motion terms in the counties of the first district as well as in the counties adjoining it, the first district exceptions become unnecessary.

The eighth district exception applies to motions in actions triable in that district. It prohibits the making of such a motion outside the district and thereby affects only motions in actions triable in the four counties of the eighth district that border the seventh district—the counties of Orleans, Genesee, Wyoming and Allegany. The exception is workable because Erie county has continuous motion terms and there is therefore a county always available within the district. Yet, in other districts, despite the availability of a county within the district, the present rule permits motions to be made in adjoining counties outside the district. There thus seems no good reason for retaining the eighth district exception, especially since, under present law, motions in actions triable in the seventh district border counties may be brought in the above-named eighth district counties. Under the proposed subdivision, the exception has been omitted and, if no motion term or justice is available in the county where the action is triable, the seventh-eighth district border may be crossed in either direction.

Subdivision 3 of present rule 63, excepting motions which must be made in the county of residence of the person affected where "specially prescribed by law," has been omitted as unnecessary. Throughout the proposed rules, specific rules govern more general ones.

Subdivisions 4 and 5 of rule 63 deal with terms for the hearing of motions. They have been omitted since the design of the proposed rules is to leave the regulation of such matters to local court rules.

It is not intended that the present practice of appointing special terms for the hearing of particular kinds of motions be altered. The portion of subdivision 4 of present rule 63 permitting motions "necessary for the disposition" of an action to be made at the trial term where the action is on the calendar is unnecessary, since the trial judge has power to hear such a motion without explicit statement.

The word "triable" in regard to a pending action refers to the place where venue actually has been laid, not where it might have been laid. *Bangs* v. *Selden,* 13 How. Pr. 163, 374 (N.Y. Sup. Ct. 1856). Where an action has already been tried, it refers to the place where the action was tried. *Specht* v. *Specht,* 202 App. Div. 848, 194 N.Y. Supp. 981 (2d Dep't 1922). Where the action has not yet been commenced, the motion may be brought at any place where venue is proper.

It should be noted that a motion may be referred to a judge familiar with the case under proposed rules 33.6 and 31.4.

No change is intended in the rule of case law which presently permits the parties to stipulate to making a motion in any judicial district in the state. See *Rice* v. *Ehele,* 65 Barb. 185, 46 How. Pr. 153 (Sup. Ct., Gen. T. 1873), *rev'd on other grounds,* 55 N.Y. 518 (1874).

(b) Ex parte motions. If no justice is available in a county specified in subdivision (a), a motion in an action or proceeding in the supreme court that may be made without notice may be made in any county in the state.

Notes

This provision is based on a part of section 130(2) of the civil practice act. Although section 130(2) refers to orders made out of court *and* without notice, the cases seem to ignore the "out of court" language and state as a general rule that *ex parte* motions may be made anywhere in the state. See *Rhodes* v. *Wheeler,* 48 App. Div. 410, 63 N.Y. Supp. 184 (3d Dep't 1900); *Farquhar* v. *Wisc. Cond. Milk Co.,* 30 Misc. 270, 62 N.Y. Supp. 305 (Sup. Ct.), *modified,* 53 App. Div. 641, 66 N.Y. Supp. 1130 (2d Dep't 1900).

There is no need to impose venue limitations for such motions. The convenience of attorneys is not involved, since there is no need for the opposing party's attorney to appear and contest the motion. If the judge to whom the application is made feels too unfamiliar with the case to decide it, he can deny it on this ground. The possibility of judge-shopping does exist but the proposed provision minimizes it by dispensing with venue limitations only when no justice specified in subdivision (a) is available.

The proposed provision allows the motion to be made either to the Supreme Court or, by virtue of proposed rule 33.2, to a Supreme Court justice out of court.

(c) Motions that may be made to a county judge. If no justice of the supreme court is available in the county where the action or proceeding is triable, any motion in an action or proceeding in the supreme court may be made to a county judge of the county where the action or proceeding is triable, except a motion in a matrimonial action, a motion under title 45, or a motion for an order that would dispose of the action or proceeding, in whole or in part, in any manner other than by settlement under rule 91.7. The county judge may refer a motion made under this subdivision to a supreme court justice when no prejudice to the parties will result. The appellate division may by rule exclude particular motions from the operation of this subdivision within a department, district or county. This subdivision does not apply in any county within the city of New York.

Notes

This subdivision replaces so much of sections 77 and 130 of the civil practice act as allows county judges to make orders in actions and proceedings pending in the Supreme Court. It is cast in terms of motions to a "judge," rather than a "court," because the county judge under this provision in effect acts as a Supreme Court justice, by making orders in a case pending in the Supreme Court. By this it is not intended to imply that the county judge must act at chambers; he may act at any time, in court or out of court.

Present sections 77 and 130(2) are extremely obscure and the decisions considering them have only obscured them further. See *Court-Judge Study* at pp. 583–84, 608–614 *infra.*

Section 77 seems to give a county judge within his county *all* the powers of a Supreme Court justice at chambers, without qualification. This would authorize the county judge to make all orders that may be made out of court in both actions and special proceedings pending in the Supreme Court, whether made with or without notice, as well as to hear special proceedings that may be instituted before a Supreme Court justice out of court. The peculiar language

of the section, referring to the "power conferred by law in general language upon an officer authorized to perform the duties of a justice of the supreme court at chambers or out of court," stems from the Throop Code. As the provision first appeared in section 403 of the Field Code, it stated simply:

> In an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the supreme court at chambers, according to the existing practice, except as otherwise provided in this act . . . .

The authors of the Throop Code made the provision apply also to a "judge of a superior city court, within his city" and utilized the "power conferred . . . upon an officer" formulation N.Y. Code Civ. Proc. §241, note (Throop ed. 1880). It is unlikely comments to the section, to preserve not only section 403 but "various other enactments, granting in general language, the powers of a justice of the supreme court at chambers, to several officers, including recorders of cities, etc., as well as those . . . named." N.Y. Code Civ. Proc. §241, note Throop ed. 1880). It is unlikely that this change was meant to affect the power of county judges to handle chambers business of Supreme Court justices. Thus, under the Throop Code formulation, the Court of Appeals held that the county judge had no power to determine the custody of infants after the law was changed to require that such an application be made to the Supreme Court in court rather than to a justice at Chambers; and it stated that "[t]he powers of a county judge alter with alteration of the powers of the justice of the Supreme Court at chambers, for the powers of that officer at chambers form the standard by which to measure those of the county judge in that respect." *People ex rel. Parr* v. *Parr,* 121 N.Y. 679, 680, 24 N.E. 481 (1880); see also *People ex rel. Williams* v. *Corey,* 46 Hun 408 (N.Y. Gen. T. 3d Dep't 1887); *Lowman* v. *Billington,* 65 Misc. 111, 118, 119 N.Y. Supp. 825, 831 (Sup. Ct. 1909). Nevertheless, at least one decision has treated the present language, introduced by the Throop Code, as granting less power to county judges than the Field Code provision did. *Gates* v. *Gates,* 171 N.Y. Supp. 1036 (Sup. Ct. 1918) (*per* Rodenbeck, J.).

In another case Judge Rodenbeck declared that "[t]here is no provision of the Code of Civil Procedure which confers upon a county judge . . . the power exercised by a Supreme Court justice at chambers in all cases," a statement that seems to fly in the face of section 77. *Matter of Parkman,* 108 Misc. 316, 317, 177 N.Y. Supp. 589, 590 (Sup. Ct. 1919) (invalidating garnishee execution issued by county judge).

While section 130(2) also authorizes county judges to handle chambers business of the Supreme Court, it applies only to orders in actions that may be made out of court *and without notice.* Since not all orders that may be made at chambers may be made without notice (see, *e.g.,* N.Y. Civ. Prac. Act §§129, 588, 882; N.Y. R. Civ. P. 249), section 130(2) appears to grant narrower powers than

section 77. The cases have not satisfactorily dealt with the dual coverage of these sections and their forerunners. Some have emphasized the *ex parte* requirement of section 130(2), seeming to ignore the broader language of section 77. Thus, in *Middletown* v. *Rondount and Oswego R. R.,* 12 Abb. Pr. (N.S.) 276, 43 How. Pr. 144 (N.Y. Sup. Ct.), *aff'd,* 43 How. Pr. 481 (N.Y. Gen. T. 4th Dep't 1872), it was held that a county judge could make an *ex parte* injunction order in a Supreme Court action but could not require the defendants to show cause before him why it should not be continued, since this would be equivalent to a motion on notice. See also *Parmenter* v. *Roth,* 9 Abb. (N.S.) 385 (Ct. App. 1870); *Rochester* v. *Davis,* 12 Abb. (N.S.) 270 (Sup. Ct. 1872). *But cf. Babcock* v. *Clark,* 23 Hun 391 (N.Y. Gen. T. 4th Dep't 1881); *Hathaway* v. *Warren,* 44 How. Pr. 161 (N.Y. Sup. Ct. 1872).

Another line of cases holds that these sections, "being general in scope, are controlled by the special provisions" governing particular motions and stating that they shall be made to "the court or a judge thereof." *Larkin* v. *Steele,* 25 Hun 254, 256 (N.Y. Gen. T. 4th Dep't 1881). Such language, these cases reason, evidences an intention that only the court in which the action is pending or a judge of that court should handle the motion. But the "court or a judge thereof" formulation is used in almost all the provisions that allow action out of court, except those that refer to a judge alone; it is the usual statutory formula for indicating that a motion may be heard out of court. If sections 77 and 130(2) mean anything, they must apply to such provisions, and if the "special provision" reasoning of these cases were uniformly applied it would practically render these sections nugatory. Nevertheless, under this reasoning, the courts have invalidated county judge orders in Supreme Court cases requiring security for costs (*Gates* v. *Gates,* 171 N.Y. Supp. 1036 (Sup. Ct. 1918); *Longstreet* v. *Sawyer,* 15 N.Y. Supp. 608 (Sup. Ct. 1891)), directing entry of a default judgment (*Kline* v. *Snyder,* 133 Misc. 128, 231 N.Y. Supp. 275 (Sup. Ct. 1928)) and even granting an order to show cause returnable before the Supreme Court (*Larkin* v. *Steele, supra; contra: Gokey* v. *Moate,* 190 Misc. 213, 74 N.Y.S.2d 32 (Sup. Ct. 1947)), although all of these orders may be made by a Supreme Court justice out of court.

The present sections, then, are virtually worthless as guides to the power of county judges in Supreme Court cases. The proposed provision rejects the criteria of these sections entirely and instead allows county judges to handle any kind of motion in a Supreme Court action, with only the specified exceptions. A similar proposal, without these exceptions, was advanced in 1915 by the Board of Statutory Consolidation. See 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York, rule 22 (1915).

The committee sees no reason to circumscribe the county judge's power more narrowly. The proposed subdivision is limited, unlike present sections 77 and 130(2), to the situation where no justice of the Supreme Court is available in the county. This is the only

time there is any need for the county judge to act. In those upstate counties with no resident Supreme Court justice, it would contribute greatly to the convenience of counsel.

The proposed subdivision conditions its broad grant of power by authorizing the Appellate Division to exclude any or all kinds of motions within a department, district or county, and thereby adapt the provision to local conditions, attitudes and needs. These vary widely throughout the state—from counties, at one extreme, where there are continuous motion terms of the Supreme Court and no need for the county judge to act, to those at the other extreme, with no resident Supreme Court justice, where the county judge's authority assumes great importance.

Further, the county judge is allowed to refer the motion to a Supreme Court justice, to cover situations where he is not sufficiently familiar with the case to decide the motion or feels that it involves a matter best left to the court in which the case is triable, there being no urgency requiring immediate decision.

The proposed subdivision removes the necessity for the present specific references to a county judge in provisions governing certain kinds of motions. See, *e.g.*, N.Y. Civ. Prac. Act §151 (justification of sureties); *id.* §202 (appointment of guardian ad litem); *id.* §684 (garnishment). Such references in some present provisions, such as those governing service by publication (*id.* §230; see proposed rule 25.5(a)) and the provisional remedies of arrest and attachment (N.Y. Civ. Prac. Act §817; *cf.* (*id.* §882) are superfluous even under present law, since such orders may be made out of court and without notice. The proposed rules will refer to a county judge in provisions governing particular applications only where it is intended that he be authorized and required to act regardless of the presence of a Supreme Court justice within the county, as in habeas corpus proceedings. See N.Y. Civ. Prac. Act §1232; proposed section 7.2(b).

Excepted from the proposed provision are motions in marital actions, because of the special policy considerations applicable to such actions; motions under proposed title 45, which relate to the trial and should be made to the trial judge; and dispositive motions, such as a motion to dismiss or for summary judgment under proposed rules 31.1 and 31.2. See, also, *e.g.*, proposed rule 23.10 (dismissal of third-party complaint); proposed rule 23.20 (dismissal for failure to substitute); proposed rule 34.25 (dismissal for failure to disclose). The exception for dispositive motions, however, is made inapplicable to a motion for settlement of a claim by or against an infant or incompetent under proposed rule 91.7. In such cases there may be a special need for speedy action, and, since the present provision refers to a court or judge (N.Y. R. Civ. P. 294; *cf.* N.Y. Civ. Prac. Act §1320), it seems that a county judge would have this power under present law by virtue of section 77.

It is not intended that the county judge's power to order such a settlement in a Supreme Court case be limited to one within the jurisdictional limits of the county court. It is not clear whether his power would be so limited under present rule 294, although section

1323 of the civil practice act does prescribe such an express limitation where the application for settlement is made by special proceeding independent of any pending case. The notes to proposed rule 91.7(a) state that this limtation has been carried over implicity into that rule. In order to provide a consistent rule whether approval of the settlement is sought by special proceeding or by motion in a pending case, proposed rule 91.7(a) should be amended by adding a sentence, after the second sentence, to read:

> If no justice of the supreme court is available within a county where an action on the claim could have been brought, such a special proceeding may be brought in a county court even though the amount of the settlement may exceed the jurisdictional limits of the county court.

The notes to that rule should be changed by deleting the last sentence and indicating that present law has been altered in this respect, with a cross-reference to these notes.

The power granted county judges under the proposed provision is limited to the county in which the action or proceeding is triable, as under present section 77. The additional authorization contained in section 130(2), to the county judge of the county where the applicant's attorney resides, is not necessary. It was probably designed originally to serve the convenience of counsel rather than to provide an expeditious hearing, and there is little reason for it under modern conditions of transportation. The limiting phrase "and the particular judge is not specially designated by law" in section 130(2) is omitted as unnecessary, since a provision specifying a particular judge would in any event supercede the proposed rule. See *People* v. *Windholz*, 68 App. Div. 552, 74 N.Y. Supp. 241 (4th Dep't 1902).

Counties within New York city are excepted from the proposed provision because their County Courts do not possess general civil jurisdiction.

33.4. Where motion made, in county court action or proceeding.

(a) Ex parte motions. If a county judge of the county is not available, a motion in an action or proceeding in a county court that may be made without notice may be made in the county court of any county in the state.

(b) Motions that may be made to a supreme court justice. If a county judge of the county is not available, a motion in an action or proceeding in a county court may be made to a supreme

court justice in the county, or if none is there available, in another county within the judicial district, except a motion under title 45 or a motion for an order that would dispose of the action or proceeding, in whole or in part, in any manner other than by settlement under rule 91.7. The supreme court justice may refer a motion made under this subdivision to a judge of the county court where the action or proceeding is triable when no prejudice to the parties will result. The appellate division may by rule exclude particular motions from the operation of this subdivision within a department or district.

Notes

Since the County Court's jurisdiction extends only to the county in which it is situated, unlike the statewide jurisdiction of the Supreme Court, there is no need for a general venue provision analogous to proposed rule 33.3(a). A motion in an action or proceeding in a particular County Court ordinarily must be made to that court or to the county judge.

The two subdivisions of this rule—analogous to proposed rules 33.3(b) and 33.3(c) governing Supreme Court cases—are designed to provide alternative places for making motions when a county judge of the county is not available.

This rule replaces subdivision 1 of section 130. It differs from the present subdivision in that it applies only when the motion cannot be made to the proper County Court or judge (see notes to proposed rules 33.3(b) and 33.3(c)), in the types of orders covered and in that the sphere of authority granted a Supreme Court justice under subdivision (b) is limited to the judicial district in which the County Court case is triable. The latter limitation was suggested by the Board of Statutory Consolidation. 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York, rule 39 (1915).

The criteria defining the kinds of orders covered by section 130(1) are as vague as those governing section 130(2). See *Court-Judge Study* at pp. 610–13 *infra;* notes to proposed rule 33.3(c). It is unclear from the language of the provision whether the order must be one that may be made out of court and without notice, or whether it is sufficient that it may be made out of court. The cases have construed it narrowly, paying little attention to its language. See *Curry* v. *Earll,* 209 App. Div. 205, 207, 203 N.Y. Supp. 750, 752 (4th Dep't 1924); *Edwards* v. *Shreve,* 83 App. Div. 165, 82 N.Y. Supp. 514 (2d Dep't 1903); *cf. In re National Bank of Oxford,* 16 N.Y.S.2d 429, 430 (County Ct. 1939). Thus, in *Curry* v. *Earll,* holding that a Supreme Court justice could not consolidate actions pending in a Justice Court and a County Court, the court stated that section 130(1) did not apply to "matters affecting substantial rights of the parties or interfering with the jurisdiction and authority of the County Court." Since consolidation is a discretionary matter, the court reasoned, "the exercise of discretion should in any event be left to the court in which the action will be tried." *Curry* v. *Earll, supra* at 207, 203 N.Y. Supp. at 752.

As in proposed rules 33.3(b) and 33.3(c), the criteria of the present provision have not been used. Instead, subdivision (a), analogous to proposed rule 33.3(b), allows *ex parte* motions to be made to the county court of any county. Subdivision (b) has been drawn to correspond with proposed rule 33.3(c). No reason is perceived for otherwise limiting a Supreme Court justice's power to make orders in County Court cases. *Cf.* 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York, rule 39 (1915).

33.5. [This rule appears as proposed rule 33.3 at pages 184–87 of the Second Preliminary Report, except that the following sentences should be added to subdivision (c) at page 186:

Papers required to be served before the expiration of the time limited for a party to appear in the action shall be served upon him in the manner provided for service of a summons or in such manner as the court may direct.

The following should be added to the notes to subdivision (c):

The second sentence of this subdivision is based upon the second sentence of present section 975, which permits the court to dispense with notice of a motion for the appointment of a receiver where service of a summons was made by publication. It has been made generally applicable to all motions; it accords with present general practice in the absence of statute.]

33.6. [This rule appears as proposed rule 33.4 at pages 187–88 of the Second Preliminary Report.]

33.7. [This rule appears as proposed rule 33.5 at page 188 of the Second Preliminary Report.]

33.8. [This rule appears as proposed rule 33.6 at pages 188–89 of the Second Preliminary Report.]

33.9. [This rule appears as proposed rule 33.7 at page 190 of the Second Preliminary Report.]

33.10. Form of order.

(a) Generally. An order determining a motion shall be in writing and shall be the same in form whether made by a court or a judge. An order determining a motion made upon supporting papers shall be signed by the judge who made it, state the court of which he is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper.

Notes

This provision is derived from section 127 of the civil practice act and rule of civil practice 70. Section 127 defines all orders, including the final order in a special proceeding, but the latter is covered in proposed title 27 dealing with special proceedings—where the final order has been converted into a judgment. Neither the present section nor this subdivision covers oral motions made to the court during a trial. Such motions "are not strictly applications for orders, and are determined by oral rulings of the trial court entered upon the stenographic record of the case." Carmody, New York Practice 41 n. 3 (7th ed. Forkosch 1956). Furthermore, an entry in the clerk's minutes, without any subsequent preparation or signing of a formal order, has sometimes been held to be a sufficient compliance with section 127 and its forerunners. See *Gerity* v. *Seeger & Guernsey Co.*, 163 N.Y. 119, 57 N.E. 290 (1900) (order referring case to referee to hear and determine); *Howard* v. *Robinson*, 186 App. Div. 530, 174 N.Y. Supp. 330 (2d Dep't 1919) (order granting new trial upon the judge's minutes); *Loper* v. *Wading River Realty Co.*, 143 App. Div. 167, 127 N.Y. Supp. 1000 (2d Dep't 1911) (order striking case from trial calendar); *Gersman* v. *Levy*, 58 Misc. 174, 108 N.Y. Supp. 1107 (Sup. Ct., App. T. 1908) (order staying execution).

To conform with the general approach in this title of abolishing the distinction between court and judge orders and its consequences, the proposed subdivision requires that all orders be the same in form. See *Court-Judge Study* at pp. 583, 607–608 *infra*. Thus, the judge who makes the order or presides at the term where it is made is to sign his name and state the court of which he is a judge, including the county if he is a Supreme Court justice. The present distinctions in the use of the words "enter" and "filing" are unnecessary since all orders will be entered and filed under proposed rule 33.11.

The second sentence of this subdivision is based on the first paragraph of present rule 70. It applies only to motions made with supporting papers. See *Howard* v. *Robinson*, 86 App. Div. 530, 533, 174 N.Y. Supp. 330, 331 (2d Dep't 1919). The present rule derives from amendments made to section 767 of the Throop Code in 1911 and 1912 (N.Y. Laws 1911, c. 368; N.Y. Laws 1912, c. 66), designed to authorize the short form of order commonly in use today. See 1 Carmody-Wait, Cyclopedia of New York Practice 695 (1952). It authorizes a long form order indirectly by stating that "nothing herein contained shall prevent the court from making an order either originally or on an application for resettlement in more extended form." The proposed subdivision authorizes either a short or long form order by the phrase "in such detail as the judge deems proper." Rule 70 expressly authorizes the practice of endorsing or appending a short form order to the motion papers; this is omitted as unnecessary by the proposed subdivision. Omitted also is the sentence allowing either the judge's usual signature or initials; there is no reason why the judge's signature should not appear on all orders. See *Court-Judge Study* at pp. 583, 607–608 *infra*.

Although rule 70 is entitled "Form and resettlement of order," the only reference to resettlement is in the phrase quoted above authorizing an order in more extended form. No reference to resettlement is made in the proposed subdivision; none is required for it is an inherent power of the court. See *Robertson* v. *Hay*, 12 Misc. 7, 33 N.Y. Supp. 31 (N.Y. Com. Pleas 1895).

(b) Appellate court. An order of an appellate court shall be signed by the presiding judge or, in his absence or disability, by an associate judge except that, upon written authorization by the presiding judge, it may be signed by the clerk of the court or, in his absence or disability, by a deputy clerk.

Notes

This provision is based on the second paragraph of rule 70 of the rules of civil practice.

The second paragraph of rule 70 was added in 1935 on recommendation of the Judicial Council to cover a special problem of the Appellate Division. See 2 N.Y. Jud. Council Rep. 16 (1936). It is made applicable to all appellate courts to include both the Court of Appeals and the appellate terms of the Supreme Court.

33.11. Entry and filing of order; service.

(a) Entry and filing. An order determining a motion shall be entered and filed by the clerk of the court where the action

or proceeding is triable, and all papers used on the motion and any opinion or memorandum in writing shall be filed with that clerk unless the order dispenses with such filing. When statute or rule of civil practice requires such filing and entry in a county other than that in which the order was made, the party prevailing on the motion shall file the order and the papers used on the motion with the proper clerk within three days after receiving them. If a party fails to file any papers required to be filed under this subdivision, the order may be vacated as irregular, with costs.

Notes

The first two sentences of this provision are derived from rules 71, 72 and 73 of the rules of civil practice. All orders, whether made by court or judge, are required to be entered and filed with the supporting papers. Present rule 71 does not explicitly require the entry of orders but only states that the papers must be filed when an order is entered. However, the rule in practice is that court orders must be entered while judge orders generally need not be. There is no reason for such a distinction. See *Court-Judge Study* at pp. 582, 607–608 *infra*. Section 101 of the civil practice act presently seems to require the entry and filing of all orders made in a special proceeding, and does not distinguish between court and judge orders or intermediate and final orders.

The clerk who should file the order is the clerk of the court where the action or special proceeding is triable. See N.Y. Civ. Prac. Act §7; N.Y. R. Civ. P. 15; proposed rule 32.2. The second sentence of rule 71, forbidding entry unless the motion papers are filed and the order signed, is omitted as unnecessary, since such defects permit the order to be vacated under the last sentence of the proposed provision. This sentence replaces the similar phrase in both rules 71 and 72.

Rules 72 and 73 have been considerably shortened in their transposition to the proposed subdivision but no change in substance is intended. The provision in the second sentence of rule 72 that an opinion is part of the record on which the order was made is unnecessary, since it is covered by proposed rule 80.16, governing the contents of a record on appeal. Entry and filing in a different county will be required when a motion is made under proposed rules 33.3 or 33.4 in a county other than the one where the case is triable. See N.Y. Civ. Prac. Act §130; N.Y. R. Civ. P. 63.

(b) Service. Service of an order may be made by serving a copy of the order certified to be a true copy by the clerk or an attorney.

Notes

The present rules say nothing as to the service of orders generally; the matter is regulated by practice provisions relating to the service of particular kinds of orders and by case law. See 1 Carmody-Wait, Cyclopedia of New York Practice 707–09 (1952). If the order is a court order under present law, it will have been filed, and a copy must be served; if it is a judge order, the original is exhibited and a copy delivered. Since under the proposed rules all orders will be entered, a copy is authorized to be served in all cases. Certification by an attorney is allowed to cover those cases where an order is obtained from the judge out of court, and it is desirable that service be made before it can be entered by the clerk. In such a case the service must of necessity be made without a notice of entry. Subsequent service of a notice of entry would be necessary to start the time to appeal running. If the losing party desires to appeal and the order has not been entered, he can have it entered himself. See N.Y. Civ. Prac. Act §§612, 624, 632; proposed rule 80.3.

33.12. Vacating order.

A motion to vacate or modify an order shall be made on notice to the judge who signed it except that

1. a motion to vacate or modify an order which was made upon a default may be made on notice to any judge of the court; and

2. a motion to vacate or modify an order which was made without notice may be made without notice to the judge who signed it, or on notice to any other judge of the court.

Notes

Matters such as resettlement, amendment, vacation and modification of orders are presently governed by case law (see 1 Carmody-Wait, Cyclopedia of New York Practice 717–726 (1952)) except for the provisions of sections 131 and 132 of the civil practice act.

Section 132, authorizing the Appellate Division, an appellate term, or a justice thereof to vacate *ex parte* Supreme Court orders, originally appeared in section 1348 of the Throop Code, together with the forerunner of present section 66, which allows the Appellate

Division to grant *ex parte* orders refused by the Supreme Court. Since these sections relate to the power of the Appellate Division and appellate terms, they will be treated in titles 131 and 132 of Part XIII of the proposed rules, dealing with courts and clerks of court.

Section 131 applies only to orders made out of court and without notice, since the word "such" refers to orders specified in subdivision 2 of section 130. These provisions appeared consecutively in section 772 of the Throop Code. The purpose of section 131 is apparently to allow a greater latitude in making motions to vacate *ex parte* orders, since such orders cannot be appealed and vacatur is the only remedy. The notice requirement applies only if the motion to vacate is made to the court, in which case a judge other than the one who made the order may hear the motion.

The substance of section 131 is retained by subparagraph 2 of the proposed rule. For the sake of completeness, the proposed rule states the general case law doctrine that all motions to vacate or modify must be heard by the judge who made the order or presided at the term where it was made. See, *e.g., Platt* v. *New York & Sea Beach Ry.,* 170 N.Y. 451, 63 N.E. 532 (1902); 1 Carmody-Wait, Cyclopedia of New York Practice 719 (1952). "By a long-continued course of practice, recognized and enforced by the courts, it is settled as a rule of law that one judge should not vacate an order made by a court held by another judge except in cases expressly provided for . . . ." *Willard* v. *Willard,* 194 App. Div. 123, 125, 185 N.Y. Supp. 569, 571 (2d Dep't 1920). This doctrine is sometimes overlooked in exceptional cases, such as "[w]here new elements, like fraud or collusion, are shown and it is not possible to send the matter to the judge who made the original order." *Ibid.* The proposed rule is not intended to inhibit the courts in such exceptional cases.

Subparagraph 1 of the proposed rule expressly covers the exception for orders made upon a default which is presently made by the decisions. See 1 Carmody-Wait, Cyclopedia of New York Practice 720 (1952).

Another exception relates to orders made without jurisdiction, but these are not covered by the proposed rule; such orders may not only be set aside by any judge but may be attacked collaterally or disregarded entirely, since they are void. See *ibid.*; see also *Kamp* v. *Kamp,* 59 N.Y. 212 (1874).

The proviso in section 131, that an order granting a provisional remedy may be vacated only in the mode specially prescribed by law, is unnecessary. Throughout the proposed act and rules such specific provisions govern general ones. See, *e.g.,* proposed rule 73.4.

33.13. Docketing order as judgment.

The clerk shall docket an order directing the payment of money, including motion costs, or affecting the title to real property, as a judgment, at the request of any party.

Notes

This provision is derived from rule 74 of the rules of civil practice, with a number of alterations.

The first sentence of rule 74 in terms allows docketing of any order directing the payment of money, other than motion costs. The second sentence provides that an order affecting the title to real property, "if founded on petition, where no complaint is filed" —*i.e.,* in a special proceeding—may be enrolled and docketed as a judgment and indexed with notices of pendency of action. Both sentences require a court direction for such docketing or indexing.

General Rule of Practice 27, from which rule 74 was derived, allowed the enrollment and docketing of orders and judgments directing the payment of money or affecting the title to property, but was limited in both respects to those "founded on petition, where no complaint is filed"; it also differed from the present rule in containing no provision for indexing with notices of pendency and in requiring only a request of a party rather than a court order.

The proposed rule has been drafted to conform with the general plan of the proposed rules for enforcement of orders and judgments. Orders directing the payment of money, including motion costs, are enforceable in the same way as money judgments under proposed rule 60.1. Consequently, the proposed rule provides that all such orders may be docketed as judgments. While it is unlikely that the docketing procedure will often be utilized or necessary to enforce payment of motion costs, it is best to have the procedure available to discourage recalcitrancy in this respect. The present final order in a special proceeding is termed a judgment in proposed rule 27.9, and consequently any such determination directing the payment of money will be docketable and enforceable in the same manner as other judgments.

The alternative of indexing orders affecting title to real property with notices of pendency has been dropped. Docketing is a much more efficient method of apprising interested persons of a change in the title to real property than a notice of pendency. Such a notice only indicates that the title is subject to litigation and, under recently enacted section 121-a of the civil practice act, is only effective for three years unless extended upon motion. See 2 N.Y. Jud. Conference Rep. 114–16 (1957). Yet, under present law, there is no provision for docketing a judgment affecting real property and a notice of pendency apparently must serve the notice function even after a judgment has determined the status of the property. The second sentence of rule 74 probably originated because a notice of pendency is not available in a special proceeding, where no complaint is filed, unless specifically authorized.

The proposed rules instead allow the docketing of all judgments and orders affecting the title to real property. Proposed rule 50.8(a) does this for judgments, which, because of proposed rule 27.9 also includes the present final order in a special proceeding, and the instant rule makes the same provision for orders.

The requirement of a court order for docketing under present rule 74 seems useless. The practice in New York county, for example,

is to insert such a direction automatically in orders directing the payment of money. The proposed rule allows docketing at the option of the parties.

The present provision for enrollment—*i.e.*, making and filing a judgment-roll—is unnecessary, since under proposed rule 33.11(a) all papers used on the motion and any opinion or memorandum in writing must in any event be filed with the order.

TITLE 36. CALENDAR PRACTICE; TRIAL PREFERENCES

INTRODUCTION

The proposed rules adopt, with only minor language changes, the present provisions in the civil practice act and rules regulating calendar practice and preferences. The only significant change is the use of precatory language calling for calendar practice which is uniform and integrated as far as practicable in the city of New York. Calendar practice is not regulated by state-wide act or rules but is left to the Appellate Division in each Department and to local courts. See also proposed rule 35.1(d) (pre-trial conferences). This is the practice in the Federal system and in almost all states.

Three states have state-wide calendar rules. Cal. R. Civ. P. 5–14; Mich. R. Civ. P. 35; N.J. R. Civ. P. 4:41-4—4:41-5. See also Judicial Council Draft, South Carolina Rules of Civil Procedure 72 (1958). *But cf.* Note, Rules for Calendar Making, VIII Bar Notes, North Carolina Bar Association 24 (1957). The three state-wide rules are set forth at pp. 697–708 *infra* with the proposed calendar rule of South Carolina. California's rules in effect prior to the amendments effective January 1, 1957 are set forth together with the amended rules. See Holbrook, A Survey of Metropolitan Trial Courts, Los Angeles Area 218 (1956) (description of pre-1957 mechanics). The effect of the 1957 changes was to emphasize the pre-trial conference as a basic device for controlling calendars. By its proposed pre-trial rules the advisory committee has provided a similar instrument for New York. See proposed title 35. It should be noted that even in a state like New Jersey with centralized calendar control there is a great deal of local control over the mechanics of calendars. See Report of the New Jersey Supreme Court's Committee on Pretrial and Calendar Control 13 (mimeographed, March 13, 1957), 80 N.J.L.J. 258 (1957).

In our state, with its wide variety of calendars, it would be difficult, if not impossible, to provide a uniform state-wide calendar practice. In some counties the Supreme Court has many judges sitting simultaneously; in others there are only a few trial terms a year. Some counties have no reported delay in trials while others indicate a calendar delay of years. In some counties practically all trials are by jury but in others there are a substantial percentage of jury waivers and equity cases. Most litigation arises out of negligence, but in one county (New York) aproximately a third of the matters arise out of commercial disputes. In some counties there appears to be no problem of providing sufficient trial lawyers with cases ready to be tried, while in at least one county there are complaints that the part of the bar available to try negligence cases is too small and is kept occupied in other counties, so that at times cases can not be provided for the available trial parts. See Interim Report of the Queens County Bar Association on Congested Calendars in the Supreme Court, Tenth Judicial District (January 18, 1954). Finally, details of calendar practice are often affected

by the availability of a judge or judges with an interest, temperament and capacity to control calendars.

The Appellate Division in the various Departments has in recent years taken a healthy interest in devising new ways of meeting calendar problems. See, *e.g.,* Chandler, McConnell and Tolman, *Administering the Courts—Federal, State and Local,* 42 J. Am. Jud. Soc'y 13, 17–19 (1958); Note, *Efforts to Alleviate Calendar Congestion in the New York Supreme Court: Preference Rules and Calendar Classification,* 54 Colum. L. Rev. 110 (1954); see also Burger, *The Courts on Trial: A Call for Action against Delay,* 44 A.B.A.J. 738, 798–99 (1958) (pointing out the need for the Judicial Councils of the Federal circuits to assume their full responsibility to reduce delay). In affirming the constitutionality of Rule V of the New York County Supreme Court Trial Term Rules, which places cases which the court believes should have been brought in a lower court in a calendar status making it virtually impossible to obtain a trial in the Supreme Court, the Appellate Division reasserted its continuing interest in calendars by declaring in *Plachte* v. *The Bancroft, Inc.,* 3 A.D.2d 437, 438, 161 N.Y.S.2d 892, 893–94 (1st Dep't 1957):

> It is ancient and undisputed law that courts have an inherent power over the control of their calendars, and the disposition of business before them, including the order in which disposition will be made of that business (Landis v. North American Co., 299 U.S., 248, 254; accord, American Life Ins. Co. v. Stewart, 300 U.S., 203, 215; Morse v. Press Pub. Co., 71 App. Div., 351, 357). Moreover, this power exists independently of statute (Riglander v. Star Company, 98 App. Div., 101, aff'd 181 N.Y., 531; Clark v. Eighth Ave. RR., 114 Misc., 707; Reinertsen v. Erie RR., 66 Misc., 229; Smith v. Keepers, 66 How. Pr., 474; 88 C. J. S. Trial, sec. 33).
>
> Indeed, a statute which would impose a mandate upon the court in the otherwise discretionary handling of time of trial is unconstitutional (Riglander v. Star Co., supra; accord, Woerner v. Star Co., 107 App. Div., 248; People v. McClellan, 56 Misc., 123).

In its discussion of the problem of calendar delay, the court noted its duty to control calendars when it stated:

> But the existence of the power is not the only aspect revealed by the decisional and statutory history. There also appear constantly changing method and experimentation to resolve a stubborn chronic problem of trial delay. More and more the granting and denial of preferences in individual cases or assignment of cases to preferred or classified calendars were associated with efforts at solution. Thus arose, and later disappeared, the short cause calendar. Then arose the commercial calendar, and more recently the non-jury calendars. The problem not being solved, new and further methods and experimentation were indicated.
>
> Given the power and the existence of the problem, the duty is mandated on the courts. . . . [*Id.* at 440, 161 N.Y.S.2d at 895–96.]

Although new calendar procedures such as those provided by the readiness rule are controversial, there appears to be a release of judicial energy merely from the experimenting with new methods. See Karlen, *Psychological Attitudes and Calendar Delay,* 140 N.Y.L.J. no. 118, p. 4, col. 1 (1958); *cf.* Botein, *Our Courts Face the Future,* 13 The Record 117, 120 (1958); Botein, *Announcement on Reduction in Delay,* 139 N.Y.L.J. no. 110, p. 1, col. 3 (1958); Peck, *Report on Reduction in the Backlog of Cases,* 137 N.Y.L.J. no. 79, p. 1, col. 8 (1957). Placing responsibility for calendar control on the state-wide level might well smother some of this enthusiasm of the bench to meet calendar problems.

The committee is aware of the dissatisfaction of the public because of delay in the trial of cases. It is common knowledge that members of the trial bar are disturbed by what appears to be an undue burden on their time in placing an excessive number of cases on the day calendar in some counties, although it is clear that many of the cases can not possibly be reached; by requirements for their personal appearance in court when stipulations and use of the telephone and mail by court clerks might suffice; by their inability to tell clients and witnesses when they will actually be needed in court; and by the high cost of paperwork and the possibility of delaying tactics arising out of the readiness rules. See Breitel and Corbin, *Courts and Bar May Stand or Fall,* 13 N.Y. County Lawyers A.B. Bull. 6, 11–12 (1955); Recommended Uniform Calendar System for the City Court of the City of New York, 19 N.Y. Jud. Council Rep. 165, 174, 175–77, 180 (1953) (containing a description of calendar practice in all the courts in New York city). Moreover, the committee is aware that trial parts are not always kept fully occupied. See *id.* at 178. Nevertheless, at this stage in the development of calendar control, it believes that state-wide rules would be premature and that they might have a permanent adverse effect by inhibiting the exercise of local initiative and interest by bench and bar acting jointly to meet their responsibility to reduce calendar congestion. For a description of calendar studies in progress, see the Bulletin of the American Bar Foundation, Project on Congestion in the Courts, entitled "Court Congestion." *Cf., e.g.,* Evans, *Calendar Congestion—A New Approach,* 26 N.Y.S.B. Bull. 368 (1953) (recommending rotating calendar); 19 N.Y. Jud. Council Rep. 179 (1953) (recommending a modified rotating calendar based on the practice in Bronx City Court); Cleveland Bar Associaton, Report of Committee on Court Congestion and Delay in Litigation 23 (1958) (recommending adoption of New York certificate of readiness rule); Kaufman, *Calendar Decongestion in the Southern District of New York,* 40 J. Am. Jud. Soc'y 70 (1956) (suggesting adoption of repeated pre-trial screenings by a judge and a readiness rule).

Supplying the basic tool for meeting court congestion—the availability of a sufficient body of judicial manpower operating in a

modernized court system—is not within the terms of reference of the advisory committee. *Cf.* N.Y. Temp. Comm'n on the Courts Rep. IV 21 *et seq.*, Leg. Doc. 6(c) (1957); New York State Bar Association, Report of Committee on Calendar Congestion in the Supreme Court in New York City and in the Metropolitan Area, adopted by the Committee on Negligence Litigation (1954); Vanderbilt, *Clearing Congested Calendars,* 22 D.C.B.A.J. 618, 624–26 (1955). Its revisions of the practice have, however, been designed to reduce as far as practicable unnecessary demands on the time of bench and bar so that a greater proportion of our judicial manpower will be available to try cases, so that only those cases which should be tried are tried, and so that the trials are as speedy as just results will permit. *Cf., e.g.,* Brennan, *The Congested Calendars in Our Courts—The Problem Can Be Solved,* 38 Chicago B. Record 103 (1956); Brownell, *Bringing Justice Up-To-Date,* 137 N.Y.L.J. no. 72, p. 4, col. 3 (1957); Vanderbilt, *supra* at 618; Report of Executive Committee of the Attorney-General's Conference on Court Congestion, 40 J. Am. Jud. Soc'y 108 (1957).

TABLE OF RULES IN TITLE 36

RULES—TITLE 36. CALENDAR PRACTICE; TRIAL PREFERENCES

36.1 Control of calendars by appellate division; uniform rules within the city of New York.

The appellate division in each department shall adopt rules regulating the hearing of causes, the filing of notes of issue, the preparation and publication of calendars and the calendar practice for the supreme court in such department. The appellate division in the first and second departments shall consult with each other before adopting such rules so that, insofar as practicable, calendar rules within the city of New York shall be uniform and the trial parts in each county within that city supplied with cases ready for trial.

Notes

The first sentence of the proposed rule incorporates power presently granted by section 85 of the Judiciary Law. It is identical with the first paragraph of present rule 237, except that "may" is changed to "shall." The Judiciary Law permits calendar rules to be established, but the proposed rules require them to be established for the Supreme Court. The proposed amendments to the rule-making provisions of the Judiciary Law permit calendar rules to be established for inferior courts. See proposed drafts on rule-making power, at pp. 459–463 *infra.* The first clause of present section 152 of the Judiciary Law provides that "the justices of the supreme court elected in the eighth judicial district may adopt, and from time to time amend rules and regulations for making calendars of cases at issue to be tried in the supreme court in and for the county of Erie." This clause should be stricken to give the Appellate Division in the Fourth Department the same control over calendars that it has in other Departments.

The second sentence of proposed rule 36.1 is designed to provide uniform calendar rules within the city of New York to the extent practicable by requiring consultation between the Appellate Division in the First and Second Departments. These two departments are presently required to cooperate in drafting uniform jury rules for the city of New York (N.Y. Judiciary Law §592) and in approving rules of the Municipal Court of the City of New York. N.Y.C. Munic. Ct. Code §8. See also Conway, *Report to State Bar Association,* 30 N.Y.S.B. Bull. 279, 282 (1958). These rules should be drafted with a view to keeping the parts in all counties in the city occupied as well as with a realization that a number of lawyers try cases extensively within the city. See Remarks of Justice S. Rabin, in Trauma Related To Psychosis 261–64 (Midwinter Seminar, N.Y.S. Ass'n of Plaintiffs' Trial Lawyers, Inc., 1958); *cf.* proposed rule 35.2(c) (scheduling of pre-trial conferences in the city of New York).

Rule 258 of the rules proposed in the 1915 Report of the Board of Statutory Consolidation provided that "the calendar practice shall be regulated in each department by the respective justices of the appellate division so as to facilitate the dispatch of business." 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 109 (1915). In the notes to these rules a sample rule to regulate calendar practice in New York county was provided, which required assignment of cases to judges in rotation as soon as a note of issue was filed. *Id.* at 367. In 1957, the Temporary Commission on the Courts, in their Recommendations Respecting Calendar Congestion and Delay, proposed assignment to masters and set forth rules for the First Department. N.Y. Temp. Comm'n on the Courts Rep. IV 25, Leg. Doc. 6(c)(1957). In view of its decision to leave control of calendar practice with the

Appellate Division, the advisory committee makes no recommendations with respect to such proposals.

Proposed rule 43.1(c) provides that the clerk of the court shall send notice of appointment to an unofficial referee. The official referee can be notified of any cases placed on his docket in the same way as a judge is so notified.

Present section 426 directs the clerk to place a case upon the jury or non-jury calendar depending upon waiver of the right to jury trial. See proposed rule 41.2 and notes. This direction is omitted as unnecessary. The types of calendars are left to the control of the Appellate Division.

36.2. Note of issue.

(a) Placing case on calendar. At any time after issue is first joined, or at least forty days after service of a summons has been completed irrespective of joinder of issue, any party may place a case upon the calendar by filing with proof of service two copies of a note of issue with the clerk and such other data as may be required by the applicable rules of the court in which the note is filed. The clerk shall enter the case upon the calendar as of the date of the filing of the note of issue.

(b) New parties. A party who brings in a new party shall within five days thereafter serve him with a copy of the note of issue and file a statement with the clerk advising him of the bringing in of such new party and of any change in the title of the action, with proof of service of the note of issue upon the new party, and of such statement upon all parties who have appeared in the action. The case shall retain its place upon the calendar unless the court shall otherwise direct.

Notes

This rule is the same as present rule 150 with minor language changes and a number of omissions but no change in substance.

References to terms of court have been omitted. It should be possible to file a note of issue at any time. The separate problem of the term at which the case should be tried can be treated, if it is necessary to do so, by calendar rules adopted pursuant to proposed rule 36.1. The third paragraph and the second sentence of the second paragraph of the present rule 150 deal with abolition of notice of trial and lack of necessity for a further note of issue; they are omitted as unnecessary. The final paragraph of present rule 150, providing that a case shall not be tried if there has not been time to appear, plead or make motions with respect to the pleadings, has also been omitted. It is specifically covered by proposed rule 23.10 so far as third parties are concerned, and the time specified in the first clause of subdivision (a) of this rule protects original parties.

The portion of present section 433 providing that a case may be brought to trial by filing a note of issue is omitted as unnecessary. That portion providing for dismissals on default is covered in proposed rule 31.6 (a).

Present rule 150-a providing the form of the note of issue will be incorporated in the forms to be appended to the rules.

36.3. Trial preferences.

(a) Preferred cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference:

1. An action brought by or against the state, or a political subdivision of the state, or an officer or board of officers of the state or a political subdivision of the state, in his or its official capacity, on the application of the state, the political subdivision, or the officer or board of officers.

2. An action where a preference is provided for by statute.

3. An action in which the interest of justice will be served by an early trial.

(b) Obtaining preference. Unless the court otherwise orders, notice of a motion for preference shall be served with the copy of the note of issue.

Notes

This rule is the same as present rule 151 with minor language changes but no change in substance. Present sections 139 and 140 are omitted as unnecessary. Section 139 provides preferences for certain actions by the state but they are covered in present rule 151. Section 140 permits the Appellate Division to adopt rules for preferences. Proposed rule 80.11 (preferences on appeal) does not contain a guide on methods of obtaining a preference because the matter is covered by the rules of the various appellate courts. See, *e.g.*, Court of Appeals Rules of Practice, Rule XIV; Appellate Division, First Department Rules, Rule V.

A preference may be obtained by a party other than the one filing the note of issue.

TITLE 50. JUDGMENT

INTRODUCTION

Article 35 of the civil practice act contains eighty-one sections under the caption "Judgment." N.Y. Civ. Prac. Act §§472–548. Title 24 of the rules of civil practice, also captioned "Judgment," contains twenty rules. N.Y.R. Civ. P. 185–204. Proposed title 50 covers the material in the rules of present title 24 and most of the sections of present article 35 which have not been considered elsewhere. In the main, the aim has been to consolidate and restate more simply and concisely the present mass of provisions, which are disorganized, repetitious and over detailed in certain areas.

The only important changes that have been made involve the procedure for recording satisfactions and returns of execution. The design of the proposed procedure is to provide a single place to obtain information regarding the status of the judgment and its enforcement. This place would be the county clerk's office of the county in which the judgment was rendered, if the judgment has been docketed there. Judgments of the Supreme and County Courts would always be docketed in the county clerk's office originally, since he is the clerk of both those courts (N.Y. County Law §525); judgments of a lower court may be docketed there by transcript under proposed rule 50.8(a). See also, *e.g.*, N.Y.C. Munic. Ct. Code §131(2); N.Y. Justice Ct. Act §272. If a lower court judgment has not been docketed in the county clerk's office, execution would issue only from the lower court and no problem of recording in other offices would arise.

The proposed rules require that all executions be issued from and returned to this central office (see proposed rules 61.9(b), 61.9(c)) and that the clerk of this office be notified, and make an appropriate entry when the judgment is docketed in another county by transcript. This system will prevent piecemeal and misleading entries in scattered counties and enable the court and all interested persons to ascertain quickly all places where the judgment has been docketed and executions may be outstanding.

The recent proposals of the Judicial Conference concerning transcripts and docketing have not been considered in this draft because they were received as this report was being sent to the printer. See 4 N.Y. Jud. Conference Rep. 125–173 (1959).

Proposed rule 50.5, dealing with the setting aside of a judgment, differs markedly from the present provisions on the subject (N.Y. Civ. Prac. Act §§108, 521–529) but actually is a more accurate statement of New York law as found in the decisions.

The advisory committee has considered and decided against incorporating the Uniform Enforcement of Foreign Judgments Act. The purpose of the Uniform Act, as stated in the commissioners' notes, is "to set up a summary judgment procedure specifically suited to actions on foreign judgments." 9A Uniform Laws Ann. 288, 292 (1957). The committee feels that nothing would be gained by adoption of the Uniform Act, in view of the expeditious sum-

mary judgment procedure provided in proposed rules 31.2 and 31.3; indeed, greater speed is possible under the proposed rules than under the Uniform Act. Rule 31.3 provides that an action on a judgment may be commenced by serving with the summons a notice of motion for summary judgment returnable 20 days after service.

Present section 473 and rules 210–214, which deal with declaratory judgments, have been omitted from this title. Section 473 and rule 212 are replaced by proposed section 1.4. Rule 210, stating that an action to obtain a declaratory judgment shall follow the normal practice provisions, has been omitted; since the rules do not provide otherwise, this result is obvious and need not be stated. Rule 213, providing for submission of questions of fact to a jury, has been omitted for the same reason. Rule 214, providing for costs in the discretion of the court, has also been omitted because the result would be the same without it. The advisory committee recommends that present rule 211 be replaced by a new subdivision to be added to proposed rule 26.8; the latter, as originally drafted, should be designated subdivision (a) and the following subdivision should be added:

> (b) Declaratory judgment. The demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.

Present sections 503 through 508 deal with the enforcement of judgments, and sections 509 through 519 and the second sentence of section 478 relate to judgment liens. They are treated in proposed article 13 and proposed title 61, except insofar as parts of sections 510 and 511 are covered in proposed rule 50.9(b).

Sections 546 through 548, dealing with judgment on submitted facts, have been replaced by a new rule to be added to proposed title 31.

Present sections 480, 480-a and 481 relate to interest. They have been covered in proposed article 12.

Section 483 of the civil practice act, providing that a judgment shall be conclusive upon a defendant on whom the summons is personally served without the state as to property within the state, and section 520, providing that a judgment against a non-resident is enforceable only against attached property, have been omitted. These sections state well-known principles of in rem or quasi in rem jurisdiction and are covered by the general statement of proposed section 3.1, which incorporates general principles of jurisdiction as heretofore exercised. See proposed rules 25.2 and 25.3; see also proposed rule 61.9(a) and notes.

Rule 203, stating that entry of final judgment and its enforcement are not stayed by an exception or the preparation or settlement of a case or a motion for a new trial unless a court order so directs, has been omitted. Since the proposed rules contain no limitations upon the entry of judgments or their enforcement in these cases such a rule is not needed. *Cf.* proposed rule 50.9(b).

Present section 496, stating that when the Appellate Division wholly or partly affirms a judgment and no issue of fact remains, it may render final judgment, is omitted since proposed rule 80.12 confers this power. Present section 497, dealing with the enforcement of affirmed or modified judgments, is unnecessary in view of the provision in proposed rule 80.14(b) that the entry of a copy of the appellate court's order is "authority for any further proceedings." Section 499, dealing with judgment after a motion for a new trial under present section 550 or 551, has been omitted since the latter two sections have been eliminated from the proposed rules. See introduction to proposed title 45; preliminary note to proposed rule 45.4. Section 500, stating that where real property is sold by virtue of a judgment directing the sale, the judgment must be entered in the office of the clerk of the county where the property is situated before the purchaser can be required to pay the purchase money or accept the deed, is covered in proposed title 60.

It is recommended that present section 533, stating that a person who executes a written assignment of a judgment without acknowledging the execution thereof may be required to acknowledge it, be transferred to the Personal Property Law. Such transfer would be accomplished by adding the italicized matter to subdivision 2 of section 41 of the Personal Property Law, entitled Transfer of Claims:

> 2. A judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred; but if it is vacated or reversed, the transfer thereof does not transfer the cause of action unless the latter was transferable before the judgment was recovered. *A person who executes such a transfer without acknowledging his signature before an officer authorized to take the acknowledgement of a deed must so acknowledge it at the request of his assignee or of a subsequent assignee or of the judgment debtor upon payment of the officer's fees.*

Rule 186 of the rules of civil practice, stating that if a judgment directing the payment of a sum of money is entered against a party after his death a memorandum of the death shall be entered with the judgment in the judgment book, indorsed on the judgment-roll, and noted on the judgment docket, has been omitted as unnecessary. These requirements are intended to implement the provision of the second sentence of section 478 of the civil practice act that such a judgment does not create a lien on real property. Proposed section 13.3(a)(4) already excepts such a judgment from the lien provision. See also proposed section 13.2(a)(5); notes to proposed section 13.8. If the present provision is needed to advise the sheriff of the death, it should be broadened to include notation of death either before or after entry. There has been no indication to the advisory committee that such a provision is needed.

Rule 188, dealing with a final judgment following an interlocutory judgment, has been omitted. It recites certain optional contents of an interlocutory judgment; these recitals are unecessary. The present rule also provides that if an interlocutory judgment awards costs the clerk shall not enter final judgment until the costs have been taxed and the amount inserted in the final judgment. Under the proposed rules, if costs are not taxed and the amount inserted in the final judgment, relief may be secured under proposed rule 50.9.

Rule 200, dealing with applications for additional allowances, will be placed in proposed title 160.

Some of the present provisions relating to transcripts state that the clerk must furnish one or more transcripts. See, *e.g.*, N.Y. Civ. Prac. Act §§502, 518. Such a provision is omitted from the proposed rules since it already appears in section 255 of the Judiciary Law. The present civil practice act provisions usually condition the clerk's duty to furnish or file a transcript upon payment of his fees. *Cf.* proposed rule 50.8(a). The condition has been omitted as unnecessary. The clerk is, of course, free to require payment of his fees before he furnishes or files a transcript.

Sections 485 through 494-a of the civil practice act and rules of civil practice 189 through 193 deal with default judgments and have been treated in proposed rule 31.6. Section 491 and rule 193 were omitted from the draft of rule 31.6 pending the consideration of judgments generally. See N.Y. Temp. Comm'n on the Courts Rep. III 101, Leg. Doc. 6(b)(1957). It has been decided to cover them in subparagraph 1 of subdivision (f) of rule 31.6, dealing with notice, and that provision should be amended to read as follows:

> 1. Notice is not required when the judgment may be entered by the clerk. Except as otherwise provided with respect to specific actions, if application must be made to the court, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless notice is dispensed with by the court upon good cause shown.

The distinction between application to a court and to a judge out of court of section 491, and the specification of the term of court in rule 193 have been omitted. Proposed rule 33.2 permits the application to be made either to a court or a judge out of court, and there is no reason to limit an application for a judgment against a defaulting defendant to the term at which the case against co-defendants was tried. *Cf. Koppel Industrial C. & E. Co.* v. *Portalis & Co., Ltd.*, 205 App. Div. 144, 199 N.Y.S. 153 (1st Dep't 1923).

Proposed rule 27.9, providing that a special proceeding terminates in a judgment, makes the provisions of this title applicable to special proceedings. See also proposed section 1.2(b).

TABLE OF RULES IN TITLE 50

RULES—TITLE 50. JUDGMENT

50.1. Definition and content of judgment.

A judgment is the determination of the rights of the parties in an action and may be interlocutory or final. It shall refer to, and state the result of, the verdict or decision, or recite the default upon which it is based.

Notes

This rule condenses and restates present provisions but makes no change in the law. The first sentence is derived from section 472 and subdivision 1 of section 474 of the civil practice act. The first two sentences of subdivision 1 of section 474, stating, in effect, that the judgment may provide appropriate relief among all the parties, has been omitted as unnecessary. The remainder of subdivision 1, providing that a judgment may direct deposit of money or property into court for a person who would not otherwise have its benefit, use or control, has been omitted because a similar provision is contained in section 978, relating to the disposition of property in litigation. See proposed rule 121.1.

The last sentence of the proposed rule is derived from the last two sentences of rule 185 of the rules of civil practice. The reference to a "report" is omitted since the proposed rules term the determination of a referee to hear and determine a "decision." See proposed rule 43.2(d). The first sentence of rule 185, stating that a judgment shall be in such form as required by the nature of the case and the relief awarded, has been omitted as unnecessary; so, too, has the clause in the second sentence specifying what the judgment shall *not* contain.

50.2. Judgment upon part of cause of action; upon several causes.

The court, having ordered a severance, may direct judgment upon a part of a cause of action or upon one or more causes of action as to one or more parties, whether presented as claims, counterclaims, cross-claims or third-party claims.

Notes

This rule is based upon civil practice act sections 474(2) and 476. *Cf.* N.Y. R. Civ. P. 114; Fed. R. Civ. P. 54(b). Although an action is traditionally viewed as a single judicial unit which can result in only one judgment, the civil practice act has recognized the desirability of permitting the courts to ignore this theory in favor of convenience and justice to litigants. *Cf.* proposed rule 24.3 (severance and separate trials); proposed rule 31.2(d) (summary judgment on less than all causes of action or defenses). Section 476 permits judgment on less than all of the causes of action or part of a cause at any stage of an action if warranted by the pleadings or admissions. The provision is of unquestioned usefulness—there is no reason for delaying judgment and execution where, for example, an answer admits indebtedness on part of the full amount of a promissory note. See *Meise* v. *Doscher*, 68 Hun 557, 23 N.Y. Supp. 49 (Sup. Ct. 1893). Similarly, subdivision 2 of section 474 allows several judgments against one or more defendants. The matter today rests primarily in the court's discretion; thus it is said that an action or cause will not be severed where the effect would be to leave the action in a chaotic condition. See 7 Carmody-Wait, Cyclopedia of New York Practice 215 (1953).

The only firm limitation on the court's present discretion to direct separate judgments is a self-imposed one applicable where substantive law defines an obligation as joint, as in an action against co-partners. See *Nathan* v. *Zierler*, 233 App. Div. 355, 228 N.Y. Supp. 170 (3d Dep't 1928); *Grossman Steel Chair Corp.* v. *Steinberg*, 54 N.Y.S.2d 275 (N.Y.C. Ct. 1944); 7 Carmody-Wait, *op. cit. supra* at 226; *but cf.* 6 Moore, Federal Practice 247–48 (2d ed. 1953). The proposed provision would be subject to the same limitation.

The proposed rule and present law make the granting of a severance a condition precedent to a judgment on part of a cause of action or on one or more but less than all of the enumerated causes of action.

A judgment as to part of an action under the proposed rule would be final and appealable; the time to appeal would begin to run from its entry. Difficulty was encountered with Federal rule 54(b) early in its history because of the conflict between the final judgment limitation on appealability and an apparently strained use of the new rule to escape the rigors of that limitation. See 6 Moore, Federal Practice 206–07 (2d ed. 1953). No such difficulty should be anticipated in this state with its tradition of interlocutory appeals. Accordingly, the Federal limitation requiring "an express determination that there is no just reason for delay" is omitted.

50.3. Effect of judgment dismissing complaint or counterclaim.

A judgment dismissing a claim before the close of the claimant's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a claim after the close of the claimant's evidence is a dismissal on the merits unless it specifies otherwise.

Notes

This rule is derived from section 482 of the civil practice act with minor language changes but no change in substance. *Cf.* proposed rule 31.7. The word "claim" is used instead of "complaint" to make the rule applicable to counterclaims and to other types of claims. Present section 482 accomplishes this in part.

50.4. Action upon judgment.

Except as provided in rule [*e.g., N.Y. Civ. Prac. Act §1185*], *an action upon a money judgment entered in a court of the state may only be maintained between the original parties to the judgment where*

1. ten years have elapsed since the first docketing of the judgment; or

2. the judgment was entered against the defendant by default for want of appearance and the summons was served otherwise than by personal service; or

3. the court in which the action is sought to be brought so orders on motion with such notice to such other persons as the court may direct.

Notes

This rule is derived from section 484 of the civil practice act. The opening words of this section, "Except in a case where it is otherwise specially prescribed in this act," will be replaced by a reference to the specific rules to be drafted which provide otherwise.

The proposed provision applies to both judgments for, and directing the payment of, a sum of money, since these are treated the same way throughout proposed title 50. See notes to proposed rule 50.8(a). The term "money judgment" is used, since this term is so defined in proposed section 13.1(a)(1).

Subparagraph 1 of section 484 provides that an action on the judgment may be maintained if "[t]en years have elapsed since the docketing of such judgment." It was apparently intended that this coincide with the period during which the judgment may create a lien on real property or chattels real (N.Y. Civ. Prac. Act §§510, 511) unless the lien is extended. *E.g., id.* §515. The term "first docketing" rather than "docketing" is used in proposed subparagraph 1, however, to make it clear that the provision does not refer to the time of a subsequent docketing of the judgment by transcript in another clerk's office. Under proposed rule 50.8(a), the "first docketing" occurs immediately after filing of the judgment-roll, which is the time from which the lien of present section 510 is measured.

Proposed section 5.12(d) provides a ten-year statute of limitation on a judgment. Further consideration has led the advisory committee to conclude that the present twenty-year period should be retained. The caption of proposed section 5.11 should therefore be amended to read: "*Actions to be commenced within twenty years,*" and the text of proposed section 5.11, as it appeared on pages 63–64 of the Second Preliminary Report, should appear as subdivision (a), captioned "*On a bond.*" The text of proposed section 5.12(d), with the words "ten years" replaced by "twenty years," should then appear as subdivision (b), captioned "*On a judgment,*" to proposed section 5.11.

Proposed subparagraphs 2 and 3 are rewordings of subparagraphs 2 and 3 of present section 484 with one change—proposed subparagraph 3 grants to the court discretion as to notice rather than providing, as does present subparagraph 3, that notice of motion must be personally served if service can be accomplished with due diligence.

50.5. Relief from judgment or order.

(a) Grounds. On motion of any interested person, the court which rendered it, upon such notice as it may direct and upon such terms as are just, may relieve a party from a judgment or order upon the ground of

1. excusable default if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under rule 45.4; or

3. fraud of an adverse party; or

4. lack of jurisdiction to render the judgment or order; or

5. reversal or vacatur of a prior judgment or order upon which it is based.

Notes

This subdivision replaces section 108 and sections 521 through 529 of the civil practice act. It is similar in approach to subdivision (b) of Federal rule 60. The New York sections create the false impression that a final judgment can be set aside only for the grounds therein specified, namely, (1) mistake, inadvertance, surprise or excusable neglect in connection with default judgments (section 108); (2) irregularity (section 521); or (3) error in fact not arising upon the trial (section 522). Actually, under case law in this state, a final judgment may also be set aside because the court which rendered the judgment lacked jurisdiction (see, *e.g.*, *Wavel* v. *Wiles*, 24 N.Y. 635 (1862); 7 Carmody-Wait, Cyclopedia of New York Practice 390–92 (1953)), for fraud (see Appleton, New York Practice 273 (5th ed. 1957)), and for newly discovered evidence. See *Palisi* v. *Yanarella*, 76 N.Y.S.2d 209 (Sup. Ct.), *aff'd*, 272 App. Div. 1070, 75 N.Y.S.2d 520 (2d Dep't 1947) (dictum); 7 Carmody-Wait, *op. cit. supra* at 381. Furthermore, a court possesses inherent discretionary power to vacate its own judgment for sufficient reason and in the interests of substantial justice, and a separate action in equity may be instituted to vacate a judgment upon such grounds as mistake or extrinsic fraud where there is no adequate remedy at law. See 7 Carmody-Wait, *op. cit. supra* at 374–380; 3 Bender, New York Practice 600–01 (Warren ed. 1954). The proposed subdivision makes specific reference to these additional grounds of setting aside final judgments. In subparagraph 2, the words "which, if introduced at the trial, would probably have produced a different result" have been added to the words of the Federal provision. In the Federal courts, newly discovered evidence is of no importance unless it would probably alter the judgment. *Glade* v. *Allied Electric Products*, 135 F.2d 590 (7th Cir. 1943). The New York rule is to the same effect. See, *e.g.*, *In re Madden's Estate*, 155 Misc. 308, 279 N.Y. Supp. 218 (Surr. Ct. 1935); 7 Carmody-Wait, *op cit. supra* at 162.

The "fraud" specified in subparagraph 3 may be either extrinsic or intrinsic. The words "misrepresentation, or other misconduct of an adverse party," appearing in the Federal provision, have been omitted. The court's inherent power to relieve a party from the operation of a judgment in the interest of substantial justice is not limited in any way by the proposed rules. "The whole power of the court to relieve from judgments taken through 'mistake, inadvertance or excusable neglect' is not limited . . . ; but in the exercise of its control over its judgments it may open them upon the applications of anyone for sufficient reason, in the furtherance of justice. Its power to do so does not depend upon any statute, but is inherent, ..." *Ladd* v. *Stevenson*, 112 N.Y. 325, 332, 19 N.E. 842, 844 (1889); see also Carmody, New York Practice 644 (7th ed. Forkosch 1956). Included is the power to permit a person not personally served to defend subject to the specific provisions in proposed rule 25.6 and the power specified in present section 522 which permits the setting aside of a judgment for errors in fact not arising on the trial. See also proposed rule 50.9(a).

Sections 523 through 527 of the civil practice act deal with the mechanics of the procedure for setting aside a final judgment for irregularity or error in fact. They are unnecessarily detailed, and yet incomplete, in defining by whom the motion can be made and how notice of motion should be given. This unnecessary specificity has been eliminated by the proposed rule; the opening words of this subdivision make it clear that the motion may be made by any interested person and that the court will prescribe the method of giving notice of the motion. If the court believes that the person requesting the setting aside of the judgment is not a proper person to raise the issue, it may, of course, exercise its discretion and refuse to grant the requested relief.

Subparagraph 1 of this subdivision, which deals with the opening of default judgments, is taken from present section 108 without change of substance. The words "excusable default" are substituted for the present words "mistake, inadvertance, surprise or excusable neglect" with no change in meaning intended.

Subparagraphs 2 through 5 are based upon Federal rule 60(b). Subparagraph 4 accomplishes the same result as Federal rule 60(b)(3), which uses the words "the judgment is void."

Subparagraph 5 is taken from Federal rule 60(b)(5). The word "satisfied" is omitted because this subject is covered in proposed rule 50.8. The concluding phrase of the Federal provision which permits relief from a final judgment because "it is no longer equitable that the judgment should have prospective application" is a restatement of former equitable power which is omitted as unnecessary. See *Ladd* v. *Stevenson, supra*. Its usual application will be "to a permanent injunction, which while proper when entered, has become of no use or benefit to the one whose rights were protected, or where it would be inequitable to continue it, because of the occurrence of facts and conditions since its rendition." 7 Moore, Federal Practice 219 (2d ed. 1955).

No time limitation other than that embodied in subparagraph 1 has been retained. Under present law a motion under the counterpart of subparagraph 4 can be made at any time and a motion under the counterpart of subparagraphs 2, 3 and 5 within a reasonable time. See, *e.g.*, 7 Carmody-Wait, *op. cit. supra* at 163, 420. What is a "reasonable time" naturally depends upon the particular reason assigned for relief. 7 Moore, *op. cit. supra* at 309–312. This freedom in the court to exercise its discretion has been retained. This result differs in some respects from the provision found in subdivision (b) of Federal rule 60. For example, the Federal provision places a one-year time limit on the grounds specified in subparagraphs 2 and 3 of the proposed subdivision. It is believed that the present New York law provides a sounder approach to the problem.

Section 528 of the civil practice act, containing special provisions for extensions for minors and insane and imprisoned persons, has not been carried over into the proposed rule. The extension under the present law is five years or to a time one year after the end of the disability. Ample protection is given to these classes by proposed rule 91.3 limiting the entry of a default judgment against an infant or incompetent. See also proposed rule 91.1.

No provision equivalent to the fourth sentence of Federal rule 60(b) has been included. New York statutes do not specify the powers of a court in an independent action to vacate a final judgment or order. Nevertheless, our courts have declared that they have inherent power to entertain a separate action attacking a judgment based upon certain restricted grounds—*i.e.*, those of fraud or mistake—where there is no adequate remedy at law, or where fraud has been perpetrated upon the court. See 7 Carmody-Wait, *op. cit. supra* at 375–380. Relief is seldom sought by means of an independent action since it may only be granted as to extrinsic fraud and not as to intrinsic fraud (see, *e.g., Crouse* v. *McVickar*, 207 N.Y. 213, 100 N.E. 697 (1912); 3 Bender, New York Practice 600–01 (Warren ed. 1954)), while relief based upon either type of fraud may be obtained by means of a motion in the original action.

(b) Restitution. Where a judgment is set aside, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

Notes

This subdivision is taken from section 529 of the civil practice act. Like the present section, it makes applicable the same rules that govern restitution after an appeal. See proposed rule 80.13.

50.6. Entry of judgment.

(a) What constitutes entry. A judgment is entered when, after it has been signed by the clerk of the court, it is filed by him.

Notes

This subdivision is derived from part of the first sentence of rule 201 of the rules of civil practice. The proposed subdivision omits the administrative directions to the clerk on the operation of his office specified in the remainder of the first sentence and in the second sentence of rule 201. The last sentence of rule 201 relates to the records to be kept by clerks and will be treated in proposed title 137.

(b) Judgment upon verdict. Judgment upon the general verdict of a jury after a trial by jury as of right shall be entered by the clerk unless the court otherwise directs; if there is a special verdict, the court shall direct entry of an appropriate judgment.

Notes

This subdivision is derived from section 495 of the civil practice act and is similar in approach to the first sentence of Federal rule 58. It applies only to jury trials as of right. In all other cases the decision rests ultimately with the court or referee and is governed by subdivision (c).

Section 495 refers to entry of judgment after a general verdict only on the application of the successful party. The usual practice is for the clerk of the trial part to furnish the successful party with an extract from the minutes stating the amount and character of the verdict, which is presented to the clerk of the court where the judgment is to be entered as authority for its entry. See 7 Carmody-Wait, Cyclopedia of New York Practice 291–92 (1953). Under the proposed provision either party could avail himself of this procedure since the words "Upon the application of the party in whose favor a general verdict is rendered" have been omitted. *Cf.* N.Y. R. Civ. P. 197. There may be instances in which the losing party wishes to appeal immediately and is willing to enter the judgment. *Cf.* proposed rule 80.3(a). If the judgment debtor enters the wrong amount, the judgment creditor could move to correct the judgment. See proposed rule 50.9(a). The words "[unless] it is otherwise specially prescribed by law" have also been eliminated; in such case the court would otherwise direct.

No special reference to general verdicts accompanied by answers to interrogatories is required because, under proposed rule 41.11(c), if the answers are inconsistent with the verdict, the court must direct entry of an appropriate judgment. *Cf.* Fed. R. Civ. P. 58. Some of the issues may be separately tried without a severance. *Compare* proposed rules 24.3 *and* 50.2, *with* proposed rule 40.1. In such case the original order of the court requiring separate trial or the order after the non-final verdict will make it clear that a judgment is not to be entered. See proposed rule 41.12; *cf.* N.Y. R. Civ. P. 194.

(c) Judgment upon decision. Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or referee shall, on motion, determine the form of the judgment.

Notes

Subdivision (c) is patterned after the second sentence of Federal rule 58. It replaces rules 194 through 199 of the rules of civil practice. These rules provide different procedures for the entry of judgment depending upon various factors, such as whether the case was tried by the court alone or with the aid of an advisory jury, whether there was a motion for judgment, and, if so, whether such motion involved any questions of fact. See 7 Carmody-Wait, Cyclopedia of New York Practice 287–326 (1953). They are overcomplicated, excessively detailed and unsupported by any rational basis. The proposed provision involves only the practical criterion of whether the judgment is simple (*i.e.*, where it is only for money or costs or is a denial of all relief) or complex. It is only in the latter situation that the judge or referee needs to settle or approve the form of the judgment and direct its entry by the clerk.

This subdivision applies to all cases other than those tried entirely by a jury as of right. It covers cases where an advisory jury or referee to report is used (see N.Y. R. Civ. P. 194, 199) and those decided on a motion for judgment under proposed rules 31.1–31.3, whether or not isues of fact requiring a trial arose in the same action. See N.Y. R. Civ. P. 195–197. Entry of default judgments, however, is governed by the special provisions of proposed rule 31.6.

No special treatment of a referee's decision in a marital action (present section 1174) is required. See 7 Carmody-Wait, *op. cit. supra* at 324. Under proposed rule 43.1(b)(2) only an official referee can determine an issue in a matrimonial action so that a judgment could not be entered by a clerk on the determination of an unofficial referee in such an action. This is the result of present section 1174. See also proposed rule 43.3(b).

The phrase "on motion" requires notice to every party not in default for failure to appear. See proposed rule 33.3(c); *cf.* N.J. R. Civ. P. 4:55-1, 4:59. The present practice of the parties submitting their proposed form of judgment will be followed.

(d) After death of party. No verdict or decision shall be rendered against a deceased party, but if a party dies before entry of final judgment and after a verdict, decision, interlocutory judgment or accepted offer to compromise pursuant to rule 31.11, final judgment shall be entered in the names of the original parties unless the verdict, decision, interlocutory judgment or offer is set aside.

Notes

This subdivision is taken from section 478 of the civil practice act without change of substance. The opening clause replaces the last two sentences of section 478. The first of these sentences states that no judgment shall be entered against a party who dies before a verdict, report or decision is rendered. Such a statement is unnecessary under the formulation of the proposed subdivision, since there could be no verdict or decision upon which the judgment could be based. The remainder of the subdivision is simply a rewording of the first sentence of section 478. The second sentence of that section relates to liens and is treated in proposed section 13.3(a)(4). See also proposed sections 13.2(a)(5), 13.8; introduction to proposed title 50.

(e) Final judgment after interlocutory judgment. Where an interlocutory judgment has been directed, a party may move for final judgment when he becomes entitled thereto.

Notes

This subdivision is based upon rule 187 of the rules of civil practice. It restates the first sentence of that rule. The second sentence of the present rule stating that a referee, required to be appointed by the interlocutory judgment, must be appointed by the judgment or by order on motion is omitted as unnecessary. *Cf.* proposed title 43, and particularly proposed rule 43.1(a).

50.7. Judgment-roll.

(a) Preparation and filing. A judgment-roll shall be prepared by the attorney for the party at whose instance the judgment is entered or by the clerk. It shall be filed by the clerk when he enters judgment, and shall state the date and time of its filing.

(b) Content. The judgment-roll shall contain the summons, pleadings, admissions, each judgment and each order involving the merits or necessarily affecting the final judgment. If the judgment was taken by default, it shall also contain the proof required by subdivision (e) of rule 31.6 and the result of any

assessment, account or reference under subdivision (b) of rule 31.6. If a trial was had, it shall also contain the verdict or decision, any offer made pursuant to rules 31.11 or 31.12, and any transcript of proceedings then on file. If any appeal was taken, it shall also contain the determination and opinion of each appellate court and the papers on which each appeal was heard. In an action on submitted facts under rule 31.13, the judgment-roll shall consist of the case, submission, affidavit, each judgment and each order necessarily affecting the final judgment. The judgment-roll of a judgment by confession under rule 31.9 shall consist of the affidavit and a copy of the judgment.

Notes

This rule is derived from rule 202 of the rules of civil practice and the first sentence of section 607 of the civil practice act.

Subdivision (a) is a rewording of subparagraphs 1 and 8 of rule 202.

Subdivision (b) is derived from subparagraphs 2 through 5 of rule 202 and the first sentence of section 607. The scope of subparagraph 5 of rule 202 and the first sentence of section 607 has been broadened to include all determinations and opinions of appellate courts. The phrase "and each paper on file, or a copy thereof" in subparagraph 2 of present rule 202 is omitted. Such a phrase makes unnecessary all the other items enumerated in the rule. Those papers required have been specified in the rule. Other papers are on file and may be obtained when they are required. Otherwise, the proposed rule makes no change in the papers that must go into the judgment-roll, but simply condenses the present provisions and conforms their terminology to that of the proposed rules.

The usual practice is to file originals of the required papers but copies may be filed instead by the express terms of present rule 202. The same practice is permitted under the proposed rules by virtue of rule 32.1(e).

Subparagraph 7 of present rule 202, covering papers pertaining to any proceeding at special or trial term subsequent to appeal but before entry of final judgment, has been omitted because proposed subdivision (b) includes the papers there referred to within the term "each order involving the merits or necessarily affecting the final judgment." A transcript on file is the equivalent of the present case or bill of exceptions.

The last two sentences of subdivision (b) incorporate, for convenience, the content of the judgment-roll in an action on submitted facts and in the case of a judgment by confession. These are presently found in civil practice act sections 544 and 548.

50.8. Docketing of judgment.

(a) Docketing by clerk of court; docketing elsewhere by transcript. Immediately after filing the judgment-roll the clerk shall docket a money judgment or a judgment affecting the title to real property. Upon the filing of a transcript of the docket of a judgment of a court other than the supreme or a county court, the clerk of the county in which the judgment was entered shall docket the judgment. Upon the filing of a transcript of the docket of a judgment which has been filed in the office of the clerk of the county in which it was entered, the clerk of any other county in the state shall docket the judgment. Whenever a county clerk dockets a judgment by transcript under this subdivision, he shall notify the clerk who isued it, who, upon receiving such notification, shall make an entry on the docket of the judgment in his office indicating where the transcript has been filed. A judgment docketed by transcript under this subdivision shall have the same effect as a docketed judgment entered in the supreme court within the county where it is docketed.

Notes

This subdivision sets up a comprehensive scheme for docketing judgments anywhere in the state. It is derived from the beginning of section 501 and from section 502 of the civil practice act. The remainder of section 501 is embodied in subdivision (c). While the first sentence of the proposed subdivision requires docketing, as does the present law, it is recognized that the attorney for the judgment creditor will often waive this requirement. There is no intention to change this practice.

The only kind of judgments that are docketed are money judgments, although present section 501 so indicates only by implication in subparagraph 3, in requiring that the docket state "the sum recovered or directed to be paid." Docketing and the docket book are to be distinguished from recording the judgment in the "judgment book." Rule of civil practice 201 requires that *all* judgments be recorded in the judgment book, although the form of that book varies in different clerk's offices—in New York county, for instance, the judgment book is actually a set of microfilm records of the judgments.

Apparently, the practice is not uniform in docketing judgments directing the payment of a sum of money, as opposed to judgments for a sum of money; some clerk's offices do not docket the former. No reason is perceived for failing to docket directions to pay. Like judgments for a sum of money, they are enforceable only by execution (see *Harris* v. *Elliott*, 163 N.Y. 269, 57 N.E. 406 (1900); *Hennig* v. *Abrahams*, 246 App. Div. 621, 282 N.Y. Supp. 970 (2d Dep't 1935); N.Y. Civ. Prac. Act §504)), with specific exceptions. N. Y. Civ. Prac. Act §505(4) (payment into court); id. §505(5) (payment by fiduciary for dereliction of duty); id. §§1171, 1171-a, 1172 (matrimonial actions). Further, they create a lien upon real property (*id.* §510), but only if they are docketed. *Id.* §509. Accordingly, the proposed provision and the other rules in the title affecting docketing (*e.g.*, proposed rules 50.9(b), 50.10(a)) refer to a "money judgment" which is defined in proposed section 13.1(a)(1) to include judgments for, and judgments directing the payment of, a sum of money.

The proposed rule also goes beyond the present provisions in allowing the docketing of judgments affecting the title to real property. Under present law a notice of pendency is the only method of apprising interested persons of a change in the title to real property, even after judgment. It is obviously inferior to docketing for this purpose, since it does not indicate the outcome of the litigation and since its duration, under recently enacted section 121-a of the Civil Practice Act, is the only three years unless extended by motion. See 2 N.Y. Jud. Conference Rep. 114–16. Docketing is presently allowed alternatively with indexing with notices of pendency under rule of civil practice 74 for final orders in a special proceeding affecting the title to real property; such special provision is presumably required because a notice of pendency ordinarily is not available in a special proceeding, where no complaint is filed. The proposed rules instead authorize docketing for any judgment or order affecting the title to real property. The instant subdivision does so for judgments, which includes the present final order in a special proceeding by virtue of proposed rule 27.9 and proposed rule 33.13 does so for orders. See notes to proposed rule 33.13.

The requirement that the clerk who issued a transcript be notified and make an entry of where it is filed is new. Where a judgment of a court below the Supreme or County Court is involved, after the judgment is docketed by the county clerk, his docket rather than the one in the lower court will serve as the foundation for enforcement procedures. See *e.g.*, proposed rule 61.9. Where transcripts of a county clerk's docket are filed in other counties, the notation of where they are filed will enable the judgment debtor to have them all discharged upon making satisfaction. Further, it will apprise the court of where executions may have issued and enable it to protect the sheriff's right to fees where a deposit into court is made pursuant to proposed rule 50.11(a)(3). It thus accords with the design of proposed rule 50.11 in making the clerk's office of the court which rendered the judgment, or the county clerk's office, if a lower court judgment has been docketed there, the center of information as to the status of the judgment and its enforcement.

(b) Docketing of judgments of court of United States. A transcript of the judgment of a court of the United States rendered or filed within the state may be filed in the office of the clerk of any county and upon such filing the clerk shall docket the judgment in the same manner and with the same effect as a judgment entered in the supreme court within the county.

Notes

This subdivision is a rewording of present section 502-a, with no change of substance. The proposed rule uses the term "filed" to cover judgments of Federal courts rendered in other states but filed in this state pursuant to section 1963 of title 28 of the United States Code. The committee has not been able to devise an effective method for the state to provide centralized docketing of Federal judgments equivalent to that in subdivision (a).

(c) Form of docketing. A judgment is docketed by making an entry in the proper docket book under the surname of each judgment debtor consisting of

1. the name and last known address of the judgment debtor, his title and trade or profession if stated in the judgment;

2. the name and last known address of the judgment creditor;

3. the sum recovered or directed to be paid in figures;

4. the date and time the judgment-roll was filed;

5. the date and time of docketing;

6. the court and county in which judgment was entered; and

7. the name and address of the attorney for the judgment creditor.

If no address is known for the judgment debtor or judgment creditor, an affidavit executed by the party at whose instance the judgment is entered or his attorney shall be filed stating that the affiant has no knowledge of an address.

Notes

This subdivision embodies part of present section 501. With regard to the docketing of Federal judgments, it should be noted that a Federal transcript may not contain all of the information contained in the docket of a judgment of a state court. See Fed. R. Civ. P. 79(c). Thus, for example, subparagraph 4 of this subdivision is not applicable to Federal judgments. This situation exists under present law but, in practice, the county clerks docket Federal judgments without difficulty.

50.9. Validity and correction of judgment; amendment of docket.

(a) Validity and correction of judgment. A judgment shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party. A trial or an appellate court may require the mistake, defect or irregularity to be cured.

Notes

This subdivision is derived from section 109 of the civil practice act. This section specifies twelve specific imperfections "and any other of like nature" which are not to be deemed to affect a judgment. The listed imperfections are apparent and need not be specifically stated. Furthermore, the entire matter is better left to the courts to handle by case law depending upon the facts of the particular case, under the general test of whether the mistake, defect or irregularity affects "a substantial right of a party."

With respect to errors in a judgment, the proposed subdivision is designed to accomplish the same result as Federal rule 60(a), which provides for correction of clerical mistakes and errors arising from oversight and omission. Under present New York law, for example, judgments have been corrected by the addition of the words "without prejudice" (*Clark* v. *Scovill*, 198 N.Y. 279, 91 N.E. 800 (1910)) and by the insertion of the proper amount of interest. *Spatz* v. *Pulensky*, 267 App. Div. 1031, 48 N.Y.S.2d 314 (3d Dep't 1944); see 7 Carmody-Wait, Cyclopedia of New York Practice 366–374 (1953). Although the subdivision prescribes no time limit within which a judgment shall be corrected, a motion should be made promptly since it may be denied for laches. See 7 Carmody-Wait, *op cit. supra* at 373. The proposed subdivision is also intended to cover correction of a judgment to designate the judgment debtor by his true name—a matter presently treated specifically in section 511 of the civil practice act. See notes to subdivision (b).

(b) Amendment of docket. When a money judgment or the lien thereof is affected in any way by a subsequent order of the court, the clerk in whose office the judgment-roll was filed shall make an appropriate entry on the docket of the judgment. Unless such order otherwise provides, the duration of the judgment lien on real property shall be measured from the original docketing of the judgment.

Notes

This subdivision is derived from that part of section 511 of the civil practice act which permits the amendment of the docket of a judgment to designate the judgment debtor by his true name but it has been broadened to cover all amendments and corrections, including those on discharge and setting aside of a judgment. Thus, it applies to orders under subdivision (a) of this rule, orders under proposed rule 50.5, orders under proposed section 13.3(b), orders under proposed section 13.4 (*cf.* N.Y. Civ. Prac. Act §517) and the qualified discharge referred to in section 538-a of the civil

practice act which leaves unaffected an existing lien on real property. There is no need to retain the specific provisions of section 538-a, since identical provisions are found in section 150 of the Debtor and Creditor Law. The civil practice act section was enacted at the same time that these provisions were added to the Debtor and Creditor Law, apparently in an excess of caution concerning the possible confusion engendered by such a discharge. See N.Y. Law Rev. Comm'n Rep. 25–53 (1953).

This subdivision is also derived from the first sentence of subparagraph 1 and from subparagraph 2 of section 498 of the civil practice act. The present subparagraphs are only concerned with reversals or with modifications in which the judgment is affirmed as to part of the sum. There are other modifications on appeal which will necessitate amendment of the docket (*e.g.*, a dismissal of the action as to one of several appellants) and the proposed provision covers all such modifications. Furthermore, the subdivision is applicable to all appellate courts. The reference in subparagraph 1 of section 498 to the "perfecting" of the appeal has been omitted since this concept has been omitted from the proposed appeals rules. See notes to proposed rule 80.9.

The last sentence of subparagraph 1 of section 498, stating that the lien of a judgment remains unaffected if the docket is not corrected, is omitted as unnecessary.

In view of the fact that corrections may be minor and that error in the original judgment may have been caused by the judgment creditor, the duration of the lien is measured from the original docketing unless the court provides otherwise.

(c) Transcript. Upon the filing of a transcript of an amendment of the docket certified by the clerk in whose office the judgment-roll is filed, the clerk of any county where the judgment has been docketed by transcript shall make an appropriate entry on the docket of the judgment.

Notes

This subdivision is based on parts of section 498 and 511 of the civil practice act; it also replaces present section 518.

50.10. Satisfaction of judgment.

(a) Filing document of authority to enforce judgment. A person other than the party recovering a money judgment who becomes entitled to enforce the judgment shall file in the office of the clerk of the court which entered the judgment or, in the case of a judgment of a court other than the supreme or a county court which has been docketed by the county clerk, in the office of the clerk of the county in which the judgment was entered, a copy of the instrument on which his authority is based, acknowledged in the form required to entitle a deed to be recorded, or, if his authority is based on a court order, a certified copy of the order. Upon such filing the clerk shall make an entry of the name and the address of the person on the docket of the judgment.

Notes

This subdivision is derived from section 534 and 539 of the civil practice act but extends their scope to cover all persons in addition to the person recovering it who may become entitled to enforce the judgment. *Cf.* N.Y. Civ Prac. Act §§650, 654. It provides a uniform method of filing proof of authority based upon the method of executing a deed entitled to be recorded in the state. Present section 539, which deals only with assignments, provides an alternative method of executing the assignment: acknowledgment before the clerk or his deputy and certification by him. The method in this subdivision, however, is used generally throughout the proposed rules.

Proposed section 13.1(a)(2) defines a person entitled to enforce a money judgment as a "judgment creditor." *Cf.* N.Y. Civ. Prac. Act §7(5).

Among the persons intended to be covered by the proposed subdivision who are not expressly covered by the present provisions are executors, administrators and court-appointed guardians. An attorney in fact is presently covered in section 530(3). The term "appropriate entry" permits the clerk to use separate books for assignments if he indicates on the docket of the judgment an appropriate cross-reference.

Present section 534 permits filing only by a resident of the state or a person having an office in the state for the regular transaction of business in person. This limitation has been omitted. The requirement for filing the original judgment is not so limited. See proposed rule 50.8. If the judgment debtor finds it difficult to pay the judgment to a non-resident, he may pay it into court under proposed rule 50.11(a).

(b) Satisfaction-piece. When a person entitled to enforce a judgment receives satisfaction or partial satisfaction of the judgment, he shall execute and deliver, or file with the proper clerk pursuant to rule 50.11(a), a satisfaction-piece or partial satisfaction-piece acknowledged in the form required to entitle a deed to be recorded, which shall set forth the book and page where the judgment is docketed.

Notes

This subdivision replaces sections 531 and 532 and part of section 530 of the civil practice act. The provisions of section 532 regarding the persons who may execute a satisfaction-piece have been broadened to conform to subdivision (a) of the proposed rule; and the form of execution of the satisfaction-piece is that required to entitle a deed to be recorded. The proposed subdivision differs from section 532 in allowing the person receiving payment to file the satisfaction-piece with the appropriate clerk as an alternative to delivering it to the person making payment (see N.J. R. Civ. P. 4:60–1) and in omitting the fee provision of the present section. Such fees will be treated in title 160.

Subparagraph 6 of present section 530 has not been carried over in terms although the same result is reached by treating a partial satisfaction-piece like a satisfaction-piece in this rule and for the purpose of entering satisfaction under proposed rule 50.11. The term "certificate of reduction," synonymous with "partial satisfaction-piece," has been omitted.

(c) Attorney of record. Within two years after the entry of a judgment the attorney of record or the attorney named on the docket for the judgment creditor may execute a satisfaction-piece or a partial satisfaction-piece, but if his authority was revoked before it was executed, the judgment may nevertheless be enforced against a person who had actual notice of the revocation before a payment on the judgment was made or a purchase of property bound by it was effected.

Notes

This subdivision is a rewording of the provisions in section 530(1) dealing with the attorney of record.

50.11. Entry of satisfaction.

(a) Entry upon satisfaction-piece, court order, deposit into court, discharge of compounding joint debtor. The clerk of the court which entered the judgment or, in the case of a judgment of a court other than the supreme or a county court which has been docketed by a county clerk, the clerk of the county in which the judgment was entered, shall make an entry of the satisfaction or partial satisfaction on the docket of the judgment upon

1. the filing of a satisfaction-piece or partial satisfaction-piece; or

2. the order of the court, made upon motion with such notice to other persons as the court may direct, when the judgment has been wholly or partially satisfied but the judgment debtor cannot furnish the clerk with a satisfaction-piece or partial satisfaction-piece; or

3. the order of the court, made upon motion with such notice to other persons as the court may direct, permitting deposit with the clerk of a sum of money which satisfies or partially satisfies the judgment when such deposit is made; such an order shall not be made unless the court is satisfied that there are no outstanding executions on which sheriff's fees have not ***been paid; or***

4. the filing of an instrument specified in article eight of the debtor and creditor law, executed by a creditor releasing or discharging a compounding joint debtor; in such case, the entry on the docket of the judgment shall state that the judgment is satisfied as to the compounding debtor only.

(b) Entry upon return of execution. A sheriff shall return an execution to the clerk of the court from which the execution issued, endorsing thereon whether it is returned unsatisfied or wholly or partially satisfied, and the clerk shall make an appropriate entry on the docket of the judgment. The sheriff shall also deliver to the person making payment, upon request, a certified copy of the execution and of the return of satisfaction or partial satisfaction. Upon the filing of such copy with the county clerk of the county where the execution was satisfied, the clerk shall enter satisfaction or partial satisfaction on the judgment docket.

(c) Entry upon certificate. Upon the filing of a certificate of the clerk of the county in which the judgment was entered, stating that the judgment has been wholly or partially satisfied, the clerk of any court or county where a judgment has been docketed shall make an appropriate entry on the docket of the judgment.

Notes

This rule covers all the methods of recording satisfaction by payment or by return of a satisfied execution. It replaces civil practice act sections 535 through 537, part of section 530 and rules of civil practice 29(2) and 204.

The proposed rule changes present law by requiring that all satisfactions be recorded initially in the office of the county clerk of the county in which the judgment was entered or, if a judgment of a court other than the Supreme or County Court has not been docketed in the county clerk's office, in the office of the clerk of the lower court. Entry of satisfaction in other counties, or in a court other than the Supreme or County Court whose judgment has been docketed by the county clerk, must then be accomplished by certificate under subdivision (c). The only exception to this rule is entry by filing with a county clerk a certified copy of execution and return of satisfaction within the same county, pursuant to subdivision (b). This procedure, presently permitted by section 536, has been retained since it may be more convenient in some cases than obtaining a certificate under subdivision (c) where speed in releasing a lien is essential. Since the execution must still be returned to the office of the clerk specified in subdivision (a), retention of the procedure does not detract from the function of that office as a central clearing-house for all information about the judgment and its enforcement. Abolished, however, is the procedure of filing a satisfaction-piece initially in a different office (N.Y. Civ. Prac. Act §530) and of filing a certificate of a different clerk with whom a certified copy of execution and return, obtained from the sheriff, has been filed. *Id.* §537.

All provisions concerning the payment of fees to a clerk or sheriff for issuing a transcript, certificate, or copy of execution and return have been omitted, as has the provision for the two per centum fees of a financial officer of present section 530(4). The sheriff will not himself issue a certificate of satisfaction or return unsatisfied until his fee has been paid. Fee matters will be treated generally elsewhere in the proposed rules.

Subparagraph 2 of proposed subdivision (a) is derived from New Jersey rule 4:60–3. There is no comparable provision in the present civil practice act or rules of civil practice.

Subparagraph 5 and the last sentence of subparagraph 6 of present section 530, designed to protect the sheriff's right to fees when an execution has been issued, have been omitted. Where an execution is returned unsatisfied, such fees as have not been paid in advance are small and there is no serious danger that an attorney would refuse to pay them; where a return of satisfaction is made, the sheriff can deduct his fees from the money paid him. See, *e.g.*, N.Y. Civ. Prac. Act §§1558(6), 1558(7), 1559. The only situation requiring protection is where a sheriff may be deprived of poundage fees because the debtor chooses to deposit the money in court to avoid them. Accordingly, both the present and proposed provisions dealing with such deposits make provision for the sheriff's protection. This protection will be more effective under the proposed rule than it is under section 530 in cases where executions are outstanding in several counties other than the one where the money is deposited with the clerk, since the court will know where transcripts of the judgment have been docketed by virtue of the notification provided for in proposed rule 50.7. Further, since

this method of payment is unusual and there should be some good reason for resorting to it, a court order ought to be required. The proposed provision differs from the present law in requiring a court order for such payment into court. The power to allow such payment could appropriately be used in such cases as where (1) a tender of money has been made to the person entitled to receive satisfaction but was not accepted; or (2) the whereabouts of the person entitled to receive satisfaction are unknown; or (3) satisfaction is claimed by several parties.

The provision in subparagraph 3 of proposed subdivision (a) requiring "such notice to other persons as the court may direct" eliminates the need for present rule 29(2).

Subparagraph 4 of proposed subdivision (a) is derived from section 531 of the civil practice act with no change of substance.

TITLE 60. ENFORCEMENT OF JUDGMENTS AND ORDERS GENERALLY

INTRODUCTION

This title replaces sections 500, 504–508 and parts of sections 638, 644, 655, 773, 974 and 1520 of the civil practice act. Sections 504 and 505 govern the enforceability of judgments by execution and contempt. Section 504 lists those final judgments enforceable by execution—a judgment for or directing the payment of a sum of money (subdivision 1), one for the plaintiff in an action of ejectment or for dower (subdivision 2), and one directing recovery of a chattel in an action to recover a chattel (subdivision 3). All other final judgments are enforceable by contempt under subdivisions one and two of section 505.

The basic structure of these provisions is preserved in proposed rules 60.1, 60.2 and 60.4. However, proposed rule 60.1, corresponding to present section 504(1), applies to orders as well as judgments directing the payment of money; further, it provides that both may be enforced as prescribed in title 61, which prescribes an integrated enforcement procedure including supplementary proceedings as well as execution.

Proposed rule 60.2 replaces subdivisions 2 and 3 of present section 504, and parts of present sections 638, 644 and 655. Like the latter three sections, it refers generally to any judgment awarding possession of property, although subdivisions 2 and 3 of section 504 refer only to actions of ejectment or for dower or to recover a chattel.

Proposed rule 60.5 preserves subdivision 4 of section 505, which allows enforcement by either contempt or execution of judgments requiring the payment of money into court or to an officer of or receiver appointed by the court, and subdivision 5 of section 505, which allows such enforcement of judgments requiring the payment of money by a fiduciary for a wilful default or dereliction of duty.

Provisions governing the enforcement of a judgment directing the sale of real property, contained in sections 500, 506, 507 and 508 of the civil practice act, have been combined in proposed rule 60.3. Subparagraph 2 of present section 974, relating to an appointment of a receiver to carry a judgment into effect, has been placed in proposed rule 60.6.

The major changes effected by this title and other of the proposed rules are in assimilating the treatment of orders and interlocutory judgments to that of final judgments.

There are no provisions in the civil practice act or rules governing the enforcement of orders other than those directing the payment of money. The authority for punishing a person who fails to obey such non-money orders presently proceeds from section 753 of the Judiciary Law. See 21 Carmody-Wait, Cyclopedia of New York Practice 211 (1956).

The first sentence of rule 74 of the rules of civil practice states, "An order directing the payment of money, other than motion costs, may direct that the same be docketed as a judgment." Present section 1520, although appearing in an article governing costs and entitled "Collection of costs of motion," provides, *inter alia*, that when "costs of a motion, *or any other sum of money*, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or, if no time is so fixed, within ten days after the service of a copy of the order, an execution against the *personal property only*" may be issued (emphasis supplied). The section also provides for a stay of proceedings by the defaulting party until payment is made, and the last sentence states, "Nothing herein contained shall be so construed as to relieve a party or person from punishment as for contempt of court for disobedience to an order in any case when the remedy of enforcement by such proceedings exists."

These provisions leave a number of questions open. In rule 27 of the old General Rules of Practice, from which rule 74 was derived, the orders covered were limited to those made on petition, where no complaint is filed—*i.e.*, resulting from a special proceeding—and it was consequentiy held that the provision did not apply to ordinary orders determining a motion. *Meyer* v. *Abett*, 20 App. Div. 390, 46 N.Y. Supp. 822 (1st Dep't 1897). In the present rule the first sentence, relating to orders directing the payment of money, does not contain such a limitation, and this change made in transposing it from the General Rules of Practice seems to evidence a design to have the provision apply to orders determining a motion as well. However, no case has considered whether the rule's coverage has been so extended. See *Enforcement of Judgments and Orders by Contempt and Execution* at pp. 719–720 *infra* (hereinafter referred to as *Contempt-Execution Study*).

Section 1520 also fails to state whether it applies to orders determining a motion or final orders determining a special proceding, or both. It has in fact been applied to final orders in a special proceeding, thus limiting the execution that may be had upon them to personal property only. See *Sullivan* v. *McCann*, 124 App. Div. 126, 108 N.Y. Supp. 909 (1st Dep't 1908); *Finkelstein* v. *Evangelides*, 176 Misc. 402, 27 N.Y.S.2d 266 (Sup. Ct. 1941). Section 1520 raises other problems as well. Although it states that the execution under it "shall be in the same form, as nearly as may be, as an execution upon a judgment," it has been held that, apart from form, the provisions of the civil practice act governing executions generally do not apply to an execution under section 1520. *Lamont* v. *Fitzgerald*, 176 Misc. 534, 26 N.Y.S.2d 266 (Sup. Ct. 1941) (five-year limitation of section 651 inapplicable). The execution consequently exists in a procedural vacuum. In addition, the courts have differed as to the effect of the last sentence of section 1520, preserving the remedy of contempt where it "exists," with the result that it is unclear whether execution is the exclusive remedy for orders covered by section 1520 or whether contempt remains as an alternative. See *Contempt-Execution Study* at pp. 722–23 *infra*.

The area of enforcement of orders is further complicated by the fact that the line between orders and judgments is sometimes difficult to draw, and the courts have treated a number of judicial directions labeled orders as judgments for enforcement purposes. See *Contempt-Execution Study* at pp. 718-19 *infra*. The result is that if an order is held to be governed by section 1520, execution upon it is limited to personal property, while if it is deemed a judgment or docketed as a judgment under rule 74 it may be enforceable against both real and personal property. See *Contempt-Execution Study* at pp. 718–722 *infra*.

The personal property limitation as originally enacted applied only to motion costs, and, in the light of the incredibly complicated history of section 1520 and its predecessors, its extension to all orders directing the payment of money seems somewhat accidental. See *Contempt-Execution Study* at pp. 721–22, 724 *infra*. There is no reason why all orders requiring the payment of money, including motion costs, should not be enforced equally stringently. The application of section 1520 to final orders in a special proceeding is particularly anomalous, since there is no practical difference between such orders and final judgments, and the provisions governing many special proceedings specifically declare that the final order shall be enforceable like a judgment in an action. See, *e.g.*, N.Y. Civ. Prac. Act §1303 (any incidental award of costs, damages or restitution in article 78 proceeding may be "entered and docketed, and enforced as a final judgment in an action"); *id.* §1425 (upon rendering final order in summary proceedings to recover realty, court may give judgment for rent due); *id.* §1431 (execution for costs may be had in summary proceeding to recover realty—"as if the final order was a judgment"); *id.* §1461 (entry of judgment upon order confirming, modifying or correcting arbitrator's award); *id.* §1466 (judgment upon arbitration order enforceable like judgment in an action). Under the proposed rules, a special proceeding terminates in a judgment, rather than an order, and all the provisions governing judgments and their enforcement are applicable. See proposed rule 27.9 and notes.

In making all orders directing the payment of money, including motion costs, enforceable in the same way as judgments, the proposed rules accord with the recommendation contained in rule 378 proposed by the New York Board of Statutory Consolidation (1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 152 (1915)) and with other modern provisions on the subject. See, *e.g.*, N.J. R. Civ. P. 4:74–1; 2A Waltzinger, New Jersey Practice 194 (1954); Eng. Rules of the Sup. Ct., 0. 42, r. 24 and notes, 1 The Annual Practice 1023 (1958); *cf.* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies.").

The proposed rules also assimilate the enforcement of interlocutory judgments to that of judgments and orders generally.

This would change the present rule that an interlocutory judgment directing the payment of money is not enforceable, either by contempt or execution, until the final judgment is rendered. See *Potter* v. *Rossiter,* 109 App. Div. 35, 95 N.Y. Supp. 1036 (1st Dep't 1905); see also *Contempt-Execution Study* at p. 717 *infra.* It also removes the need for subdivision 3 of present section 505.

The portions of section 1520 relating to a stay of proceedings, set-off and taxing motion costs as part of the costs of the action will be treated in the proposed provisions governing costs. The ten-day waiting period of section 1520 has been eliminated. Under proposed title 61, all executions may issue immediately, unless the court specifies a particular method of delayed payment, or for another reason prevents immediate enforcement. The last sentence of section 1520 has also been omitted to avoid any doubts about the unavailability of contempt proceedings to enforce an order for the payment of money. See *Contempt-Execution Study* at pp. 722–23, 725 *infra;* 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 425 (1915).

Rule 74 has been expanded, to allow docketing of all orders and judgments either directing the payment of money or affecting title to real property, and has been placed in proposed rules 33.13 and 50.8(a). An explanation of the changes made is contained in the notes to those proposed rules.

TABLE OF RULES IN TITLE 60

RULES—TITLE 60. ENFORCEMENT OF JUDGMENTS AND ORDERS GENERALLY

60.1. Enforcement of money judgment or order.

A money judgment and an order directing the payment of money, including motion costs, may be enforced as prescribed in title 61.

Notes

This rule replaces subdivision 1 of section 504 of the civil practice act, which sets forth those judgments which may be enforced "by execution," and the first two sentences of section 773, which permits supplementary proceedings to be maintained on a judgment "rendered in any sum" and on a "decree or order awarding the payment of money." Execution and supplementary proceedings, which presently offer distinct and duplicate remedies to a creditor, have been combined into an integrated enforcement procedure under proposed title 61.

The term "money judgment" is defined in proposed section 13.1(a)(1). That definition includes any part of a judgment as well as an entire interlocutory or final judgment, for or directing the payment of money. It thus replaces the specific references in sections 505(2) and 644 for enforcement of part of a judgment.

This rule also provides that orders directing the payment of money may be enforced as money judgments. *Cf.* N.Y. Civ. Prac. Act §773. Moreover, the final result of a special proceeding is designated a "judgment," rather than an "order" in proposed rule 27.9.

60.3 Enforcement of judgment directing sale of real property.

A judgment or order, or a part thereof, awarding possession of real property or a chattel may be enforced by an execution, which shall particularly describe the property and designate the party to whom the judgment or order awards its possession. The execution shall comply with the provisions of rule 61.9, except that it shall direct the sheriff to deliver possession of the property to the party designated. After the death of a party against whom a judgment or order awarding possession of real property has been obtained, an order granting leave to issue such execution may be granted upon twenty days' notice, to be served in the same manner as a summons, to the occupants of the real property and to the heirs or devisees of the deceased party.

Notes

The first two sentences of this rule replace subdivisions 2 and 3 of section 504, subdivisions 3 and 4 of section 638, and section 644 of the civil practice act. They are stated broadly enough to cover not only the actions specified in section 504, but any action that may result in a judgment awarding possession of real property or a chattel, such as one to compel the determination of a claim to real property (N.Y. Real Prop. Law §506) or an action for waste. *Id.* §523.

There is no express provision of the civil practice act or rules defining the contents of an execution on a judgment for dower, despite the fact that section 504(2) permits enforcement by execution. Under the provisions of the Real Property Law, a successful action for dower results in an interlocutory judgment for admeasurement. N.Y. Real Prop. Law §471. Thereafter, if a distinct parcel is admeasured, final judgment granting life possession of the parcel is rendered; if this is impracticable, the final judgment awards a sum of money to be paid in installments during the plaintiff's life. *Id.* §476. If the plaintiff elects to accept a gross sum, the final judgment awards title in fee simple to property admeasured and the proceeds of any property that must be sold. *Id.* §§482, 483, 488. A final judgment in an action for dower may also award damages. *Id.* §476.

Since an action for dower may result in a judgment for payment of money or possession of realty or both, the provisions of present sections 638(3) and 644 would appear to be applicable to such a judgment, or any part, which awards possession and the general execution provisions would appear to be applicable to those judgments or parts of judgments which award money. For this reason, proposed rule 60.2, which includes only the requirements for an execution upon a judgment awarding possession, is limited to the part of a judgment for dower which awards possession.

The provisions of present section 644 for a combined execution have been deleted. Although no prohibition of such an execution should be implied thereby, the better practice would seem to be the issuance of two executions, each containing its particular directions.

The last sentence of this rule is derived with minor language changes from the first paragraph of section 655 of the civil practice act. In contrast to the first two sentences of the proposed rule, it applies only to judgments awarding possession of real property. The remaining paragraph of present section 655 is covered by proposed section 13.8.

60.3 Enforcement of judgment directing sale of real property.

(a) Entry of judgment in county where real property situated. Where real property directed by a judgment to be sold is not situated in the county in which the judgment is entered, the judgment shall also be entered by the clerk of the county in which the property is situated upon filing with him a copy of the judgment certified by the clerk with whom it was first entered. A purchaser of the property is not required to pay the purchase money or accept a deed until the judgment is so entered.

(b) Place and mode of sale; security. Where a judgment directs that real property shall be sold, it shall be sold in such manner as the judgment may direct in the county where it is situated by the sheriff of that county or by a referee appointed by the court for the purpose. If the property is situated in more than one county, it may be sold in a county in which any part is situated unless the judgment directs otherwise. If a referee is appointed to sell the property, the court may require him to give an undertaking in an amount fixed by it for the proper application of the proceeds of the sale. The conveyance shall specify in the granting clause the party whose right, title or interest is directed to be sold by the judgment and is being conveyed.

Notes

Subdivision (a) is a rewording of section 500 of the civil practice act.

Subdivision (b) consolidates sections 506, 507 and 508 of the civil practice act. These provisions have been condensed but no change of substance is intended. The last sentence of section 506 and the last clause of section 507 have been omitted as unnecessary; also omitted are the portions of section 508 stating that the conveyance should not name any other parties to the action and making the executing officer liable for damages.

The provision for sale of property situated in more than one county has been changed to conform to the provisions of proposed rule 61.13(a).

60.4. Enforcement of judgment or order by contempt.

Any interlocutory or final judgment or order, or any part thereof, not enforceable under either title 61 or rule 60.2 may be enforced by serving a copy of the judgment or order, certified to be a true copy by the clerk or an attorney, upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court.

Notes

This rule is derived from subdivisions 1 and 2 of section 505 of the civil practice act. The provision has been expanded to include interlocutory and final judgments and orders. See introduction to this title.

The provision respecting certification of the copy of the order or judgment has been conformed to proposed rule 33.11(b), which governs service of an order generally.

60.5. Alternative enforcement of judgment or order.

An interlocutory or final judgment or order, or any part thereof, may be enforced either by the method prescribed in title 61 or that prescribed in rule 60.4, or both, where such judgment or part

1. requires the payment of money into court or to an officer of or receiver appointed by the court, except where the money is due upon an express or implied contract or as damages for non-performance of a contract; or

2. requires a trustee or person acting in a fiduciary relationship to pay a sum of money for a willful default or dereliction of his duty.

Notes

This rule is derived from subdivisions 4 and 5 of section 505 of the civil practice act. Subdivision 4, relating to payments into court, was introduced by the authors of the Code of Civil Procedure to change a result which had been reached under the Field Code provision on this subject. The latter, in section 285, simply provided:

> Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse he may be punished by the court as for a contempt.

Under this provision it was held in *Gray* v. *Cook,* 24 How. Pr. 432 (N.Y. Super. Ct. 1863), that a judgment directing an administrator to pay money into court "to await the further order of the court, and to be distributed according to law" must be enforced by execution, as it "requires the payment of money." The authors of the Code of Civil Procedure, with this case in mind and desirous that execution should not supersede the remedy of contempt "in equitable cases of fraud and trust," accordingly substituted for section 285 the two sections, 1240 and 1241, that appear today as sections 504 and 505 (except for subdivision 5 of section 505, which was added in 1947) of the civil practice act. See N.Y. Code Civ. Proc. §1241, note (Throop ed. 1881). Subdivision 4 of section 1241, designed to overcome the rule of *Gray* v. *Cook,* allowed either contempt or execution where the judgment requires payment of money into court or to an officer of the court. The exception for money due upon a contract or as damages for non-performance of a contract is required by Civil Rights Law section 21 (formerly N.Y. Code Civ. Proc. §16), which prohibits imprisonment in such cases.

Subdivision 5 was added in 1947 upon recommendation of the Judicial Council to cover other cases of fraud and trust which did not come within subdivision 4 because they did not require payment into court or to an officer of court. At the same time, subdivision 4 was extended to receivers appointed by the court. See 13 N.Y. Jud. Council Rep. 240–46 (1947).

It should be noted that both of these subdivisions are in apparent conflict with section 753(A) of the Judiciary Law, the general provision authorizing courts of record to punish for civil contempts. Subdivision 3 of that section allows contempt "for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in

a case where by law execution can not be awarded for the collection of such sum." This section has generally been held to preclude punishment by contempt for disobedience to any judicial pronouncement where the remedy of execution is available. See *Contempt-Execution Study* at pp. 715–17, 722–23 *infra*.

Nevertheless, no question about the conflict has been raised and the provisions are given complete effect in the decisions. Accordingly, they have been retained in the proposed rule. For the sake of consistency, however, it is recommended that section 753(A)(3) of the Judiciary Law be amended to take account of their existence. The words "except as otherwise specifically provided by law or the rules of civil practice" should be inserted after "in a case where by law execution can not be awarded for the collection of such sum."

60.6. Appointment of receiver.

A court, by or after judgment, may appoint a receiver of property which is the subject of an action, to carry the judgment into effect or to dispose of the property according to its directions. Unless the court otherwise orders, such a receivership shall be subject to the provisions of title 74.

Notes

This rule is derived from the second numbered subparagraph of section 974. The first and third subparagraphs deal with the provisional remedy of a temporary receiver pending the action or pending an appeal, and they have been treated in title 74. Since subparagraph 2 concerns only the enforcement of a judgment its grant of authority to appoint a receiver has been placed in this title, but the details of the receivership have been made subject to the provisions of title 74.

TITLE 61. ENFORCEMENT OF MONEY JUDGMENTS

INTRODUCTION

This title substantially revises the present procedures for enforcing a money judgment. The term "money judgment" is defined in proposed section 13.1(a)(1). The great number of such judgments which are never satisfied and the number which are satisfied only after years of post-judgment litigation, frustration, harassment and deception, involving substantial expenditures of time and money, point to the pressing need for a complete revision. As one observer recently noted:

> Unfortunately, even cursory familiarity with this branch of the law will produce in the student the impression that the field possesses hopeless prolixity and diversification which does not find its match in any other sector of the legal system. The basic reason for this certainly unsatisfactory state of affairs is the unhappy tendency of American jurisdictions on the one hand to cling with amazing tenacity to outmoded preconceptions and traditions of the common law, and on the other hand to give haphazard and unsystematic legislative relief to the pressing needs of the business community. . . . True, creditors have gained a vast arsenal of remedies but the procedures are often cumbersome, clumsy, inequitable and overly technical. Moreover, the field everywhere bristles with discrepancies and contradictory provisions and is full of pitfalls threatening the unwary. Only the dishonest debtor or the collection agency stands to gain from the present condition. A complete overhauling and streamlining of the whole collection devices is long overdue. [Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 Iowa L. Rev. 155, 181–82 (1957).]

Despite the fact that the purpose of most litigation is the enforcement of rights rather than their bare declaration, post-judgment procedures have received little serious consideration by legal commentators and only minimal attention from the courts. While the value of judicial supervision of pre-trial procedures has long been recognized and the practice continuously expanded, there has been no concomitant movement with regard to post-trial procedures, although the need is at least as great. Even when confronted with complete disregard of court orders or process or with outright perjury or fraud, the courts have generally failed to take the strong measures that are necessary, apparently because enforcement of money judgments is deemed unimportant. Public prosecutors, too, consider perjury and fraud in this area to be beneath their dignity—a frequently-heard epithet is that they will not act as a "collection agency."

Justifications for such neglect are frequently made on the ground that, if a creditor receives the money due him, no harm ensues

from flagrant violations of the enforcement procedures. Such a viewpoint ignores both the societal interest in respect for law and the frequency with which creditors abandon their rights only because of the present difficulties in enforcing them. On the other hand, it is of course no justification for abuse of enforcement procedures by creditors that the violation may be more effective in securing payment than strict adherence to the rules. While this title attempts to eliminate some of the illogical distinctions, inconsistencies and pitfalls in the present law by developing an integrated and relatively simple system, no change is intended in any substantial way in the balance between creditors and debtors. Whether the proposed procedure is used to take advantage of and to unmercifully harass honest debtors without assets or means to acquire them or whether it is used to permit judgment debtors with the ability to pay judgments to flout the law and defraud their creditors depends, in the ultimate analysis, upon the integrity of the bar and the seriousness with which courts view the questions involved in the collection of judgments.

While the New York procedures have been often amended and new remedies have been developed, changes have been made with little regard to their effect on the basic enforcement framework. As a result, there are two virtually separate and distinct procedures for the enforcement of money judgments: execution and supplementary proceedings. See also the discussion of judgment creditors' actions for discovery and satisfaction and receivership in supplementary proceedings in *Liens and Priorities Affecting Personal Property in New York Procedures for the Enforcement of Money Judgments* at pp. 742–753, 767–773 *infra*.

The wages of a judgment debtor may be reached by garnishee execution pursuant to section 684 of the article on executions or by an installment order pursuant to section 793 of the supplementary proceedings article. One judgment creditor may obtain an installment order requiring a judgment debtor to pay over all of his salary except that which is necessary for his subsistence and another judgment creditor may obtain an additional ten per cent of the salary by garnishee execution. While a garnishee execution may not be obtained until an execution has been returned unsatisfied, there is no such requirement with regard to an installment order. The payments under a garnishee execution are collected by a sheriff who deducts his poundage and fees; under an installment order, payments are made directly to the judgment creditor.

A judgment debtor's debtor may be stayed from paying the indebtedness by the service of a subpoena in supplementary proceedings (N.Y. Civ. Prac. Act §781) or by the sheriff leaving a copy of an execution specifying the indebtedness. *Id.* §687-a(2). Discovery regarding the indebtedness may be obtained either by a procedure specified in the execution section (*id.* §687-a(3)) or by supplementary proceedings. *Id.* §779. Should payment of the indebtedness to the sheriff be refused, both procedures permit the judgment creditor to move for an order authorizing him to maintain

an action; under the execution section, however, the sheriff is apparently entitled to poundage upon the amount recovered. *Id.* §687-a(6). In addition, under the supplementary proceeding article, the judgment creditor may seek an order for payment directly to him. *Id.* §794.

Other differences abound. Even certain types of property which are exempt from application to the satisfaction of a judgment if the judgment creditor utilizes a supplementary proceeding (*id.* §792) are not exempt under the execution sections. Apparently some variations derive from the fact that the supplementary proceeding sections are more recent and therefore contain more modern provisions. Thus, if an execution is to be issued to a county other than that in which judgment was rendered, a transcrip of the judgment must be docketed (*id.* §648), but there is no such requirement for supplementary proceedings.

In addition to the difficulties engendered by the existence of these virtually independent methods for the enforcement of judgments, there are numerous inconsistencies and fine distinctions within each procedure which are apparently devoid of logic or social policy. For example, if a third party is indebted to the judgment debtor, the court may order him to pay the indebtedness directly to the judgment creditor under section 794(2) of the supplementary proceeding article, while section 796 of the same article implies that a third party holding money belonging to the judgment debtor can only be ordered to pay it to a sheriff. A judgment creditor seeking to discover the balance in the judgment debtor's bank account may require the bank to send him the information by mail by paying the bank a fee of twenty-five cents. *Id.* §782-a. Yet, if he requires an officer of the bank to come into court with books and records to be examined for the same purpose, he pays no fee, and the bank is restrained from transferring the funds in the account as well as any other property of the judgment debtor which comes into its possession within two years. N.Y. Civ. Prac. Act §§779, 781.

The great disparity in the procedures followed by the courts in different counties has also been the source of great confusion in this area. See Raybin, *Judgment Debtor Proceedings in the City Court,* 136 N.Y.L.J. no. 79, p. 4, cols. 1–3 (1956). Even within the same county, local inferior courts may have independent enforcement machinery and marshalls and constables may levy under executions issued to them upon the same property affected by civil practice act levies and restraints.

Issuance of an execution to the sheriff, at least in large communities, was characterized over two decades ago as a "solemn and ancient farce." See Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings,* 35 Colum. L. Rev. 1007 (1935). It is only useful where the judgment creditor knows of non-exempt property of the judgment debtor. But, as a result of the requirement of an unsatisfied execution as a prerequisite for a garnishee execution, attorneys are frequently placed in the absurd position of specifically instructing the sheriff to return

the execution unsatisfied, and any demand which the sheriff makes upon the judgment debtor in such a case becomes a meaningless formality.

The necessity of first discovering assets before an execution could be effectively utilized led to the development of supplementary proceedings. See First Report of the New York Commissioners on Practice and Pleadings 201 (1848). This was to be accomplished by compelling the judgment debtor, as well as other persons, to submit to an examination under oath. Gradually, the procedure was expanded: leave of court became unnecessary in many cases and "proceedings supplementary to execution" gave way to "proceedings supplementary to judgment" when an unsatisfied execution ceased to be a prerequisite.

As succintly summarized by Judge Finch in *Reeves* v. *Crowninshield,* 274 N.Y. 74, 76, 8 N.E.2d 283 (1937):

> The uncollectibility of money judgments has ever been a subject of concern to bench and bar. A large part of the statute law of this State is designed to enable a judgment creditor to obtain satisfaction upon his money judgment. That a large percentage of these money judgments have remained uncollectible has been confirmed by statistical surveys. (Study of Civil Justice in New York [Survey of Litigation in New York], Johns Hopkins University Institute of Law [1931].) Many debtors who were in a position to pay have evaded their legal obligations by unlawful and technical means. Discontent with this situation resulted in agitation for reform in collection procedure. (Levien, The Collection of Money Judgments, New York Legislative Document, No. 50 F [1934].) Finally, in 1935, upon the recommendation of the Judical Council, a law was enacted creating a new mode of enforcing the payment of judgments (Laws of 1935, ch. 630).

This "new mode" of enforcing judgments was a modernization of supplementary proceedings, but the reform did not appreciably improve matters. The operation of supplementary proceedings has been marked by perversion of its basic purposes and by flagrant disregard for process and orders of the court. In practice, about ninety percent of the judgment debtors who are subpoenaed or ordered to appear in court default. A daily calendar record for a typical month is appended to these notes. In no other area of the law are court orders and process so freely disobeyed. Upon the judgment debtor's default, the court will issue an order to show cause why he should not be punished for contempt. If he appears in response to the order, the court virtually never imposes a penalty upon the judgment debtor for having defaulted upon the original subpoena or order but merely directs him to submit to an examination.

If the judgment debtor defaults upon the show cause order, as three-quarters of them do, he may be brought before the court by a bailable attachment issued to the sheriff. Some courts, however, do not require the attachment but, upon default on the order to show cause, the debtor is permitted to purge himself of contempt by the payment in installments of a fine, which cannot exceed $250 unless actual damage can be shown. The fine is paid to the judgment creditor and applied to the satisfaction of the judgment. Ten dollars in costs is generally the only additional penalty imposed for having been in default both on the examination subpoena or order and on the order to show cause. Where a judgment involves a substantial sum, the judgment creditor may be required to repeat this procedure many times, with a "recovery" each time—in installments spreading over many months—of no more than $250.

Even if the judgment debtor does appear for examination, the judgment creditor's problems are far from over. In most courts, the procedure upon examination has not substantially changed since this 1932 description by the Brooklyn Bar Association:

> The orders and the subpoenas now issued under section 773a are returnable before the Justice presiding at Special Term Part II, but neither he nor anyone else presides at such examination. Actually the Justice is now only consulted to pass upon any disputed point. Experience shows, however, that the amount of time wasted in waiting for an opportunity to see the Judge in such event is so great that attorneys often forego important questions, rather than wait for a decision . . . .
>
> In the City Court the examinations are conducted in a room and in a manner to describe which words are inadequate. There are no adequate accommodations. Attorneys conduct examinations of debtors sitting or standing around tables or desks, windowsills, against walls or post—sometimes even on benches in the room in which debtors are first called. Upon occasions even these 'conveniences' have not been available. Noise of quarrels fills the room . . . . Chaos reigns in place of order and dignity . . . .
>
> Under such circumstances, one should not be surprised to find that evasion and perjury are general and the whole truth the exception is such examinations. What the average debtor does not know before appearing for examination, he very quickly learns from his neighboring debtor. [Brooklyn Bar Association, Tentative Report of the Committee on Improvement of Supplementary Proceedings 5 (1932).]

It is apparent that, as to the ten percent who obey the subpoena order and appear for examination, the situation breeds disrespect, degradation and disregard for our legal system. Despite repeated criticism of this procedure, and the extraordinary waste of time and effort which it entails, no more effective procedure exists. Many attorneys prefer the judgment debtor to default upon the examination, thereby enabling them to seek the $250 fining order. In fact, there are attorneys who fail to seriously examine a judgment debtor who does appear, coercing him into consenting to successive adjournments—sometimes on the pretext that the debtor failed to bring all the books and records the attorney wishes to examine—

until the judgment debtor, who can little afford the time or expense of repeated trips to the courthouse, either makes some arrangement for payment or defaults.

With regard to third persons, there is also a substantial difference between practice and statutory provision and purpose. For example, the examination provisions are regularly utilized to bring pressure upon the judgment debtor. Thus, a debtor's wife or a relative or employer may be subpoenaed as a third party merely to harass the judgment debtor and to "induce" him to make payments upon the judgment. Under section 783(3) of the civil practice act, "third parties" are not entitled to witness fees or traveling expenses, although "witnesses" are. See also N.Y. Civ. Prac. Act §782(7). A "third party" is one who there is "reason to believe" has in his possession or control at least ten dollars' worth of the debtor's property and his examination is restricted to questions regarding such property. These restrictions are seldom observed. Attorneys for judgment creditors often allege "reason to believe" that a person has the debtor's property on the flimsiest of evidence, if not on mere speculation, to avoid payment of witness fees and travel expenses, and to be protected by the restraining provision, which can be used against third parties but not witnesses, if it should turn out that the "witness" is in possession of some of the debtor's property. Moreover, attorneys seldom feel constrained to restrict questions to the property in the possession or control of the person subpoenaed.

Sometimes, the attorney is not interested in going to the trouble and expense of discovering the extent of assets or of issuing an execution or obtaining a turnover order, but he serves a subpoena on a third party solely to effect the restraint upon transfer that it contains. He then waits until the judgment debtor seeks to recover the property restrained and finds that he must satisfy the judgment in order to have the property released. In the case of a bank account, twice the amount of the judgment is tied up. While the duration of the restraint is purportedly limited to two years, and may be extended only for "good cause shown," the requirement may be easily circumvented by obtaining a subsequent order for examination.

Under the present provisions, executions, and all motions relating to them, are considered to be part of the original action. Thus orders made as a result of such motions are not "final" for the purposes of appeal. Cohen & Karger, Powers of the New York Court of Appeals 169–170 (rev. ed. 1952). With respect to a judgment rendered by the Supreme or a County Court, this presents no conceptual difficulty, since the execution, and the papers relating to it are captioned in the court which rendered the judgment, and motions are returnable before it.

With respect to the judgments of lower courts, however, an anomalous situation exists. Except for local enforcement by way of an execution issued directly to a marshall (see, *e.g.*, N.Y.C. Munic. Ct. Code §130) or a constable (see, *e.g.*, N.Y. Justice Ct. Act §281), enforcement of a money judgment rendered by a lower court is started by the filing of a transcript of the judgment with the clerk

of the county in which the lower court is located. It should be noted, however, that a transcript of judgment in a number of City Courts may be filed with any county clerk. See 4 N.Y. Jud. Conference Rep. 125, 153 (1959) (study and proposals for uniform transcript and certificate act). As soon as a transcript is issued or filed, local enforcement is impossible. See, *e.g.*, N.Y. Munic. Ct. Code §130; N.Y. Justice Ct. Act §278. *Cf.* N.Y. Laws 1939, c. 274, §170(b), *as added by* N.Y. Laws 1949, c. 502 (no money judgment of Nassau county district court, except for a wage earner or small claim, can be enforced locally by a marshall). Thereafter, in the case of such courts as the Municipal Court of the city of New York or the Nassau county District Court, the judgment is "deemed a judgment of the supreme court and may be enforced accordingly." N.Y.C. Munic. Ct. Code §131(3); N.Y. Laws 1939, c. 274, §171(c). *But cf.* 4 N.Y. Jud. Conference Rep. 125, 166–67 (1959). Similarly, where a judgment is rendered in a Justice Court, or in one of the local courts governed by the Justice Court Act, after a transcript has been filed with the county clerk, with minor exceptions, an execution "must be in the same form and executed in the same manner as an execution issued upon a judgment of the county court." N. Y. Justice Ct. Act §279.

Since there is no enforcement difference between a Supreme Court judgment and a County Court judgment, lower court judgments, after transcripts are filed, are enforced identically with those of the state-wide courts: executions may be captioned in, and issued out of, the Supreme or a County Court; presumably, therefore, motions relating to an execution are brought in these courts. This seems to be true even with respect to a motion made before an execution was in fact issued. These motions are not separate special proceedings and they are not made in the court where the action itself was pending. Conceptually, however, they must be considered as motions in the action, and hence, for the purposes of enforcement not only is the judgment deemed a Supreme or County Court judgment, but the *action* must be deemed to have been a Supreme or County Court action. *But cf.* 4 N.Y. Jud. Conference Rep. 125, 166–67(1959). Otherwise, such questions as the appealability of the determination of the motion and the venue of the motion would remain unanswered. The situation is somewhat analogous to the motion made in Supreme Court for a subpoena which is necessary to a lower court action and cannot be served within the lower court's territorial jurisdiction.

In the case of supplementary proceedings, the situation is entirely different. A supplementary proceeding is expressly designated a "special proceeding" (N.Y. Civ. Prac. Act §773), which is instituted upon service of a subpoena or order. *Id.* §774. According to one authority, this designation "can be explained only as [an] . . . accident of history." Cohen & Karger, *op. cit. supra* at 131. Indeed, this "special proceeding" is most unusual: the relief sought is frequently only disclosure, no petition or answer is utilized, commencement is by service of an order or subpoena rather than by service of a notice, and the proceeding frequently terminates without a "final order"—in fact, the court is seldom called upon to make

any determination— at the conclusion of an examination. Even the conclusion of an examination does not terminate the proceeding for all purposes, as restraints contained in the first papers served apparently terminate only upon the expiration of two years from service, regardless of the disposition of the "proceeding." Conversely, where an examination is not concluded, the "proceeding" is deemed closed after two years.

The failure of this "special proceeding" to meet most of the traditional tests creates numerous problems. A similar situation arises in the civil practice act with respect to arbitration, which is also expressly designated a "special proceeding," even where no court intervention is sought. See N.Y. Civ. Prac. Act §1459; proposed section 17.2 and notes. At least one court has speculated, without ruling, on the validity under our concepts of due process of a "proceeding" of which the debtor had no notice. See *Estate of Schwartz* v. *Dunishtock,* 175 Misc. 860, 864–65, 25 N.Y.S.2d 742, 746–47 (N.Y.C. Ct. 1941).

Nevertheless, the designation of a proceeding supplementary to judgment as a "special proceeding" serves some useful purposes. Administratively, it serves to channel examinations and motions to a single court in each county. In New York city, the City Court handles most of these proceedings, since it has jurisdiction over proceedings on Municipal Court judgments as well as on its own judgments. N.Y. Civ. Prac. Act §777. The City Court of Buffalo also handles proceedings on its own judgments, and in other counties the bulk of the proceedings are in the County Court. *Ibid.*

The statute expressly provides that proceedings may be instituted upon judgments of "any court of this state, whether or not of record." *Id.* §773. *But see* 4 N.Y. Jud. Conference Rep. 171 (1959). It also provides that it "shall not in any case be necessary, as a condition of maintaining a proceeding . . . , to file any transcript of judgment in the office of any county clerk." N.Y. Civ. Prac. Act §777.

Since examinations must be held in the county where the person to be examined resides, is regularly employed or has a place for the regular transaction of business in person (*id.* §777 (judgment debtor); *id.* §780 (third party); *id.* §782(3) (witness)), and since each service of a subpoena or order apparently institutes a separate proceeding (*id.* §774), there may be literally dozens of proceedings "pending" in different courts, or in the same court, at the same time upon a single judgment. Ordinarily, there is no effective way that anyone but the judgment creditor may determine the number or nature of such proceedings. Moreover, it is common practice to caption each of the proceedings identically as the judgment creditor against the judgment debtor, despite the fact that the creditor may be seeking relief against a third party, or merely information from a witness. See, *e.g., Hollywood Garage Corp.* v. *Pettis & Co.,* 169 Misc. 906, 9 N.Y.S.2d 374 (Sup. Ct. 1938). *But cf.* Karger, Titles of Actions and Special Proceedings 29 (1957).

The proposed title attempts to eliminate some of the duality of procedure in the present provisions. It also largely eliminates any remaining justification for continuing the statutory judgment creditor's action procedure provided for in sections 1189 through 1196 of the civil practice act. Those sections constitute a statutory preservation of the ancient creditor's bill in chancery. See Note, *Present Status of the Creditor's Bill in New York,* 6 Syracuse L. Rev. 334, 335 (1955). Although Field intended the abrogation of that procedure and its replacement by the "cheaper and easier" proceedings supplementary to execution (First Report of Commissioners on Practice and Pleadings 201 (1848)), the legislature merely adopted supplementary proceedings as an additional, alternative procedure. See N.Y. Code Civ. Proc. §182, preliminary note (Throop ed. 1880). Since execution and supplementary proceedings afford far simpler procedures for discovering and reaching the judgment debtor's assets, the creditor's action is seldom utilized today. See 13 Carmody-Wait, Cyclopedia of New York Practice 684 (1954). Whatever vitality it still has is due to two factors. First, a contract to purchase real property may not be reached under any other enforcement procedure, unless it has been attached prior to judgment. N.Y. Civ. Prac. Act §§513, 913, 1192. Since proposed sections 13.1 and 13.2 contemplate the elimination of the restriction in present section 513, there is no reason for continuing the creditor's action on this score. Second, the creditor's action affords a method for resolving questions of title without the risk entailed in a wrongful levy under execution, which gives rise to the present adverse claimant provisions. Proposed rule 62.17, however, affords a more expeditious method for determining title than either of these present procedures.

The provisions designating particular courts in which supplementary proceedings are brought are retained by proposed rule 61.1 to enable the courts which now handle the bulk of these proceedings to continue to do so, and not burden other courts not having adequate facilities. In order merely to effect a restraint or to examine a debtor, third party or witness, however, the proposed rules do not require that a "special proceeding" be instituted. Restraining notices and subpoenas may be issued out of any court in which a proceeding could be brought. Thus, in most cases, no proceeding will be brought; the procedure will therefore be similar to that under present execution practice. Moreover, examinations are permitted to be held outside the courthouse, which should afford some relief to already over-taxed facilities.

If affirmative relief is sought against a judgment debtor, no special proceeding is necessary since the court which rendered the judgment already has jurisdiction over him. Thus, a motion may be made in any court in which a special proceeding could have been brought for an order directing a debtor to turn over property or pay installments to the judgment creditor. This motion is "in the original action" in much the same way that present motions for leave to issue an execution brought in Supreme Court are considered to be motions "in the action" in a lower court which rendered the judgment.

If affirmative relief is sought against third parties, however, a special proceeding is brought under the proposed rules by the judg-

ment creditor, as petitioner, against the third party as respondent. In this area, the present procedure is largely retained.

In abolishing the rule of present section 643 that personal property must be exhausted before a levy can be made on real property, an unwarranted burden on judgment creditors and tenderness for judgment debtors is removed from the statutes. The debtor can hardly claim that he is being harassed by sale of his real property since, if he has enough personality, he should satisfy the judgment by turning over sufficient money or personal property; in such a case, the creditor will not be prejudiced, since he has a lien on the real property. On the other hand, the judgment debtor may prefer to retain his personal property and have his real property applied to the satisfaction of his judgment, and the creditor may acquiesce in such an arrangement. It is interesting to note that in Illinois real property must be levied upon before personal property. Ill. Ann. Stat., c. 77, §11 (Smith-Hurd 1935); see also Note, 47 Nw. L. Rev. 548 (1952).

The change also has the merit of avoiding a number of difficulties. For example, there is today an ambiguous distinction between the characterization of leasehold property depending on whether the unexpired term of the lease is for more or less than five years at the time of the sale. Section 708 of the civil practice act states that the term "real property" as used in the sale and redemption sections includes leasehold property where the lease has at least five unexpired years. By implication, a lease having less than five years to run is not "real property." See 7 Carmody-Wait, Cyclopedia of New York Practice 629 (1953). Sections 509, 510(1) and 512, however, include "chattels real" with real property in dealing with liens and levies. Since section 33 of the Real Property Law defines a "chattel real" to mean an estate for years, the extent to which a lease for less than five years is treated as real property is unclear. *Cf.* N.Y. Real Prop. Law §290(1) ("real property" for the purpose of recording includes "chattels real, except a lease for a term not exceeding three years"). There is also a distinction between growing annual crops which are considered personal property and growing perennial crops which are considered realty until they are severed from the land. See 7 Carmody-Wait, *op. cit. supra* at 624.

For a discussion of the various rules with respect to priority of levy between real and personal property, see Note, 47 Nw. L. Rev. 548 (1952).

Proposed rule 61.2 consolidates the scattered provisions for enjoining transfer of the debtor's assets and permits a restraining notice to be utilized as an independent enforcement weapon without court order. Proposed rule 61.3 provides for disclosure in aid of enforcement; it parallels many of the rules in proposed title 34, which deals with disclosure generally. A method for the mail examination of all third persons similar to that presently provided only for financial institutions is contained in this rule. Examinations requiring the appearance of judgment debtors, witnesses and third parties may be secured without application in many situations

where present law requires leave of court, but the distinction between third parties and witnesses—and the consequent denial of fees to the former—has been abolished.

Enforcement by court order is covered in proposed rules 61.4, 61.5 and 61.6. Under these rules, a garnishee required to pay money in satisfaction of the judgment does so directly to the judgment creditor rather than through the sheriff as a "middleman." As a substitute for the present garnishee execution on wages, the procedure for installment orders is expanded in proposed rule 61.5 so that an order can operate as a levy on wages, but only upon default of voluntary payment by the debtor. A debtor is thus enabled to avoid embarrassment and the risk of losing his job while his creditor is substantially as secure. The vestigial requirement that an execution must be returned unsatisfied before garnishment execution can be obtained is abolished by the consolidation.

Proposed rule 61.7 is new. It vastly simplifies the present supplementary proceedings receivership provisions and incorporates the generally applicable parts of proposed title 74, which relates to temporary receivers as a provisional remedy.

A new provision, proposed rule 61.8, permits the use of enforcement devices after verdict or decisions but before the judgment is actually entered. Protection prior to verdict or decision is afforded in some cases by attachment. See proposed article 15; proposed title 72.

Executions against real and personal property are covered by proposed rule 61.9. The requirement that transcripts of the judgment be filed in each county to whose sheriff an execution is issued has been eliminated, as has the requirement that leave of the court must be obtained to issue an execution after five years in certain situations.

Proposed rules 61.10 and 61.11 regulate levy and sale of personal property; proposed rules 61.12 and 61.13 are the parallel provisions for real property. Proposed rule 6.14 provides for the disposition of the proceeds of a sale in accordance with the priority system contained in proposed article 13. The principal change made by these rules, in addition to the elimination of the requirement that personal property be exhausted before real property can be levied upon, is the elimination of the right of redemption of real property.

Although imprisonment as punishment for contempt has been retained, execution against the person has been eliminated. See introduction to proposed title 71.

The present remedies for failure of title to property sold are continued by proposed rule 61.15. Proposed rule 61.16 is an omnibus rule permitting the court to control enforcement through directions to the sheriff. The present provisions for determination of adverse claims to property affected by an enforcement device are consolidated and simplified by proposed rule 61.17.

Proposed rule 61.18 contains provisions for protecting a debtor or other person from abuse of any of the enforcement devices. On

the other hand, debtors who avoid service by leaving or concealing themselves may be arrested under proposed rule 61.19 and both debtors and third parties may be confronted with effective penalties under proposed rule 61.20 if they thwart enforcement by disregarding process and orders.

References to "property," "debt," "garnishee," "judgment creditor" and "judgment debtor" in this title should be construed in accordance with proposed section 13.1, which also defines a "money judgment." See also proposed title 60.

TABLE OF RULES IN TITLE 61

RULES—TITLE 61. ENFORCEMENT OF MONEY JUDGMENTS

61.1. Where enforcement proceeding instituted.

(a) Court and county in which proceeding instituted.

1. If the judgment sought to be enforced was entered in the city court of the city of Albany, Buffalo, Mount Vernon, New York, Rochester, Schenectady, Troy, Utica or Yonkers, or in the municipal court of the city of Syracuse, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within the county in which the court is located, a special proceeding authorized by this title shall be instituted in that court or in the county court of that county.

2. If the judgment sought to be enforced was entered in the municipal court of the city of New York, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within that city, a

special proceeding authorized by this title shall be instituted in the city court of the city of New York.

3. In any other case, if the judgment sought to be enforced was entered in any court of this state, a special proceeding authorized by this title shall be instituted either in the supreme court or a county court, in a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business in person, or, if there is no such county, in any county in which he may be served or the county in which the judgment was entered.

4. If no court in which a special proceeding authorized by this title could be instituted is in session, the special proceeding may be instituted in the supreme court or a county court in any county within the judicial district in which the proceeding could otherwise be instituted or in any county adjoining the county in which the proceeding could otherwise be instituted.

Notes

This subdivision is based upon section 777 and the first sentence of section 773 of the civil practice act. While section 777 relates to the place of institution of proceedings against judgment debtors, its provisions are incorporated by sections 780 and 782(3), which apply to the place where proceedings against third parties and witnesses are to be instituted.

These present sections primarily serve to limit the place of an examination as well as the place where the proceeding is instituted. Under proposed rule 61.3, however, it is not necessary to institute a proceeding in order to conduct an examination. Nevertheless, the place of examination under the proposed rules does not differ substantially from present practice, at least with respect to the *county* in which the examination is held. See notes to proposed rule 61.3(c).

Present sections 777, 780 and 782(3) are exceedingly cumbersome and ambiguous. While the proposed subdivision is intended to retain the present practice in order that there be no shift in the administrative burdens imposed by supplementary proceedings, it has been necessary to clarify some of the present provisions.

Rather than use the term "court of record," proposed subparagraphs 1 and 2 specifically list the courts of record below the Supreme and County Courts. See N.Y. Judiciary Law §2. The City Court of Buffalo is also listed, in order to retain the present express authorization to that court, which is not a court of record. See proposed section 13.10 and notes. Throughout the proposed rules, the distinction between provisions applicable in courts of record and those applicable in courts not of record has been eliminated wherever possible; in this case, however, existing facilities for handling supplementary proceedings would be disturbed by any alteration in the present provisions.

The provision of present section 773 that supplementary proceedings may be had on any judgment rendered in the state, whether by a court of record or by a court not of record, is included in the opening language of proposed subparagraph 3.

Present section 777 apparently indicates that a proceeding on a judgment of the Municipal Court of the city of New York should be instituted in the City Court in the county where the debtor lives or works. Because of the ease of transportation within New York city, and in accordance with other provisions of the proposed rules, New York city is treated as a single unit, and a proceeding under proposed subparagraph 2 may be instituted in any county in the city of New York.

The term "respondent" in the proposed subdivision designates the adverse party in the special proceeding. See proposed rule 27.1. The judgment creditor would be the petitioner in the proceeding and the respondent may be a garnishee, employer or other third party. See, *e.g.*, proposed rule 61.4. Since no proceeding is necessary to examine a witness and since the judgment debtor is proceeded against by motion (see proposed subdivision (b)), a witness or the judgment debtor will not ordinarily be a "respondent." A witness or judgment debtor is considered as if he were a "respondent," however, for the purposes of subdivision (b), which designates the appropriate court for issuance of subpoenas and notices, as well as the appropriate court for making a motion against the judgment debtor.

The fourth sentence of present section 777, as well as the second sentences of present sections 780 and 782(3), are covered in subparagraph 4. *Cf.* proposed rules 33.3(a), 33.3(c) and 33.4.

The separate venue provisions for garnishee executions in subdivision 1 of present section 684 have been deleted; they are unnecessary as a result of the consolidation of garnishee executions with installment payment orders. See proposed rule 61.5 and notes.

(b) Notices, subpoenas and motions. A notice or subpoena authorized by this title may be issued from, and a motion authorized by this title may be made in, any court in which a special proceeding authorized by this title could be instituted if the person served with the notice, subpoena or notice of motion were respondent.

Notes

Since this title eliminates the necessity of instituting a special proceeding in order to examine or strain a person, or in order to seek relief against a judgment debtor, the proposed subdivision is necessary to specify the court from which subpoenas and notices are issued and in which a motion is made. It also replaces a similar provision contained in the second sentence of subdivision 8 of present section 782, that a proceeding is "deemed pending" upon issuance of process, even if the process is not served, for the purpose of examining a witness out of the state.

By making subpoenas, notices and enforcement motions in effect part of the original action, some of the present problems of appeal raised by the designation of supplementary proceedings as "special proceedings" are eliminated. See introduction to this title; see also Cohen & Karger, Powers of the New York Court of Appeals 131 & n.20, 169, 203 n.63 (rev. ed. 1952). Examinations, restraints and enforcement motions would ordinarily not result in "final orders"; this is similar to the present disposition of motions relating to executions. *Ibid.* Where the rights of a third party are involved, however, or affirmative relief against him is sought, the judgment creditor would proceed under this title by special proceeding which would result in an appealable judgment. See proposed rule 27.9.

61.2. Restraining notice.

Preliminary Note

This rule is based upon parts of sections 773, 775(1), 779(1), 779(4), 781, 783(1), 783(2), 799 and 799-a in the article on proceedings supplementary to judgment of the civil practice act. It also replaces parts of present sections 687-a(2), 687-a(7) and 795.

Some of these present provisions provide for restraints on the transfer of a judgment debtor's property: section 775(1) allows a restraining provision in an order for the examination of a judgment debtor; section 779(1) is a similar authorization for third party examination orders; section 781 takes effect when a subpoena for the examination of a judgment debtor or third party, indorsed with the section, is served. Section 799 permits the court to make an injunction order restraining any person, "whether a party or not a party to the special proceeding," and section 799-a provides that the judgment debtor's transfer of property subject to restraint is void against the creditor, even though the debtor was not restrained himself. Section 795 provides for a restraint when an action is brought against a judgment debtor's debtor and section 687-a provides for a similar restraint when such a debt is levied upon. The remaining provisions relate to duration of the restraint and methods of service.

It has been suggested that the judgment itself should contain a restraining provision. Report of the Commission on the Administration of Justice in New York State 354 (1934); *Zwerdling* v. *Hamman Building Corp.*, 145 Misc. 471, 473–74, 259 N.Y. Supp. 593, 596 (Sup. Ct. 1932). In 1932, the Committee on Practice and Procedure in the City Court of the New York County Lawyers' Association recommended:

> [I]t would be advantageous to have the judgment automatically operate as a restraining order prohibiting the judgment debtor from disposing of his property without a fair consideration, unless the judgment were bonded. To effect such restaint, however, it would be necessary (1) that the action be commenced by personal service of a summons accompanied by a notice to the effect that the judgment entered would restrain the defendant from disposing of his property. (2) If a complaint were served, a prayer for such relief should be incorporated and (3) the judgment itself should contain such a restraining order and be served upon the judgment debtor or his attorney. [Yearbook, New York County Lawyers' Association 284 (1932).]

If service of the judgment is to be required, there appears to be no advantage to be gained by including the restraining provision in the judgment and there may well be practical disadvantages. Moreover, the notice accompanying the summons and complaint contemplated by the Committee of the County Lawyers' Association, might well be interpreted by the prospective judgment debtor as notice to dispose of his assets prior to the entry of judgment. Proposed rule 61.8 provides greater protection than the New York County Lawyers' Association proposal. If the judgment creditor has grounds to believe that he will have difficulty in collection, he can obtain a restraint when the decision is handed down. Some prior protection is available through provisional remedies.

Proposed rule 61.2 provides a simple method for restraining the judgment debtor from disposing of any of his non-exempt property until the judgment is satisfied, vacated, or the time limited for commencing an action upon the judgment expires. Under present law, restraint of transfer is generally treated as an adjunct to examination and to application by the judgment creditor of discovered assets to the satisfaction of the judgment. In practice, however, a restraining notice is sometimes used as an enforcement procedure

by itself. There is no substantial reason for the present restriction which permits restraining notices without a court order only where an examination is sought. The proposed rule contemplates independent use of a restraining notice where desirable. If the judgment debtor does not have any non-exempt assets, the restraining notice will not affect him; if he does, he should be required to apply those assets to the satisfaction of the judgment, before the restraint is released. The burden is placed where it should be—upon the judgment debtor.

Since the restraining notice is an enforcement procedure, where the judgment debtor obtains a stay for purposes of appeal pursuant to proposed rule 80.9, the prohibition against disposition of assets will be suspended. The court should continue the restraint, however, as it may do pursuant to proposed rule 80.9(b), where a stay is obtained without security. Similarly, the court may impose a restraint upon the judgment debtor at the conclusion of trial pursuant to rule 61.8, pending the giving of security.

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court. It may be served upon any person. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested. It shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and it shall set forth rule 61.2(b) and shall state that disobedience is punishable as a contempt of court.

Notes

This subdivision is new. It permits a restraining notice to be utilized as an independent enforcement device. Issuance parallels the provision for issuance of a subpoena of proposed rule 38.2(a), except that no provision is here made for issuance by "the judge where there is no clerk," because all of the enforcement courts listed in proposed rule 61.1(a) have clerks. Service is prescribed in the same manner as a summons or by registered or certified mail, return receipt requested. Since failure to comply with a restraining notice is punishable as a contempt of court (see proposed rule 61.20; *cf.* N.Y. Civ. Prac. Act §801), service should be in a manner calculated to insure actual receipt of the notice. *Cf.* N.Y. Civ. Prac. Act §783.

The provision requiring a statement in the notice of the "amount then due" on the judgment is required by the last sentence of subdivision (b) permitting a garnishee to dispose of any property and money if he withholds twice the amount of money due on the judgment. A similar provision in present section 781 ambiguously refers to the "amount claimed" by the judgment creditor in the subpoena; the subpoena is required only to include a statement of the total amount of the judgment. See N.Y. Civ. Prac. Act §775(2).

The restraining notice may be served on the debtor as well as on any garnishee or suspected garnishee. *Cf.* N.Y. Civ. Prac. Act §781.

While independent use of a restraining notice is permitted by this rule, there is no intent to disapprove its use in connection with other enforcement devices. It may be served simultaneously with a subpoena, for example, as under present practice.

The restraining notice should be captioned in the court in which a proceeding could be brought. See proposed rules 32.1(c), 61.1(b).

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment is satisfied or vacated or the time limited for commencing an action upon the judgment expires. A restraining notice served upon a person other than the judgment debtor is only effective if, at the time of service, he owes a debt to the judgment debtor, or he is in the possession or custody of property in which he knows or has reason to believe the judgment debtor has an interest, or which has been specified by the judgment creditor as such property in the notice. All such property then or thereafter in the possession or custody of such a person and all debts of such a person to the judgment debtor, shall be subject to the notice. Such a person is for-

bidden to make or suffer any sale, assignment, transfer or interference with any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court, for six months after the notice is served upon him, or until the judgment is satisfied or vacated or the time limited for commencing an action upon the judgment expires, whichever event first occurs. While a restraining notice is in effect, no transfer, whether by the garnishee or by the judgment debtor, of property or of a debt subject to the notice shall be effective against the judgment creditor who served the notice, except as otherwise provided by law or order of the court. If a garnishee served with a restraining notice withholds the payment of money due the judgment debtor in an amount equal to twice the amount due on the judgment, the restraining notice is not effective as to other property or money.

Notes

This subdivision is based upon section 781 of the civil practice act. It also replaces the provisions with respect to the effect and duration of a restraint contained in sections 773, 775, 779, 799 and 799-a.

Under the second sentence of this subdivision the restraining notice is effective against persons other than the judgment debtor only if they know or have reason to believe at the time of service that they are indebted to, or have property of, the judgment debtor. This provision is based on present section 781 which provides that the restraining provision in a *subpoena* is not effective unless the third party has property of the judgment debtor at the time of service. The restraining provision in an *order* for examination under section 779 does not contain the limitation in section 781 but the order is issued only upon "a showing by affidavit that the judgment creditor or his attorney has reason to believe that any person

or corporation has, property of the judgment debtor exceeding ten dollars in value, or is indebted to him, in a like sum."

This limitation, in both the proposed subdivision and present section 781, is designed to relieve persons who may have no connection with the judgment debtor from the burden of imposing a continuing check upon all funds or property which may subsequently be received during the effective period of the notice. Thus, if the judgment debtor has no account or safe deposit box in a banking institution at the time of service, the institution has no further obligation, even if the judgment debtor thereafter opens an account. Under any other rule, the burden upon such institutions would be excessive.

The term "knows or has reason to believe" is used to avoid hardship where a garnishee who has property of the judgment debtor at the time of service is unaware of the true owner—as in the case of a bank account maintained in a different name. *Cf. Cotnareanu* v. *Chase Nat'l Bank*, 271 N.Y. 294, 2 N.E.2d 664 (1936).

Unlike sections 775(1) and 781 of the civil practice act, which limit the period of restraint to two years from the time of service, the proposed subdivision provides that the restraining notice remains in effect against a judgment debtor until the judgment is satisfied, vacated or the time for commencing an action upon the judgment has expired. Under present section 781, the period of restraint may be extended beyond the two-year period by "order of the court for good cause shown." An order for a new examination of the judgment debtor may be obtained, however, upon a showing that the judgment is at least partly unsatisfied and either that one year has elapsed since the judgment debtor was last examined or that "there is reason to believe" that the judgment debtor has property or income, and a new restraint for an additional two-year period may be effected thereby. N.Y. Civ. Prac. Act §775(1). Prohibiting the judgment debtor from freely disposing of his assets until the judgment is satisfied is neither unreasonable nor an excessive hardship; if the judgment debtor has assets they should be applied to the satisfaction of the judgment; if he has none, the restraining provision will have no effect. Proposed rule 61.18 permits modification of the time provision and the imposition of any conditions deemed desirable by the court.

Sections 779(1) and 781 of the civil practice act provide the same two-year period of restraint for third parties as is provided for judgment debtors. A judgment debtor who finds a restraint too harsh always has the power to terminate it by satisfying the judgment, but a garnishee may not have such an option; the effective period of the restraint as to garnishees is therefore limited by the proposed subdivision to six months. This short period should encourage prompt action by the judgment creditor; it affords adequate time for examination and application of property to the satisfaction of the judgment. If more time is required in an unusual case, the judgment creditor may obtain an extension pursuant to proposed rule 61.18 or leave to serve a new restraining notice pursuant to subdivision (c) of this rule.

This subdivision continues the provision of present section 781 permitting the garnishee to dispose of any excess money or any other property of the judgment debtor in his possession or control, if he withholds money equal to twice the amount due on the judgment. See notes to proposed subdivision (a). Twice the amount is required to insure that there will be a sum adequate to cover costs and interest.

The third paragraph of present section 781, and the identical provision in section 779(1), are replaced by the provision in the proposed subdivision that the person served must "know" or have "reason to believe" that property belongs to the judgment debtor and by the provision that the restraining notice may specify the property subject to the restraint. The latter provision is based upon a similar provision in proposed rule 72.5(b) with regard to attachment. See notes to proposed rule 72.5(b).

The restrictions of section 792 are omitted as unnecessary since property and debts exempt from application to the satisfaction of a money judgment are not included in the definitions of property and debt in proposed section 13.1, and the judgment therefore cannot be enforced against them.

The next to last sentence in the proposed subdivision is based upon present section 799-a. The ineffectiveness of transfers by the judgment debtor in the present section has been extended to transfers by a garnishee served with the notice, as well as to transfers by a judgment debtor who has himself been served with a restaining notice. Moreover, the proposed provision recognizes the superiority of the lien and priority provision of proposed sections 13.2 and 13.3—a transfer made in satisfaction of a prior properly-docketed judgment, for example, would be effective against a judgment creditor even though he had served a restraining notice.

In addition to a transfer being ineffective as to the judgment creditor under present section 799-a and the proposed provision, the sanction of contempt may be available for violation of the restraining notice. It should be noted, however, that the operation of section 799-a does not depend upon a contempt. For example, if, after a garnishee is served with a restraining notice, the debtor assigns his interest in property held by the garnishee, neither the garnishee nor the judgment debtor is in contempt: the garnishee did not transfer the property and the debtor was not subject to a restraint. Nevertheless, section 799-a protects the creditor by providing that the transfer is ineffective as to him.

The exception in section 799-a for negotiable documents is covered by proposed section 13.1(d)(4), under which a restraining notice is only effective if served upon the person holding the instrument.

Sections 775(1), 779(1), 795 and 799 of the civil practice act provide for restraints by court order, while that of section 687-a operates upon a levy by the sheriff. Since violation of a restraining notice is punishable by contempt under proposed rule 61.20, the provisions of proposed rule 61.2 for an attorney-issued restraint would appear to be sufficient for all purposes. Abuse would be

brought to a court's attention under proposed rule 61.18, but the court's intervention seems unnecessary to the imposition of a restraint.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment.

Notes

This subdivision is new. Although the last paragraph of present section 781 provides for extensions of a restraint only upon "good cause shown," a new two-year restraint would be contained in an order for a subsequent examination, which can be obtained by a mere showing that one year has elapsed since the last examination. N.Y. Civ. Prac. Act §§779(1), 779(4).

The proposed subdivision is designed to require that the judgment creditor show his need for a new restraint, whether or not he seeks an examination. He may show such matters as that he was unaware of certain property despite diligent attempts to ascertain its existence and location during the earlier restraining period or that he was unable to apply property discovered to the satisfaction of the judgment during that period.

To prevent undue harassment of third parties, the proposed subdivision requires leave of court whether or not the judgment has been assigned to a new judgment creditor.

Because a restraining notice served upon a judgment debtor is effective under subdivision (b) for the life of the judgment, subdivision (c) is only applicable to notices served upon persons other than the judgment debtor. See notes to proposed subdivision (b).

61.3. Disclosure.

(a) Form of subpoena; service. At any time before a judgment is satisfied or vacated or the time limited for commencing an action upon the judgment expires, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon,

and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court. Any or all of the following kinds of subpoenas may be served:

1. A subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein.

2. A subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein.

3. An information subpoena, accompanied by a copy and original of written questions and a prepaid, addressed return envelope. Service of an information subpoena may be made by registered or certified mail, return receipt requested. Answers shall be made in writing under oath by the person upon whom served, if an individual, or by an officer, director, agent or employee having the information, if a corporation, partnership or sole proprietorship. Each question shall be answered separately and fully and each answer shall refer to the question to which it responds. Answers shall be returned together with the original of the questions within seven days after receipt.

Notes

This subdivision is derived from parts of sections 774(4), 775, 779, 782 and 782-a of the civil practice act, which relate to the manner in which judgment debtors, third parties, witnesses and financial institutions may be examined in supplementary proceedings. It also replaces subdivision 3 of section 687-a. which contains an entirely separate procedure, derived from the attachment sections, for disclosure from a debtor of the judgment debtor. These sections are extremely prolix, they contain numerous inconsistencies and technicalities, and their procedures have proven wasteful of the time of the court, the judgment creditor and the person to be examined.

An examination may be obtained, by subpoena, of the judgment debtor within two years from the "recovery" of the judgment under present section 775(2), and of a third party or witness within two years from the "date" of the judgment under present sections 779(2) and 782(2). Subdivision 6 of section 782, however, apparently permits a subpoena to examine a witness to issue after the two-year period, if an examination of the judgment debtor or a third party is in progress or was concluded less than six months before.

An "information subpoena," for obtaining disclosure from a financial institution by requiring it to answer questions by mail regarding accounts and deposits maintained by the judgment debtor, may only be utilized "within the time allowed for examination of witnesses under section seven hundred eighty-two." N.Y. Civ. Prac. Act §782-a(2). Since section 782 imposes no limitation upon examination by order, the clause quoted apparently refers to examination by subpoena. But, as noted above, section 782 contains two distinct time provisions for examination by subpoena: a two-year provision in subdivision 2 and a provision in subdivision 6 determined by the duration of an examination of the judgment debtor or a third party. Even if the time limitation on information subpoenas was clear, its utility may be seriously questioned, for its expiration only serves to prevent the simple letter procedure, for a fee—even if a small one—to the person examined, and leaves the judgment creditor no alternative but to seek an examination in which appearance with books and records may be compelled, and transfer restrained, without fee.

It should also be noted that subdivisions 2 and 4 of section 774 indicate that the period within which a subpoena may be served upon the judgment debtor, a third party or a witness, as well as that within which an information subpoena may be served upon a financial institution, is "two years from the date" of the judgment.

The proposed subdivision places no time limit on examination by any type of subpoena. Under it, examination may be had at any time before the judgment is satisfied, vacated or barred by the statutes of limitation. Subparagraph 3 also expands the information subpoena procedure so that it may be used to obtain information from any person and relaxes the present limitation on the questions that may be asked.

Although present section 782-a(4) provides for service of an information subpoena by ordinary mail, since failure of the person to whom the subpoena is directed to respond within seven days is punishable as a contempt, expansion of this procedure to other persons dictates a manner of service better calculated to insure

actual receipt. Subparagraph 3 of the proposed subdivision requires that if service is not made personally, as with other subpoenas, it be made by registered or certified mail. The requirement that an original and a copy of the questions be enclosed is similar to that of present section 782-a(3)(c) and is designed to enable the person served to keep a record of the event without undue burden.

Although answers to information subpoenas need not be under oath under present section 782-a, subparagraph 3 of the proposed subdivision adds this requirement. This change should not result in any substantial burden to financial institutions. Indeed, financial institutions, and other third parties, under present practice are frequently permitted by the attorney for the judgment creditor to mail an affidavit in lieu of an appearance, in cases where a subpoena requiring appearance is served primarily to effect the restraint it contains. The requirement of an oath should also impress other persons who may be served with an information subpoena under the proposed subdivision with the importance of answering truthfully. Because of this requirement of an oath, which would necessitate a notarial fee, the fee of subdivision 4 of present section 782-a has been increased from twenty-five cents to fifty cents. See proposed subdivision (b).

This expansion of the information subpoena procedure, together with the severance of the restraining notice effected by proposed rule 61.2, limits a subpoena requiring appearance to its proper use. Accordingly, where a person is served with such a subpoena, he will be actually required to appear for an examination. In that event, unless it is the judgment debtor himself who has been served, the person subpoenaed should be paid witness fees and traveling expenses; there is no sound reason for the present rule that such fees need not be paid if there is "reason to believe" that the third person has property of the judgment debtor. See introduction to this title; notes to proposed subdivision (b).

Service of a subpoena under subparagraphs 1 or 2 of this subdivision would be made, in accordance with proposed rule 38.3, in the same manner as a summons. Accordingly, subdivisions 1 and 2 of present section 783, which are to the same effect, have been omitted from this title. Similarly, proposed rule 38.2(a) covers who may issue a subpoena and replaces the many provisions specifying the attorney for the judgment creditor in the supplementary proceedings article of the civil practice act.

The phrase "all matters relevant to the satisfaction of the judgment" is new and is designed to change the rule of those cases which have held that examination must be limited to material means for satisfying the judgment. *Cf. Estate of Schwartz* v. *Dunishtock*, 175 Misc. 860, 25 N.Y.S.2d 742 (N.Y.C. Ct. 1941). There is no reason for precluding the judgment creditor from discovering such matters as the judgment debtor's address, place of employment, number of dependents or other obligations, especially if the witness' fees are paid as required by proposed subdivision (b).

Each of the subpoenas specified by this subdivision are captioned in a court in which a proceeding may be brought. See proposed

rules 32.1(c), 61.1(b). Unlike the present provisions, service of a subpoena under this title does not itself initiate a separate proceeding. The place of examination is similar to that under present practice, however. See proposed subdivision (c).

The last sentence of the introductory paragraph of this subdivision is designed to make it clear that service of one kind of subpoena does not preclude subsequent or simultaneous service of another. It is limited with respect to repeated examination of the same judgment debtor by proposed subdivision (f); the fee provision of proposed subdivision (b) and the protection of the court under proposed rule 61.18 also operate to keep repeated examinations within bounds.

Although many of the present provisions provide for examination by court order, rather than by attorney-issued subpoena, they are only significant when an attorney is prevented from issuing a subpoena because of lapse of time or because of a previous examination. In this proposed rule, the time limitation provision has been abolished, and the limits upon repeated examination are handled by requiring fees to be paid all witnesses but the judgment debtor and by requiring leave of court to issue a second subpoena for examination of the judgment debtor. See proposed subdivisions (b) and (f). Therefore, it is contemplated that post-trial examination will be primarily attorney-instigated and attorney-conducted, subject to the power of the court to supervise proceedings or to protect a witness under proposed rule 61.18.

The provision in sections 782(7) and 783(3) of the civil practice act requiring payment of witness fees at the time of service has been changed to "paid or tendered." Although proposed rule 38.3 was drafted to require a demand by the witness, the advisory committee, on reconsideration, decided that the language be changed to read as follows (brackets indicate deletions, italics indicate insertions):

> A subpoena shall be served in the same manner as a summons. Any person subpoenaed [, upon demand,] shall be paid *or tendered* in advance authorized traveling expenses and one day's witness fee.
>
> *(b) Fees. A judgment debtor served with a subpoena under this rule shall not be entitled to any fee. Any other person served with a subpoena requiring attendance or the production of books and papers shall be paid or tendered in advance authorized traveling expenses and one day's witness fee. Any other person served with an information subpoena shall be paid in advance the sum of fifty cents.*

Notes

This subdivision is based upon parts of sections 782(7), 782-a(4) and 783(3) of the civil practice act.

The provision in present section 783(3) that the judgment debtor shall not be entitled to fees is continued in the proposed rule. He is protected against harassment by proposed rules 61.3(f) and 61.18. The distinctions made in section 783(3) and other sections between witnesses and third parties, however, have been eliminated. Under the present section, fees and traveling expenses are denied to "third parties," even those who have no intent to impede collection of the judgment, apparently in an effort to minimize the expense of enforcing judgments. On the other hand, "witnesses" are entitled to their fees. N.Y. Civ. Prac. Act. §§782(7), 783(3). The distinction is not a clear one; an attorney for the judgment creditor may not know in advance whether a person is a "witness" or a "third party." A "third party" may actually have no property belonging to the judgment debtor but so long as the attorney for the judgment creditor alleges that there is "reason to believe" that he has at least ten dollars worth of such property, he can be denied fees. It is not uncommon for a person to be subpoenaed as a "third party," rather than as a "witness," solely to avoid fees. While there are restrictions on the questions that a third party can be asked which do not exist for witnesses (see *City of New York* v. *Rein, Weinstein Fur Corp.,* 49 N.Y.S.2d 833 (Sup. Ct. 1944)), the restrictions are seldom observed. Moreover, a prudent attorney is induced to treat all persons as third parties, because a third party order or subpoena contains a restraining provision, while a witness subpoena does not.

The last sentence of this subdivision is based upon a provision of present section 782-a(4), except that the fee has been increased from twenty-five cents to fifty cents to cover the additional expense resulting from the requirement of an oath. See notes to proposed subdivision (a).

The imposition of fees for all third parties should serve to prevent indiscriminate use of supplementary proceeding subpoenas. Fear of such use apparently leads to the present restrictions upon the matters which may be inquired into. See *Estate of Schwartz* v. *Dunishtock,* 175 Misc. 860, 25 N.Y.S.2d 742 (N.Y.C. Ct. 1941). These restrictions have been abolished in the proposed rules. See notes to proposed subdivision (a). Some of the difficulties alluded to in the *Dunishtock* case could also be alleviated by the proposed expansion of the information subpoena procedure to all third parties.

(c) Time and place of examination. A deposition on oral or written questions or an examination of books and papers may proceed upon not less than ten days' notice to the person subpoenaed, unless the court orders shorter notice, before any person authorized by rule 34.12(a). An examination shall be held during business hours and, if taken within the state, at a place specified in rule 34.9.

Notes

This subdivision is new and replaces parts of sections 775, 777, 780, 782, 783(3) and 791 of the civil practice act.

Section 783(3) of the civil practice act provides that subpoenas shall be served "not less than three days nor more than twenty days before the return date." The proposed subdivision extends the minimum period between service and return date to ten days to afford the witness more time to arrange his schedule and to gather any documents which are required for the examination. It conforms with proposed rule 34.7(a). The twenty-day maximum limitation serves no real purpose; it has been eliminated as unnecessary.

The provision regarding persons before whom the examination may be conducted incorporates proposed rule 34.12(a), which relates to disclosure generally. *Cf.* N.Y. Civ. Prac. Act §791. Because it specifies the person before whom an examination may be taken within or without the state, it makes unnecessary a provision such as subdivision 8 of section 782 of the civil practice act, which incorporates the provisions of article 29 of the civil practice act permitting examinations "of the judgment debtor or any witness" outside the state; the omission of third parties from the quoted phrase is undoubtedly inadvertent.

While present section 791 seemingly limits the person before whom an examination may be conducted by consent, no reason appears why consent cannot be validly given to any time and place and to any person.

Present sections 777, 780 and 782(3) relate to the place of examination as well as to the courts in which supplementary proceedings may be instituted against judgment debtors, third parties and witnesses. This accounts, in part, for their length and complexity. Under present law, a separate supplementary proceeding is usually instituted for each examination. For example, section 774(4) even provides that service of an information subpoena upon a financial institution commences a proceeding. Under proposed title 61, however, this would be unnecessary as post-trial examinations do not alone institute a new proceeding. Rather they are considered to be proceedings in the main action in the same manner as pre-trial examinations.

In this title, the court in which a proceeding may be instituted is specified in subdivision (a) of proposed rule 61.1; under subdivision (b) of that rule, this is the court in which a subpoena is

captioned. This subdivision specifies the place where an examination may be held. No substantial change in present practice results from this division of provisions.

Under present law, an examination within the state must be held in a courtroom unless the person to be examined consents to its being conducted elsewhere. And, although the statutory subpoena form contained in section 775 provides that the person subpoenaed must appear "before one of the justices of our court," in practice judges are virtually never present at the examination. Most courts have no facilities adequate for the conduct of examinations and the proceedings on an examination ordinarily present an unseemly spectacle not befitting the dignity of the courts. See introduction to this title.

Since examinations are largely unsupervised, there appears to be no reason for requiring them to be held in court. Under present law, examinations may be held by consent at another place before a notary public or commissioner of deeds. N.Y. Civ. Prac. Act §791. This is similar to the practice for pre-trial examinations which need not be conducted in court. Accordingly, this subdivision utilizes the general disclosure provision of proposed rule 34.9 to cover the place of examination within the state. Attorneys would still be able to schedule examinations at court within the proper county under the proposed subdivision and a person subpoenaed would be able to seek a protective order to prevent abuse under proposed rule 61.18.

This title does not appreciably alter the present provisions with respect to the county in which the examination must be held. Section 777 of the civil practice act requires proceedings to be instituted, and hence examinations to be held, in a county where the judgment debtor resides, is regularly employed or has a place for the regular transaction of business in person. If there is no such county in the state, he may be examined wherever he can be served. The elaborate provisions of section 777, when the particular court requirements are removed, reduce to a preference for the county where the judgment was renderd, if that county is otherwise proper. Sections 780 and 782(3) have similar requirements for the place of examinations of a third party or witness. Proposed rule 34.9, when read with proposed rule 61.1, which specifies the court from which the subpoena is issued, also has similar requirements.

(d) Conduct of examination. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction, record the testimony. The testimony shall be transcribed. Examination and cross-examination of the witness shall proceed as

permitted in the trial of actions in open court. Either party may be examined as a witness in his own behalf. Cross-examination need not be limited to the subject matter of the examination in chief. All objections made at the time of the examination to the qualifications of the officer taking the deposition or the person recording it, or to the manner of taking it, or to the evidence presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of the witness to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness otherwise agrees. If the witness does not understand the English language, the judgment creditor shall, at his own expense, provide a translation of all questions and answers. Unless the court orders otherwise, a person other than the judgment debtor served with a subpoena duces tecum requiring the production of books of account may produce in place of the original books of account a sworn transcript of such accounts as are relevant.

Notes

This subdivision is based upon parts of proposed rules 34.12(b), 34.12(c) and 34.13, which are contained in the general disclosure title. They are set forth here, rather than referred to, for convenience and because minor changes have been made to conform them to post-judgment examination procedure.

Some of the provisions of this subdivision replace parts of section 784 of the civil practice act. The last sentence of this subdivision is derived from the last sentence of the first paragraph of section 784-a of the civil practice act. The remainder of section 784-a is omitted. Its specific provisions for the protection of trade secrets are covered by proposed rule 61.18.

(e) Signing deposition; physical preparation. The officer at the taking of the deposition shall request the witness to read and sign it or to appear at a stated time for that purpose. The witness shall be entitled to no fee for signing. The deposition shall be submitted to the witness for examination and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness. If the witness fails to sign the deposition, the officer shall sign it and state on the record the fact of the witness's failure or refusal to sign, together with any reason given. The deposition may then be used as fully as though signed. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall list all appearances by the parties and attorneys.

Notes

This subdivision is based upon parts of subdivisions (a) and (b) of proposed rule 34.15, which are contained in the general disclosure title. They are set forth here, rather than referred to, for convenience and because minor changes have been made to conform them to post-judgment examination procedure.

Although the subdivision provides for signing of the deposition either at the time of the examination or at a stated time thereafter, it is contemplated that the present practice in supplementary proceedings of using written questions prepared in advance with the attorney writing in the answers will be followed. This will enable the witness to sign at the time his deposition is taken.

(f) Subsequent examination. Leave of court is required to compel a judgment debtor to appear for the taking of his deposition or to compel the production by him of books and papers within one year after the conclusion of a previous examination of him with respect to the same judgment.

Notes

This subdivision is based upon sections 775(1), 775(2) and 779(4) of the civil practice act. Under subdivisions 1 and 2 of section 775, a subsequent examination of the judgment debtor may be obtained only by court order upon a showing that one year has elapsed since he was last examined in supplementary proceedings or that there is reason to believe that he has or will acquire non-exempt property. Similarly, the provision of subdivision 1 of section 779, that to obtain an order for the initial examination of a third party it must be shown that "the judgment creditor or his attorney has reason to believe" that the person to be examined is a garnishee, is apparently to be read into subdivision 4 of the same section, which provides for a subsequent examination upon a showing that one year has elapsed since the last examination of the third party.

In the case of a person examined as a witness, there is no restriction regarding subsequent examinations, apparently because of the requirement for fees. See notes to proposed subdivision (b). If the subsequent examination is sought within two years from the date of judgment (N.Y. Civ. Prac. Act §§774(2), 782(2)) or within six months from the conclusion of an examination of the judgment debtor or a third party (*id.* §782(6)), it may apparently be obtained by subpoena. At any other time, the examination may be obtained by order upon a showing either that there is reason to believe that the witness has relevant information (*id.* §782(1)) or that the examination is "necessary." *Id.* §782(7).

The proposed subdivision eliminates all restrictions upon subsequent examination except as to the judgment debtor. The requirement of subdivision (b) that fees be paid should deter abuse of the examination as to witnesses or third parties; when it does not, the person subpoenaed may apply for a protective order pursuant to proposed rule 61.18.

To prevent undue harassment of judgment debtors, the proposed subdivision restricts examinations with respect to the same *judgment;* thus, if after examination, the judgment is assigned, the assignee would have to secure leave of court in order to reexamine

the debtor unless one year has expired from the conclusion of the previous examination.

The last paragraph of subdivision 2 of present section 775 provides that a judgment debtor may not subsequently be examined by subpoena, but subdivision 1 of section 775 provides that subsequent examinations may be obtained by court order upon a bare showing that the judgment is unsatisfied and that one year has elapsed since the last examination. Since the court is not required to exercise judgment or discretion, the requirement of a court order is little more than a useless formality. It is an unnecessary annoyance for judgment creditors and courts.

Subdivision 1 of section 775 also permits the court to grant a subsequent examination, although one year has not elapsed, upon a showing that there is reason to believe that the debtor has acquired, or is about to acquire non-exempt property. In this case, the court may apparently exercise discretion in deciding if the showing of "reason to believe" is sufficient, in order to protect the judgment debtor from undue harassment. Accordingly, the proposed subdivision provides that leave of court is only necessary where a subsequent examination is sought within one year after a previous examination.

61.4. Payment or delivery of property of judgment debtor.

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(b) Property not in the possession of judgment debtor. Upon a special proceeding instituted by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, where it is shown that the judgment debtor is entitled to the possession of such property, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding.

(c) Documents to effect payment or delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery.

Notes

This rule is based upon section 796 of the civil practice act which provides for payment and delivery orders in supplementary proceedings. Section 796 limits the evidence which may be presented on the motion to that appearing "from the examination or testimony taken in a special proceeding authorized by this article." There is no apparent reason for confining the admissible evidence in this

manner, and the proposed rule does not so limit the source of the court's information. The judgment creditor may have acquired evidence independently and he should be permitted to introduce it.

Although section 796 contains no limitations with regard to personal property of the judgment debtor in his own possession or control, the section is applicable only to such property in the possession or control of a garnishee that is "capable of delivery" and the judgment debtor's "right to the possession whereof is not substantially disputed."

The "capable of delivery" condition has been omitted; although the court cannot order "delivery" of property incapable of delivery —*i.e.*, intangible property—it can order assignment or transfer under subdivision (c). Moreover, under proposed section 13.1(d)(4) and present sections 687 and 916, intangible property represented by an instrument or certificate, such as corporate stock, is treated as property capable of delivery.

The second condition in section 796 has also been omitted. If the judgment debtor's right to possession is disputed, the issue can be determined upon the motion or proceeding or in accordance with proposed rule 61.17. See notes to proposed rule 61.17.

Section 796 expressly provides that the granting of the order is discretionary with the court. It is interesting to note that section 794, dealing with orders against a debtor of the judgment debtor provides for both a mandatory order directing payment of the indebtedness to the judgment creditor, in which case the court "must grant" the order if the required showing is made, and a discretionary order permitting such payment, in which case the court "may" grant the order. If the judgment debtor is entitled to the property or payment, it would appear that the order should be granted, and proposed rules 61.4 and 61.6 so provide.

Section 796 apparently requires payment of money as well as delivery of other property to the sheriff. Since a sheriff's sale is not required where only money is involved, there is no reason for requiring payment of money to the sheriff. Indeed, sections 793 and 794 of the civil practice act provide for payments of money directly to the judgment creditor.

The proposed subdivision provides that if the person against whom the order is sought has both money and other property of the judgment debtor, the other property should not be delivered unless the money is insufficient to satisfy the judgment. This provision is designed to avoid loss to the judgment debtor by reason of the expenses of, and the distress price which may be received at, a sheriff's sale and to expedite collection by the creditor. It is anticipated that the court in determining which of several types of property should be turned over, after any money available is exhausted, will prefer the more liquid and more easily valued and marketable properties.

Subdivision (c) of this rule is partly new; it is designed to make it clear that the court can implement a payment or delivery orded by directing execution of documents. To the extent that it requires "delivery" of documents, it replaces the second sentence

of present section 687-a(6) and part of the second sentence of present section 795.

Under the proposed rule, the judgment creditor proceeds by motion against the judgment debtor or by special proceeding against third parties. The motion rules of proposed title 33 and special proceeding rules of proposed title 27 are applicable, except insofar as they are inconsistent with provisions of this title. Failure of the judgment debtor to obey the resulting order is punishable as contempt; a judgment obtained against a garnishee is enforceable in the same way as any other judgment. Se proposed rule 61.20. The proceeding is brought in a court specified in proposed rule 61.1(a). The motion is made, in a court in which a proceeding could be brought under proposed rule 61.1(b).

Although a proceeding need not be instituted against a judgment debtor in order to secure an order that he turn over property, subdivision (a) of the proposed rule requires service of the notice of motion in a way calculated to insure his actually being notified. Similar requirements are made for service of a restraining notice under proposed rule 61.2(a), and service of a notice of motion for an installment order under proposed rule 61.5(a).

Section 796 also permits payment or delivery to a receiver, if one has been appointed. This aspect of the present section is treated in proposed rule 61.7(a).

The provision in subdivision (b) of this rule limiting costs where the respondent does not contest the proceeding is adapted from the last sentence of present section 687-a(6), and part of the last sentence of present section 795; both of these sections relate to an action against a debtor of the judgment debtor. The remainder of the last sentence of section 795, providing that the "action . . . shall make the judgment debtor a party defendant," has also been included in the last two sentences of proposed subdivision (b). See also proposed rule 61.6.

61.5. Installment payment order.

(a) Motion for installment order. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without compensation, the court shall order that the judgment debtor makes specified installment payments to the judgment creditor. Notice of the motion shall be served on the judgment debtor in the same

manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him in satisfaction of other judgments and wage assignments, the amount due on the judgment, the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

Notes

This subdivision is based upon section 793 of the civil practice act.

While garnishee execution pursuant to section 684 of the civil practice act affords a relatively automatic procedure for reaching ten percent of the income of certain judgment debtors, its disadvantages to judgment creditors, judgment debtors and employers are substantial. Since any fixed figure necessarily represents a compromise, it may be far from adequate where the judgment debtor's income is large, and oppressive when his income is small. Although a statutory sliding scale would be an improvement over the present arrangement, it could not adequately allow for all of the factors which are material to a determination of a reasonable sum; flexibility in this area is essential. As one commentator observed, it must "be flexible enough to conform to each individual case. To be so comformable it can scarcely be solidified in statutory form and still be satisfactory." Woodbridge, *Installment Payment of Judgments*, 39 Mich. L. Rev. 357, 364 (1941).

Certain of the disadvantages to judgment creditors of garnishee execution were eliminated by the adoption of section 793 which affords a means for reaching income which cannot be reached by execution, such as that derived from Federal employment, out-of-state employers, or from self-employment. Section 793 can also be utilized against ordinary income to obtain more than the ten percent ceiling imposed by section 684. It enables a second judgment creditor to obtain a portion of a judgment debtor's income without awaiting the expiration of a prior garnishee execution. Under section 793, a judgment creditor can reach income without first having an execution returned unsatisfied and, since income is

reached after it is in the judgment debtor's hands, without filing a transcript of the judgment in the county in which the employer is located, or, indeed, in any county.

Thus, to some extent, section 793 fills the gaps left by the garnishee execution procedure of section 684. On the other hand, there is much overlap and the operation of these two independent methods for reaching income has created many problems. Thus, one judgment creditor may seek and obtain an order under section 793 for a sum representing the most that a judgment debtor can reasonably afford to pay, without precluding another judgment creditor from obtaining an additional ten percent of the judgment debtor's income pursuant to a garnishee execution under section 684.

The proposed subdivision provides for a court determination, similar to that required by present section 793, of the amount of income to be applied to the satisfaction of the judgment. This procedure may entail a greater expenditure of court time than the fixed percentage of section 684 but courts, increasingly called upon to make determinations pursuant to section 793, are today frequently reluctant to specify the maximum reasonable sum because there is no way of preventing another creditor from subsequently obtaining the fixed percentage of a garnishee execution. Furthermore, many installment orders are entered on consent with no expenditure of court time.

Earnings for services rendered within sixty days before, or at any time after, a motion is made under this subdivision and income from an exempt trust are exempt from application to the satisfaction of a money judgment except as the court may find them unnecessary to the debtor's requirements. See proposed section 13.5(e)(2). Therefore, service of a restraining notice upon the judgment debtor's employer pursuant to proposed rule 61.2 will not restrain payment of such earnings or income, and such restraint may only be effected after a determination is made under this subdivision. See subparagraph 3 of proposed subdivision (b).

The last paragraph of section 793 of the civil practice act requires orders for payments out of income consisting of moneys awarded in a matrimonial action for the support of the judgment debtor to be made only by the court which made the award. This limited exemption is treated in proposed section 13.5(e)(3).

(b) Withholding of installments.

1. An installment order granted under subdivision (a) shall provide that after a default of the judgment debtor, the order may be served, together with an affidavit of the attorney for the judgment creditor specifying the amount due on the judgment, upon any person from whom the judgment debtor is

receiving or will receive money, in the same manner as a summons or by registered or certified mail, return receipt requested. Service upon such person shall not relieve the judgment debtor of his default.

2. An installment order served upon a municipal or public benefit corporation, or board of education, shall be effective fifteen days after service and shall specify the title or position of the judgment debtor and the bureau, office, department or subdivision in which he is employed and the municipal or public benefit corporation, or board of education, shall be entitled to a fee of two dollars upon being served. In order to affect money payable directly by a department of the state, or by an institution under its jurisdiction, the order shall be served upon the head of the department, or upon a person designated by him, at the office of the department in Albany; in order to affect money payable directly upon the state comptroller's warrant, or directly by a state board, commission, body or agency which is not within any department of the state, the order shall be served upon the state department of audit and control at its office in Albany.

3. A person served with an installment order shall withhold from money then or thereafter due to the judgment debtor, as they become due, the installments specified in the order, and pay them over to the judgment creditor. If such person shall fail to so pay the judgment creditor, he may be punished for a contempt of court and the judgment creditor may maintain an action against him for accrued installments.

4. If, for ninety consecutive days, no money shall become due to the judgment debtor from a person served with an installment order, the order shall thereafter be ineffective.

Notes

Subparagraphs 1 and 3 of this subdivision are designed to replace the garnishee execution procedure of section 684 and 685 of the civil practice act. Upon the debtor's default, every installment payment order is converted into an order to the employer or other garnishee.

Under present garnishee execution procedure, employers are put to considerable expense and annoyance, which could be avoided where the judgment debtor is willing to pay the installments himself. To a large extent, judgment creditors are also unnecessarily hampered by the requirements of filing a transcript and of having an execution against property returned unsatisfied before garnishee execution may be obtained. Although apparently designed to afford the judgment debtor an opportunity to satisfy the judgment before burdening his employer and subjecting himself to embarrassment and the risk of losing his job, the opportunity provided by the requirement for an unsatisfied execution is to pay the judgment in full and not in installments. Moreover, the prerequisite execution may be one which was issued to a county in which the judgment debtor does not reside, or it may have been one issued many years before garnishee execution is sought. It does not effectively operate to protect debtors or their employers from creditors who could satisfy their judgments with little difficulty by levying upon personal property. Compliance with the requirement is frequently a meaningless but costly formality; the attorney instructs the sheriff to return the execution unsatisfied immediately, and any demand the sheriff makes is perfunctory. Garnishee execution is usually sought when the judgment creditor assumes that the judgment debtor is not able to satisfy the judgment immediately, and sheriffs are not in a position to learn of hidden assets. Requiring an unsatisfied execution against property before a garnishee execution may be issued is only effective in practice to the extent that the judgment debtor voluntarily pays the judgment in full, which he could do in any case.

The proposed procedure should avoid annoyance to third parties if the judgment debtor is willing and able to satisfy the judgment by making regular installment payments out of income—the judgment debtor will have an opportunity to make such payments and he will

have notice that unless they are made, an installment order will be served on his employer. Experience with this type of procedure in other states has been favorable. See Nugent, *Devices for Liquidating Small Claims in Detroit,* 2 Law & Contemp. Problems 259 (1935); Woodbridge, *Installment Payment of Judgments,* 39 Mich. L. Rev. 357, 377–80 (1941) (motion for installment order made by judgment debtor stays garnishee execution in Michigan).

Subparagraph 3 of this subdivision continues the provision of present section 684(3) which requires an action to recover a deduction which an employer neglects or refuses to turn over. It changes present law, however, in making the employer's omission punishable by contempt.

The proposed subdivision provides for direct payments to the judgment creditor by the garnishee. While this accords with present section 794, it changes the provision of present sections 684 and 685 that collection pursuant to a garnishee execution is made only by a sheriff. As stated by one commentator, "So long as proceedings under this [latter] type of statute are execution proceedings, the payment of the money must be made to the sheriff, accounted for by him and then paid by him to the judgment creditor. This mode of procedure entails costs, added bookkeeping in the office of the sheriff and the clerk of the courts, and, while originally the costs and fees are subtracted from the sum which goes to the judgment creditor, eventually they are paid by the judgment debtor." Woodbridge, *Installment Payment of Judgments,* 39 Mich L. Rev. 357, 368 (1941).

The provisions in sections 684 and 793 of the civil practice act regarding modification in the event of altered circumstances are covered by proposed rule 61.18.

Subparagraph 2 of this subdivision is derived from parts of subdivisions 4, 6 and 8 of section 684. The fee provision in the first sentence is based upon the last sentence of subdivision 4 of section 684; the requirements of specification of title and department and the fifteen-day delay in effectiveness in the first sentence are derived from subdivision 6 of section 684. The second sentence of proposed subparagraph 2 is based upon subdivision 8 of section 684. While the provisions have been simplified, no significant change is made. For example, the extensive provision for service in present section 684(8) are amply covered by the second sentence of proposed subparagraph 2 when it is read with the general service provision of proposed subparagraph 1.

The first sentence of subdivision 8 of present section 684 is covered in proposed section 13.7.

Subparagraph 4 of the proposed subdivision is based upon a provision contained in the first sentence of subdivision 6 of present section 684, which is only applicable to municipal employees. There is no similar provision in the civil practice act defining the extent to which a garnishee execution continues in force despite termination of employment. Thus, other employers who neglect to notify the sheriff that the execution should be returned partly satisfied may be bound upon reemployment, regardless of the length of the

time interval during which the debtor was not employed. Moreover, by terminating the employment and notifying the sheriff, an employer under present law can apparently have the garnishee execution returned, and the levy removed, whereupon he is free to rehire the employee without thereafter making deductions. While it is possible that the employer's lack of good faith in such circumstances would defeat this result, the proposed provision, by extending the present rule to all employers, more definitely defines the employer's duties when served with an installment order. If an employer holds the order for ninety days after termination of employment, he may safely disregard it thereafter. For large employers, especially, this provision should decrease the burden imposed by installment orders without working signficant hardship on judgment creditors.

It should be noted that present section 684 supplements, and may be considered inconsistent with, present section 687-a, since the former permits a "continuing levy" upon wages as they are earned and the latter provides only for a levy upon debts which are "due or certain to become due." The inconsistency is more succinctly posed by two lines of cases that arose under section 916 in the attachment article, which defines debts that may be levied upon as those "due or yet to become due."

In *Sheehy* v. *Madison Square Garden,* 266 N.Y. 44, 193 N.E. 633 (1934), the Court of Appeals held that under section 916 of the civil practice act, no attachment could issue where, at the time of levy, no money had been earned or was due from Madison Square Garden under a contract with the judgment debtor to give a per formance of a rodeo. The Court construed the liability as a cause of action that had not then accrued. In *Morris Plan Industrial Bank* v. *Gunning,* 295 N.Y. 324, 67 N.E.2d 510 (1946), however, it held that, under sections 916 and 684 of the civil practice act, ten percent of the defendant's future wages could be attached since the attachment operated as a "continuing levy." The rationale of the *Sheehy* case, that, at the time of the delivery of the warrant of attachment to Madison Square Garden, there was no money absolutely due and consequently no claim or cause of action against Madison Square Garden, may be considered to be inconsistent with the *Gunning* decision which, by means of the "continuing levy" concept of section 684, permitted attachment of wages to which there was no present absolute right, and for which there was then no claim or cause of action.

While this inconsistency was not recognized in either case, the *Gunning* and *Sheehy* cases each have bred a line of decisions. See, *e.g., Heiskell* v. *Heiskell,* 62 N.Y.S.2d 532 (Sup. Ct. 1938) (following *Gunning*); *Koch* v. *Burdsal,* 199 Misc. 880, 104 N.Y.S.2d 782 (N.Y.C. Ct. 1951) (same); N. Y. Law Rev. Comm'n Rep. 384–85 & nn. 78–88 (1952). In *Rehill* v. *Rehill,* 202 Misc. 865, 866, 118 N.Y.S.2d 251, 252 (Sup. Ct. 1952), the court stated:

> It long was settled that an indebtedness was not attachable unless it was absolutely payable at present or in the future and not dependable upon any contingency, or, in other words, that

> an attachment did not reach a mere contract right to earn money by a future performance of services . . . [citing the *Sheehy* case] . . . But the rule also was that an execution did not reach wages which became due after the date it was levied, until it was changed by . . . [section 684]; and, as the Court of Appeals has now held in [the *Gunning* case] that the attachment and garnishment statutes must be read together, and in that case so far assimilated [sections 684 and 916] that the 10% limitation in the former is to be read into the latter, it seems to me that the logical inference is that the continuing levy feature of the former is likewise to be read into the latter, and that it hence must be held that an attachment (as well as an execution under C.P.A. §684) now operates as a continuing levy upon 10% of what will become due to defendant from his employers while the warrant is outstanding.

The court thus apparently found no inconsistency between the two cases, having had the opportunity to examine both.

Section 684 applies in terms to garnishee executions upon "wages, debts, earnings, salary, income from trust funds or profits, due or to become due." Thus, if the facts of the *Sheehy* case did not include a contract for a performance at Madison Square Garden, but rather a contract of employment, for a salary, by Madison Square Garden, the decision would be directly in conflict with section 684. It may be asked whether so great a difference in the application of the law is justified by so small a difference in the form of the transaction. Moreover, the language of section 684 may be read to include any contractual right to payment for future services.

In situations in which there is no appropriate garnishee, such as where the judgment debtor is self-employed or employed by the Federal government (see *Reeves* v. *Crowninshield,* 274 N.Y. 74, 80, 8 N.E.2d 283, 285 (1937)) or by an out-of-state employer, the provisions of this subdivision will not be applicable. The judgment creditor must then rely on punitive measures against the judgment debtor directly, under present as well as proposed provisions.

61.6. Payment of debts owed to judgment debtor.

Upon a special proceeding instituted by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court shall require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding.

Notes

This rule is based upon section 794(2) of the civil practice act and is designed to replace sections 687-a(6), 794(1) and 795.

The civil practice act provides judgment creditors with several methods for discovering, restraining and reaching debts due the judgment debtor from third persons. For example, a garnishee may be required to disclose the nature and extent of an indebtedness by certificate after an execution pursuant to section 687-a(3), by subpoena pursuant to sections 779(2) and 782(2), by information subpoena, if the garnishee is a financial institution, pursuant to section 782-a, by court order, if no certificate is furnished pursuant to section 687-a(3), and by court order in the first instance pursuant to sections 779(1) and 782(1). A garnishee may be restrained from paying an indebtedness to the judgment debtor by an execution pursuant to section 687-a(2), by subpoena pursuant to sections 779(2) and 781, and by court order pursuant to sections 779(1), 795 and 799. A garnishee may be authorized to pay the indebtedness in satisfaction of the judgment by an execution pursuant to section 687-a, he may be subjected to an action on the indebtedness by the judgment creditor by court order pursuant to sections 687-a(6) and 795, and he may be permitted to pay the indebtedness by a court order pursuant to subdivision 1 of section 794 or required to do so by an order pursuant to subdivision 2 of the same section. The "certificate" requirement of present section 687-a(3), as well as the other discovery provisions have been replaced by proposed rule 61.3. Similarly, the restraint provisions are consolidated by proposed rule 61.2, and the provisions regarding the methods of reaching an indebtedness by court order, by this subdivision.

Section 794(1) which provides for a court order permitting a garnishee to pay an indebtedness to the judgment creditor or a sheriff has been deleted as unnecessary. Where a garnishee is willing to pay an indebtedness, the judgment creditor may issue an execution pursuant to proposed rule 61.9 for its collection as under present section 687-a or the creditor may proceed pursuant to this subdivision. In either case, the garnishee is protected by the discharge effected by proposed section 13.9.

The sole distinction between the requirements for a permissive and a mandatory order pursuant to section 794 is that the former

may be obtained without notice while the latter must be on notice to both the garnishee and the judgment debtor.

In the case of a garnishee holding money or other property belonging to the judgment debtor, there is no present permissive order provision apparently because such property has long been subject to execution while debts were not made subject until the adoption of section 687-a in 1952.

Sections 687-a(6) and 795, providing methods by which a judgment creditor may be authorized to bring suit against a garnishee on an indebtedness due the judgment debtor, are also replaced by this rule. While the language of subdivision 6 of section 687-a was based upon section 795 of the civil practice act (see N.Y. Law Rev. Comm'n Rep. 355, 364 (1952)), the provisions differ with respect to the manner in which the judgment debtor is to be given notice of the action and the manner in which a recovery in the action is to be applied to the satisfaction of the judgment. Section 795 provides that the judgment debtor shall be made a party defendant, while section 687-a(6) provides that "notice of the pendency of the action shall be given to the judgment debtor, in such manner as the court directs, and the judgment debtor may intervene in the action as a party." Under section 795, any recovery is applied to the satisfaction of the judgment by the judgment creditor, but section 687-a(6) provides that "money or property recovered in the action shall be applied by the officer who made the levy toward the payment of the execution." Apparently the sheriff is entitled to poundage upon the latter recovery, but where the garnishee fails to make a voluntary payment after judgment and enforcement procedures are instituted against him, it is unclear whether funds or property recovered by a sheriff in a different county must be returned to the sheriff who made the initial 687-a levy and whether both sheriffs are entitled to poundage.

Since the same showing that the garnishee is indebted to the judgment debtor must be made whether the judgment creditor seeks an authorization to bring suit pursuant to section 687-a(6) and 795 or seeks a mandatory payment order pursuant to section 794(2), there would seem to be no reason for a judgment creditor to choose the former method where there are no issues of fact. Under the proposed title, if the judgment creditor proceeds by execution, any dispute about the debt may be settled under the provisions of proposed rule 61.17; if the creditor institutes a proceeding under this rule the matter would be disposed of under the provisions of proposed title 27.

The references to receivers in section 794(2) have been omitted in this rule. They are covered by proposed rule 61.7(a).

While section 794 does not explicitly provide for the application of causes of action of the judgment debtor to the satisfaction of the judgment, the courts have applied its provisions to causes of action arising out of contract to the same extent as they may be reached under section 916 of the civil practice act which expressly makes them subject to attachment. See N.Y. Law Rev. Comm'n Rep. 383 (1952). Section 687-a provides that causes of action may be reached by execution and section 1191 provides for their application to the

satisfaction of the judgment by a judgment creditor's action. Under the definition of proposed section 13.1(b), the word "debt" in this subdivision includes a cause of action which could be legally assigned.

61.7. Receivers.

(a) Appointment of receiver. Upon motion of a judgment creditor, upon such notice as the court may require, the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment. As far as practicable, the court shall require that notice be given to the judgment debtor and to any other judgment creditors of the judgment debtor. The order of appointment shall specify the property to be received, the duties of the receiver and the manner in which they are to be performed. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. A receiver shall be entitled to necessary expenses and to such commissions, not exceeding five per cent of the sums received and disbursed by him, as the court which appointed him allows, but if a judgment creditor is appointed receiver, he shall not be entitled to compensation. If a receiver has been appointed, a court making an order directing payment, or delivery, of property shall direct that payment, or delivery, be made to the receiver rather than to a sheriff. Rules 74.2, 74.3, 74.4 and 74.5 are applicable to receivers appointed under this subdivision.

Notes

This subdivision is new and is designed to replace the provisions relating to statutory receivers in supplementary proceedings largely contained in sections 804 through 810 of the civil practice act and rules 175 and 177 of the rules of civil practice.

The supplementary proceeding receivership comprises a distinct and complete enforcement system. It affords judgment creditors a separate method for discovering and applying the assets of a judgment debtor to the satisfaction of judgments and enables the creditors to acquire a lien and priority which they could not obtain by execution or supplementary proceedings alone. The use of a receivership permits different procedures for such matters as obtaining examinations, restraining transfers, collecting debts, selling personal property and determining adverse claims. With the expansion of supplementary proceedings, however, judgment creditors have obtained very nearly all of the tools for having property of the judgment debtor applied directly to the satisfaction of their judgments without the necessity of a receivership and the attendant expense and delay. Proposed rule 61.17, providing for the determination of adverse claims, would further diminish the need for a receivership as a method of applying assets to the satisfaction of the judgment. Although the use of a receiver for this purpose has been described as "a legal vermiform appendix: an organ useful at one time, but since become only a situs for infection" (Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Colum. L. Rev. 1007, 1014 (1935)), there are situations in which the appointment of a receiver may be the most efficacious remedy and others where it may be the only one possible. The proposed rule contemplates a limited receivership which would provide for such cases without the cumbersome machinery and total enforcement system aspects of the present procedure.

A supplementary proceeding receivership has the secondary function of providing a creditor with a lien and priority. Although under present law this may be its principal advantage to judgment creditors, this aspect of a receivership has been eliminated.

The lien acquired by the creditor who pursues this procedure under present law is vastly superior to those obtained by execution or by the commencement of supplementary proceedings. The filing of a receivership order with the clerk of the county of the judgment debtor's residence prevents the debtor from passing title to his personal property to anyone, including a bona fide purchaser for value. N.Y. Civ. Prac. Act §807. Title of the receiver "extends back by relation" to the commencement of supplementary proceedings against any transferee who is not a bona fide purchaser or creditor without notice; the burden of proof rests with the transferee, although it is unclear whether he must show that he lacks notice of the judgment or of the supplementary proceeding. *Id.* §808.

The creditor who obtains the appointment of a receiver is also afforded a priority over creditors who pursue other enforcement procedures. He need have little fear that other judgment creditors will thereafter be more diligent or have better fortune and deplete

the judgment debtor's assets. Even if other judgment creditors have already levied under an execution but have not sold the property, the receiver obtains priority over the executing creditor, if the receivership creditor commenced supplementary proceedings before the execution was delivered to the sheriff. *Lawyer's Cooperative Pub. Co.* v. *Axelrod,* 92 N.Y.L.J. 622 (N.Y.C. Ct. 1934). Moreover, where prior creditors commenced supplementary proceedings first, a receivership creditor has priority unless they have the receivership "extended" to themselves.

Should the receiver be appointed many years after the close of a supplementary proceeding, with no effort to satisfy the judgment in the interim, priority will still be determined from the original commencement of the supplementary proceeding. *Herlihy* v. *Watkins,* 252 App. Div. 605, 300 N.Y. Supp. 242 (1st Dep't 1948). If the receiver is appointed more than four months before the judgment debtor's bankruptcy, he would be entitled to priority over the trustee in bankruptcy. See 11 U.S.C.A. §107(d); *cf. Liens and Priorities Affecting Personal Property in New York Procedures for the Enforcement of Money Judgments* at pp. 746–753, 782 *infra.*

To the extent that a judgment creditor should be able to obtain a lien that is good against a bona fide purchaser, he should not be required to utilize an anachronistic procedure which may involve substantial expense, and delay the satisfaction of the judgment, with little benefit other than the lien itself. If one creditor should be entitled to priority over all subsequent creditors, there is no apparent reason for limiting his priority to the receivership situation.

Under the proposed subdivision, the receiver will not obtain any "title" to the judgment debtor's property. When specified in the order, he will have the right to pass the judgment debtor's "title" to a third person—as in the case of an equity receiver or a sheriff pursuant to an execution. No lien will attach by the appointment of a receiver and no priority will be obtained thereby. This accords with proposed sections 13.2 and 13.3, which provide for liens and priority among judgment creditors that do not depend upon the particular method chosen for having the debtor's assets applied to the judgment.

Removal of the lien and priority function of the receivership obviates the need for both the intricate, litigation-producing concepts of "vesting" and "relation back" of title in sections 807 and 808 of the civil practice act, and the special filing and indexing provisions in sections 809 and 810.

Under the proposed subdivision, only where there is some particular advantage to be gained by having a receiver will one be appointed, and then only for particular functions. Thus, where the judgment debtor is a landlord, although the judgment creditor may be able to secure the rents by payment orders or by having the sheriff levy pursuant to execution, it might be much simpler to have a receiver appointed to collect them. The receiver may also be authorized to make repairs and improvements and to lease vacant apartments, methods of protecting creditors which may be secured

under no other procedure. Even where all that is involved is the sale of personal property, there are instances in which it is preferable to have a sale by a receiver rather than by the sheriff. See *Application of Myer,* 273 App. Div. 387, 77 N.Y.S.2d 660 (1st Dep't 1948) (sale of large block of securities). These situations would probably be much more frequent when real property is involved. "Sale of real estate today under execution is usually a nonrealistic form. Even under a 'normal' real estate market, a huge apartment house, or any parcel of urban realty, is not best disposed of at a sheriff's sale, but after negotiation and bargaining with individual purchasers." Cohen, *supra* at 1026.

While the term "property" has been used throughout the proposed rules to include both real and personal property, the proposed subdivision expressly permits authority to sell real property, in view of the reluctance on the part of courts to give receivers such power. Although the Field Code provided for a receiver "of the property" of the judgment debtor and defined "property" as including both realty and personalty, and although the Code of Civil Procedure expressly provided that "[r]eal property vested in a receiver," the courts have prohibited the sale of real property by a supplmentary proceeding receiver. The culmination of this development was analyzed as follows:

> The *dictum* in the *Quackenbush* case was thereafter used by the court in *Faneuil Hall National Bank* v. *Bussing* [147 N.Y. 665, 42 N.E. 345 (1895)] to warp the statute so as to deprive the receiver of any title to the debtor's realty. In that case the debtor was possessed of certain premises when the receiver in supplementary proceedings was appointed. Thereafter the receiver obtained an order permitting him to sell the debtor's interest. The owner of the property moved successfully to vacate the order for the sale. The court's explanation was (a) that the section conferring title to the debtor's realty on the receiver "cannot be taken literally" and should be read in the light of other statutes; (b) that the receiver's title to realty was "a qualified one in the nature of a security for the plaintiff in the judgment." It did not divest the debtor of the legal title. The receiver did not take such "absolute title" as would enable him to sell the property when it could be sold under an execution whereby the debtor would be granted power of redemption; (c) supplementary proceedings being a substitute for the old creditor's bill, it is only when the legal remedy is exhausted that a creditor may resort to the "more effective remedies" found in equity; (d) therefore, since the property could have been sold under execution and was not, (relying on the *Quackenbush dictum*) the receiver took no title.
>
> Subsequent cases merely completed the job of denuding the receiver of all rights to the debtor's realty, and of giving him, instead of "title," a weird product of judicial sentimentality liberally sprinkled on the debtor. In actual fact the receiver does not get the "title" promised by the statute, but a "qualified title" by way of security, a security which the courts have not cared to explain. "Possession" is promised and when demanded, denied. If the premises have been leased Special Term is inclined to compel the tenants to attorn to the receiver, and to give him the power to collect the rents. The Appellate Division has held, however, that since a receiver has no title, he is not entitled to rent, and this despite the existence of a Code provision giving the receiver power to make leases. [Cohen, *supra* at 1024–25 (footnotes omitted).]

The problem of a right of redemption after a receiver's sale, a problem that particularly concerns the courts, is no longer important under the proposed rules since no right of redemption is provided. See preliminary note to proposed rule 61.13.

The term "administer" in the proposed subdivision is new. Although an equity receiver has the power to take possession of the debtor's business with a view to operation, the courts have denied this power to a statutory supplementary proceedings receiver. See *Ward* v. *Petrie,* 157 N.Y. 301, 308, 51 N.E. 1002, 1004 (1898). The instances in which a court might appoint a receiver to "administer" the debtor's property will undoubtedly be rare, but the term is used to give courts the extremely broad discretion which enforcement problems warrant.

Rules 175 and 177 of the rules of civil practice enumerate powers which a receiver has unless they are explicitly denied him by order of the court, and also lists those which must be granted by order. Since the proposed rule contemplates that a specific and limited authorization will be given the receiver, these provisions are not meaningful. The provision of present rule 180 regarding employment of counsel has been retained, however, in order to avoid abuse of receiverships.

The terms "collect" and "sell" are intended to cover settlement of claims of the judgment debtor by the receiver. In any event this power, when granted by the court, is encompassed within the term "or do any other acts designed to satisfy the judgment."

The limited nature of the receivership should result in a reduction of its cost since the receiver will only be entitled to commissions on the funds which he collects. Under the present receivership practice, once a receiver is appointed, the judgment creditor is required to turn over to the receiver funds which the creditor subsequently collects through his own efforts. See N.Y. Civ. Prac. Act §§794, 796; *Herlihy* v. *Watkins,* 256 App. Div. 339, 10 N.Y.S.2d 7 (1st Dep't 1939); *Franklin Nat. Bank* v. *Madero,* 4 M.2d 145, 157 N.Y.S.2d 431 (Sup. Ct. 1956). The receiver might then be entitled to a commission on these funds although he was not instrumental in their collection. See N.Y. Civ. Prac. Act §§804-a, 1547.

Although the first sentence of section 804-a of the civil practice act, dealing with commissions, is virtually identical to the first sentence of section 1547, which is applicable to receivers generally, the provision has been repeated here for convenience. *Cf. R-W Realty Co.* v. *Glatzer,* 185 Misc. 1021, 58 N.Y.S.2d 368 (N.Y.C. Ct. 1945) (remainder of section 1547 held applicable to supple-

mentary proceeding receivers). The second sentence of present section 804-a, however, has been deleted. It permits the receiver to refuse to reduce a judgment debtor's property to possession without a request and indemnification by the judgment creditor, and is not necessary under the proposed rules since the only action that the receiver may take is that requested by the judgment creditor and authorized by the court. The court will, of course, be able to condition its granting of the requested relief by requiring indemnification for the receiver's expenses.

Under the proposed subdivision, the appointment of a receiver is in the court's discretion. Since the expenses and commissions of the receivership, which may be substantial, are ultimately to be paid by the judgment debtor if he has sufficient funds, the appointment should not be made unless some greater benefit to the judgment creditor than that which could be secured by other available procedures can be anticipated. In 1938, the earlier discretionary language of present section 804 was amended to provide that "the court must make an order appointing a receiver of the property of the judgment debtor upon application of the judgment creditor, whether or not it shall appear that the judgment debtor has property applicable to the payment of the judgment." This strongly mandatory language was adopted to insure the judgment creditor against the transfer of hidden assets of the judgment debtor; the receiver's "title" being good even against a bona fide purchaser. Despite the clear mandate of the statute, many courts have continued to deny receiverships where the judgment creditor cannot show that the judgment debtor has non-exempt property. For example, in *Tosti* v. *Sbano,* 170 Misc. 828, 830–31, 11 N.Y.S.2d 321, 323–24 (N.Y.C. Ct. 1939), the court stated:

> On the pending motion, which is for the reargument of a former motion for the appointment of a receiver, and which motion was denied, the only reason advanced by the judgment creditor's attorney for the reversal of the court's decision, is that it is in conflict with the mandatory provisions of section 804 of the Civil Practice Act, as amended by Laws 1938, chapter 605, in effect September 1, 1938. . . .
>
> A statute framed in imperative language may be construed as permissive, where it is evident from the entire act considered as a whole *and from the surrounding circumstances* that it was not intended to receive a peremptory construction. In such a case, the term "must" or "shall" will be interpreted in the sense of "may." This is frequently the case where statutes provide for orders to be made by judges; if it appears evident that the judge should exercise a discretion in the granting of the order, the circumstance that the statute provides that the order "must" be granted will not deter him from exercising a discretion and denying the application if justice is thereby promoted.

Fortunately, the problem presented by this court's approach may be avoided under the proposed subdivision, since a lien—

the reason for the present mandatory language—is not created by the proposed limited receivership.

The proposed subdivision provides that if a judgment creditor is appointed receiver, he must serve without compensation. Permitting a judgment creditor to be so appointed was recommended in the 1934 Report of the Commission on the Administration of Justice in New York State at page 363:

> In an early case the judgment creditor was appointed receiver in supplementary proceedings, *Chamberlain* v. *Greeleaf,* 4 Abbott's New Cases 92, but apparently not since then.
>
> This recommendation has frequently been made. Its purpose and value should be apparent. The 1932 Committee on Practice and Procedure in the City Court of the New York County Lawyers' Association endorsed this idea. 1932 Year Book, New York County Lawyers' Association, page 283. It said:
>
> "A study was made of the laws of other jurisdictions with reference to receivers, and your Committee recommends that, unless some good reason to the contrary is shown, the judgment creditor should be made the receiver in supplementary proceedings, under a bond in a sum approved by the court, on condition that he serve without compensation. As such receiver he should be authorized to bring actions in his own behalf and in behalf of all other judgment creditors appearing and contributing to the expense of the proceedings. This is the general practice in Great Britain where it seems to have worked successfully. Certainly no one is more interested in pursuing the judgment debtor with zeal than the judgment creditor himself and the judgment debtor is benefited and protected by the fact that the receiver will act without fees and be under bond."
>
> Where the judgment creditor is a corporation, one of its officers should be appointed receiver upon the same terms as stated in the quotation.

Despite these recommendations, the proposal was never adopted, probably because the broad discretion given the receiver presented too great an opportunity for abuse and harassment. Under the proposed receivership procedure, however, in which the particular function and the manner in which it is to be performed is prescribed by the court, the likelihood of abuse is sharply reduced. Furthermore, the proposed subdivision allows the court, in its discretion, to determine that a disinterested third person should be appointed in a particular case. Thus, while appointment of the judgment creditor to collect rent or to lease property may present little likelihood of abuse, the court may find it more advisable to have a third person negotiate settlements or sales.

The extensive notice provisions in present sections 804(1) and 805 have been replaced by the second sentence of the proposed subdivision. The phrase, "As far as practicable" amply covers the present complicated provisions.

The requirement of section 804(1) that supplementary proceedings be commenced before a receiver may be appointed has been deleted. Unlike the prsent provisions, a subpoena for examination does not commence a supplementary proceeding under the proposed title. Moreover, if the judgment creditor knows of the debtor's assets, the proposed subdivision permits him to move for the appointment of a receiver without any preliminary step.

Present section 806, dealing with the extension of an existing receivership to other judgment creditors, is treated in proposed subdivision (b).

The undertaking provision in present section 809 is covered by proposed rule 74.3, which is incorporated into this subdivision by reference. While present section 809 indicates that the court has discretion in determining whether to require a bond, in practice, a bond is required in every case. See 8 Carmody-Wait, Cyclopedia of New York Practice 295 (1954). Despite the mandatory language in proposed rule 74.3, the court, in effect, will still have discretion since it is authorized to set the amount of the undertaking.

Subdivision 3 of present section 804 is covered by proposed rule 74.4 which is also incorporated by reference.

The provision in present sections 794(1), 794(2), 796 and 797(2) that an order, ordinarily directing delivery or payment to a sheriff, shall direct delivery or payment to the receiver if one has been appointed, are covered by the next to last sentence of the proposed subdivision.

(b) Extension of receivership. Where a receiver has been appointed, the court, upon motion of a judgment creditor, upon such notice as it may require, shall extend the receivership to his judgment.

Notes

This subdivision is derived from the second sentence of section 806 of the civil practice act. Where a receiver has already been appointed, extension of the receivership should be obtainable *ex parte* and as a matter of course.

The remainder of present section 806 has been deleted as unnecessary. If a judgment creditor considers that other judgment creditors are being unfairly preferred, or are controlling or directing the receiver to his prejudice, he may apply for an order under proposed rule 61.18 to protect his interest.

61.8. Enforcement before judgment entered.

Before a judgment is entered, upon motion of the party in whose favor a verdict or decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment.

Notes

This rule is new. It authorizes the examination of an adverse party and the granting of a restraining order against him immediately after the rendition of a verdict or decision, to prevent divesting of assets before the judgment is entered. There is no reason for requiring a judgment creditor to wait for judgment to be entered in order to serve a subpoena or restraining notice where it can be shown at the conclusion of the trial that such delay may prejudice him. Examination may not be necessary for the evidence at the trial may indicate that the adverse party has sufficient assets to satisfy the judgment. If there is a danger that he will dispose of them, however, the court may order him restrained until a judgment can be entered and a payment or delivery order sought.

Substantially the same reform has been repeatedly advocated. Over a quarter of a century ago, for example, Mr. Justice Cuff suggested:

> . . . Legislation should be enacted which would automatically, on the rendering of a verdict by a jury or a decision by a court in actions at law, stay the loser from disposing of or transferring any of his property unless allowed to do so by his creditor's consent or an order of court upon notice. The burden would then be where it belonged—on the one who owes the money.
>
> Another improvement would be to do away with the supplementary proceedings entirely—require plaintiff and defendant to be in court when a verdict or decision is to be announced. In inquests and defaults subpoena defendant. Nonappearance should be punishable as a contempt of court. The loser should immediately be sworn and examined by the court and opposing counsel as to his property and ability to pay the judgment to be entered. Some will readily object to this procedure on the ground that the trial judge should not be required to actually preside at such an examination. This is only because we have grown used to the theory that an action at law ends with the entry of judgment. It should not end until all the processes and instrumentalities of the court have been employed to put the money in the purse of the successful party. The examination could be avoided upon filing a bond or obtaining the creditor's consent. The questioning as to the property of the unsuccessful party would not take long if conducted in the presence of the trial judge and with his active cooperation. Even if it consumed some additional time, it would be worth while, for it would be moving

toward the end the litigant had in view when he started the suit, to wit, to obtain money. As a matter of fact, the time required for this examination would be compensated for by the elimination of all the motions incidental to the supplementary proceedings in which the judgment creditor vainly attempts to collect his just deserts. Volumes of typing would be saved; days and weeks of the time of attorneys, who now are required to carry on their examinations without the presence or aid of the court, would be spared for other gainful work. The palpable lying that is typical of the supplementary proceeding inquiry would be greatly reduced or perhaps eliminated, for obvious lying is not nearly as likely to be perpetrated before an organized court as it is in the corner of the examination room with no judge, clerk, or stenographer present. There is room for more improvement in this direction. [*Zwerdling* v. *Hamman Bldg. Corporation*, 145 Misc. 471, 473, 259 N.Y. Supp. 593, 596–97 (Sup. Ct. 1932).]

An enforcement order granted under any of the rules of title 61 may be stayed pending appeal. See proposed rule 80.9.

In addition to provisional remedies which may be available, the advisory committee recommends that creditors have a further remedy to discourage a defendant from fraudulently disposing of assets in contemplation of an adverse judgment while an action is till pending. In order to overturn such transfers under the Fraudulent Conveyance Act, the creditor is presently required to show actual intent to defraud; or that the debtor was rendered insolvent by the transfer; or that after any particular conveyance by a debtor in business he was left with an "unreasonably small capital"; or that the debtor intended or believed that he would incur debts "beyond his ability to pay as they mature" at the time of the conveyance. N.Y. Debt. & Cred. Law §§273, 274, 275, 276. These facts are frequently difficult to prove.

Even if the gift was made without intent to defraud and if the judgment debtor was not rendered insolvent thereby and is not insolvent after judgment but simply chooses not to satisfy it, there is nevertheless no reason for requiring the judgment creditor to pursue him rather than a gratuitous recipient of the debtor's assets.

Accordingly, it is recommended that a new section be added to the Debtor and Creditor Law, as follows:

> § 273-a. Conveyances by defendants. Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or where a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

This new section would place no greater burden upon gratuitous transferees with regard to their acting in reliance of the gift

than is placed upon them under present provisions of the Fraudulent Conveyance Act. In fact, it should be much easier for them to determine whether the transferor is involved in litigation than to determine whether he was left with "an unreasonably small capital" or intended to incur subsequent debts.

61.9. Executions.

(a) Form. An execution shall specify the date of the judgment, the court in which it was entered, the amount of the judgment and the amount due thereon. Where the judgment was entered in a court other than the supreme court or a county court, the execution shall also specify the date on which a transcript of the judgment was filed with the clerk of the county in which the judgment was entered. Where one or more persons against whom the judgment was recovered are not judgment debtors, or are deceased, the execution shall also specify each judgment debtor not deceased and direct that only property in which he has an interest, or debts owed to him, be levied upon or sold thereunder. Where jurisdiction in the action was based upon a levy upon property or debt pursuant to an order of attachment, the execution shall also state that fact, describe all property and debts levied upon, and direct that only such property and debts be sold thereunder. Where the judgment was recovered for all or part of a mortgage debt, the execution shall also describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder.

Notes

This subdivision replaces parts of sections 222-a, 640, 641, 642, 643, 645(1), 658, 711 and 1199 of the civil practice act. It is designed to consolidate and simplify the formal requirements of an execution. In this subdivision are gathered together the various scattered provisions which prescribe what must be specified in an execution under particular circumstances. For example, it includes the provision in the last sentence of section 222-a of the civil practice act which requires an execution to be indorsed with the names of the persons summoned where the judgment is against a partnership. It also includes the similar provision in section 1199 and that in the last sentence of present section 642 that the execution must show which of the parties are judgment debtors (see notes to proposed section 13.1(c)) and the provision of section 658 requiring an execution to specify the name of a judgment debtor who has died. The last sentence in this subdivision is derived from present section 711 of the civil practice act. It implements the provision of section 710 which is retained by proposed rules 61.12 and 61.13(b). The effect of this provision when read with section 1077 of the civil practice act is to require an election between foreclosure and a suit on the mortgage debt. See notes to proposed rule 61.13(b).

The next to last sentence in the proposed subdivision is derived from subdivision 1 of section 645 of the civil practice act. The present priority provision, that personal property attached must be applied before real property attached, has been deleted in accordance with the deletion of the similar general priority requirement of section 643. See introduction to this title. Subdivision 2 of present section 645 requires that attached property be first applied to the satisfaction of a judgment, even where personal jurisdiction was obtained, before other property is levied upon. This requirement has also been deleted. It will obviously facilitate collection of a judgment if property already in the hands of the sheriff is applied before other property, but no reason appears to prevent the sheriff from levying on money, for example, rather than selling property that has been attached. Moreover, the further requirement of subdivision 2 of section 645 that personal property not attached be levied upon before real property already attached can be utilized is also deleted, because of the same considerations which dictated abolition of the personal property priority where no property has been attached. See introduction to this title.

Where a judgment in an action where jurisdiction was based upon an attachment has been partially satisfied by application of the attached property, the plaintiff may bring an action on the judgment for the balance due him. See proposed rule 50.4(2); N.Y. Civ. Prac. Act §§484(2), 520. In such an action, however, he should allege the extent to which the prior judgment has been satisfied; such an allegation would also be necessary where an action is brought upon a judgment because the statute of limitation is about to expire. *Cf.* proposed rule 50.4(1); N.Y. Civ. Prac. Act 484(1). See also N.J. R. Civ. P. 4:55–3, 4:60–6. Accordingly, a new subdivision should be added to proposed rule 26.6, as follows:

> (e) Action on a judgment. A complaint shall state the extent to which any judgment recovered by the plaintiff against the defendant, or against a person jointly liable with the defendant, on the same cause of action has been satisfied.

The phrase "or against a person jointly liable with the defendant" in this pleading requirement would make sections 1185 to 1188 and section 1201 of the civil practice act unnecessary, as the only unique feature of these judgment creditors' action sections is the allegation required in section 1186 which is replaced by the quoted language. See also proposed section 13.1(c) and notes.

Present section 640-a has been omitted because of the elimination of the five-year limitation of sections 650, 651 and 652. See notes to subdivision (b). The language of section 642 relating to a date from which interest should be computed has also been omitted. Since all money judgments bear interest from the date they are entered (see proposed section 12.3; N.Y. Civ. Prac. Act §481), requiring specification of the "date of the judgment" is sufficient.

(b) Issuance. At any time before a judgment is satisfied or vacated or the time limited for commencing an action upon the judgment expires, an execution may be issued from the supreme court or a county court, in the county in which the judgment was first docketed, by the clerk of the court or the attorney for the judgment creditor as officer of the court, to the sheriffs of one or more counties of the state, directing each of them to levy upon the real and personal property of the judgment debtor.

Notes

This subdivision replaces parts of sections 635, 636, 641, 643, 648, 650, 651, 652 and 653 of the civil practice act.

The present law distinguishes between executions issued before and after five years from the entry of judgment. Where an execution was not issued during the first five years, leave of court, granted only upon notice and proof that the judgment remains unsatisfied, is necessary to issue an execution thereafter. This distinction is an unreal one and results in an unnecessary burden upon the courts and judgment creditors. It ignores other enforcement procedures that the creditor may have taken within the first five years and

penalizes a creditor who withholds issuing a patently unproductive execution during that time. This five-year "junior limitation statute" has therefore been eliminated. *Cf.* Calif. Code Civ. Proc. §§681, 685 (period during which an execution may be issued without leave of the court extended in 1955 from five to ten years); see also Reisenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus,* 42 Iowa L. Rev. 155, 176–77 (1957).

The proposed subdivision also eliminates the present requirement that a transcript of the judgment be filed in the county to which an execution is issued. There is no such requirement in most states and present New York provisions in the supplementary proceedings and attachment articles do not include a similar requirement. Since the execution will specify the court in which judgment was entered and where the judgment-roll is filed, sheriffs may easily verify the information contained in an execution by mail or telephone to the clerk of that court. Except for effecting a lien on local real property, the docketing of transcripts is not worth the expenditure of time and money by the courts and litigants that it entails. It should be noted that section 648 of the civil practice act permits an execution against the person or for the delivery of the possession of a chattel to be issued to "any county" without regard to where the judgment is docketed.

Several executions upon a single judgment may presently be issued and be made returnable to the clerks of various counties simultaneously. *Cf.* N.Y. Civ. Prac. Act, §641; N.Y. Justice Ct. Act §§274, 280; N.Y.C. Munic. Ct. Code §133. When the executions are returned partially satisfied, the records of each clerk may indicate a different amount remaining due on the judgment. To avoid such confusion, the proposed subdivision provides for a single place of issuance for executions upon the same judgment. And subdivision (c) requires all returns to be made to the clerk of the court from which the execution issued. *Cf.* proposed rules 50.7(a), 50.11(b), 50.11(c); N.Y. Civ. Prac. Act §72.

The explicit statement that executions may be issued by an attorney as officer of the court is new but represents present practice. *Cf.* proposed rule 38.2(a).

Under the proposed subdivision executions retain their different status from supplementary proceedings to some extent. In order to issue an execution to a sheriff, with a few exceptions, all inferior court judgments must be docketed by transcript in the county where the inferior court is located under the present provisions as well as under the proposed rules; supplementary proceedings require no transcript under both present and proposed law. See introduction to this title.

Because of the abolition of the five-year limitation on executions, the "New York system of separating actionability, executability and operation as lien" (Reisenfeld, *supra* at 177) is reduced in complexity. Actionability remains at twenty years—although proposed section 5.12(d) reduces the period to ten years, the advisory committee, on reconsideration, has recommended that the present

twenty-year period of section 44 of the civil practice act be retained (see notes to proposed rule 50.4)—and executability becomes coextensive with it. The ten-year lien on real property is retained by proposed section 13.3(a).

The provision of the first sentence of present section 636 that an execution be directed to a sheriff is included in this subdivision. The remainder of that sentence, providing that an execution be directed to the coroner or coroners when the sheriff is a party or interested, is omitted, since such a provision is already included in subdivision 1 of section 661 of the County Law. Similarly, the provision of subdivision 3 of section 661 of the County Law that the medical examiner performs such duties if the office of coroner has been abolished, and that of section 909 of the County Law authorizing the county clerks in the city of New York to perform such duties, together cover most of the remaining provisions of section 636 of the civil practice act. In the light of these provisions, there seems no necessity to expressly continue the authority of the court to appoint a private person to whom an execution shall be directed. The last sentence of section 636, which was added in 1957 (N.Y. Laws 1957, c. 563), is deleted as unnecessary because it is only operative where the sheriff is a nominal party under section 922 or 943 of the civil practice act and the suit by the sheriff under those sections has been abolished by proposed title 72. See notes to proposed rule 72.5(d); *cf.* proposed rule 72.11.

Section 639 of the civil practice act, which, by its own terms, "does not apply in a case where special provision is otherwise made by law," is also deleted. Provisions in sections 651 and 652(1) of the County Law amply cover the problem of vacancy in the sheriff's office. Because of these latter provisions and because of the abolition of redemption of real property (see preliminary note to proposed rule 61.13), sections 752 through 755 of the civil practice act are also deleted as unnecessary.

(c) Return. An execution shall be returned to the clerk of the court from which it was issued within sixty days after issuance unless the time is extended by the attorney for the judgment creditor.

Notes

This subdivision is based upon parts of sections 640 and 641 of the civil practice act. The last sentence of section 640 provides: "Except as otherwise prescribed in the next section, it [an execution] must be made returnable to the clerk with whom the judgment-roll is filed." Although section 640-a has been "the next section" since 1947, the exception refers to section 641, which provides that where the execution is issued out of a court other than that in which the judgment was rendered, upon filing a transcript of the judgment, the execution must be made returnable to the clerk with whom the transcript was filed.

The sixty-day provision of section 640 is retained but the limitation upon the time for which an execution may be extended has been omitted. Since there is no limit upon the number of executions which may be issued, the provision has little effect. The provisions of proposed section 13.2(a) regarding liens will remove its present minimal impact upon the facility of continuing an execution lien on personal property. See N.Y. Civ. Prac. Act §679. While section 640 does not state that more than one extension of a single execution is permitted, the wording of the proposed subdivision is so intended. *Cf.* N.Y.C. Munic. Ct. Code §138.

(d) Records of sheriff. Each sheriff shall keep a record of executions delivered to him showing the names of the parties; the dates of issue, delivery and return; the amount due at the time the execution was delivered to him; and the amount of the judgment and of the sheriff's fees unpaid, if any, at the time of the return.

Notes

This subdivision is derived from 636-a of the civil practice act. The additional requirement of present section 637 that a memorandum of the hour and minute when an execution is received be endorsed upon it, has been deleted. This provision is necessary in the present civil practice act because, under section 679, priority and liens upon personal property are determined in the order of delivery. Under proposed section 13.2, however, personal property liens and priority are determined by the order of docketing of the judgment. *Cf.* proposed rule 61.14.

61.10. Levy upon personal property.

(a) Levy by service of notice. The sheriff shall levy upon any interest of the judgment debtor in personal property not capable of delivery, or upon any debt owed to the judgment debtor, by serving a copy of the execution personally upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivering a copy to a person authorized to receive service of summons solely by a designation

filed pursuant to law. The garnishee shall forthwith transfer such interest or pay such debt to the sheriff.

Notes

This subdivision replaces section 687-a of the civil practice act, which was enacted in 1952 after a study and recommendation by the Law Revision Commission. N.Y. Law Rev. Comm'n Rep. 355–448 (1952).

Although section 687-a contains eight lengthy subdivisions and more than 2,000 words, its only meaningful addition to prior law is a provision that a garnishee who is willing to pay an indebtedness or liability due the judgment debtor may pay the sheriff and be discharged to the extent of the payment. The Field proposals contained a one sentence provision to the same effect. First Report of the New York Commissioners on Practice and Pleadings 202 (1848).

The prolixity and repetition in section 687-a stem largely from the fact that the attachment sections of the civil practice act were utilized in drafting it rather than the supplementary proceedings sections. Where a garnishee is unwilling to make payments, the supplementary proceeding provisions are more effective than section 687-a in virtually every respect. Thus, a violation of the restraint imposed by section 687-a(2) is not punishable as a contempt while such a violation in supplementary proceedings is; a judgment creditor may obtain a mandatory payment order under section 794(2) upon a showing that the garnishee is indebted to the judgment debtor while such a showing under section 687-a(1) only entitles the judgment creditor to commerce a separate action to recover the indebtedness.

The requirement in section 687-a(1) of a written specification of a debt or liability, has been deleted. It is valuable only with regard to the restraint imposed by subdivision 2 of the section.

Because of the ease with which the creditor can utilize a restraining notice under proposed rule 61.2, the restraint of present section 687-a(2) has ben deleted. Under proposed rule 61.2(b), a restraining notice may specify property.

Similarly, the provisions of subdivision 3 of present section 687-a are omitted as they are largely duplicated by the disclosure provisions of proposed rule 61.3; those of subdivision 4 of section 687-a are omitted as they are redundant of the provisions of proposed rule 61.18; and those of subdivision 5 of section 687-a are omitted as they are redundant of the provisions of proposed rule 61.17.

The word "debt" in this subdivision includes legally assignable causes of action, in accordance with the definition of proposed section 13.1(b). This represents an expansion of present section 687-a, where causes of action are limited to those on contract.

In accordance with present section 687-a, this subdivision provides a method of levying upon intangibles similar to that provided

by section 917 of the civil practice act for levying under an attachment. See proposed rule 72.5 and notes.

Under proposed section 13.1(d)(4), intangibles represented by an instrument are treated as property capable of delivery; levy upon such property is therefore made under subdivision (b) of this rule. No substantive change in present law is effected thereby, since under present section 687 and subdivision 1 of present section 687-a, the same result ensues.

The last sentence of this subdivision requires the garnishee to pay over the property to the sheriff. Should he fail to do so, the creditor would bring a proceeding pursuant to proposed rule 61.4. *Cf.* N.Y. Civ. Prac. Act §687-a(6).

(b) Levy by seizure. The sheriff shall levy upon any interest of the judgment debtor in personal property capable of delivery by taking the property into his custody without interfering with the lawful possession of pledgees and lessees. The sheriff shall forthwith serve a copy of the execution in the manner prescribed by subdivision (a) upon the person from whose possession or custody the property was taken.

Notes

This subdivision is new. The provision relating to pledgees and lessees is based upon part of section 688 of the civil practice act.

There is no present provision regarding the method by which a sheriff is to levy pursuant to an execution although section 917 of the civil practice act contains such provisions with regard to attachment. This provision is designed to codify present practice. See 7 Carmody-Wait, Cyclopedia of New York Practice 635 (1953).

The phrase "any interest of the judgment debtor in personal property," used in this subdivision and in subdivision (a) of this rule, is designed to replace the enumeration of specific personal property subject to execution in sections 679, 686, 687-a and 688 of the civil practice act. Present section 679(1) provides that except for goods and chattels, personal property is not subject to execution unless "expressly declared by law to be subject." The distinction between tangible and intangible property which is the basis for this provision, has been the cause of much confusion and litigation. See 7 Carmody-Wait, Cyclopedia of New York Practice 623–31 (1953); N.Y. Law Rev. Comm'n Rep. 373 (1952). Since the adoption of section 687-a in 1952, intangibles have been subject to execution, and any further need for requiring specific enumeration of subject property has disappeared.

At the time of the adoption of section 687-a, however, the provision of section 679(1) requiring express enumeration of property subject to execution was not deleted; rather, subdivision 2 was added to section 679 to provide for the intangibles which were made subject to execution by section 687-a.

Since the proposed rules are drafted in terms of "property" and "debts" which are defined in proposed section 13.1 to include only that which is subject to execution, there is no need for present section 679. The function of this section to create a lien on personal property, and to distinguish the time of creation of the lien for different kinds of property, has been replaced by the lien provisions of proposed section 13.2. The exemption provisions of proposed section 13.5 specify those interests not subject to execution.

The phrase, "without interfering with the lawful possession of pledgees and lessees," continues the provision of present section 688 with respect to a pledgee's possession; there is no present provision regarding a lessee's possession in the article on executions. However, section 796, in the supplementary proceeding article, apparently recognizes the interest of lessees in not being deprived of the use of property without some provision for their rights. It prohibits issuance of a delivery order if there is a substantial dispute regarding the right of the judgment debtor to possession of the property belonging to him. The right of a bona fide lessee to possession should not be automatically abrogated by a sheriff's seizure under execution. If the the sheriff sells the property, without interfering with the lessee's possession, the purchaser would take subject to the leasehold interest. *Cf.* N.Y. Civ. Prac. Act §688 (purchaser takes subject to interest of chattel mortgagee, conditional vendor or pledgee).

Present section 686 expressly provides that the sheriff "must levy upon current money of the United States belonging to the judgment debtor, and must pay it over as so much money collected, without exposing it for sale." It is clear under the proposed rules that money is included in the term "property." Under proposed rule 61.9(a), the sheriff is not required to sell "legal tender of the United States." Section 686's function in the post-Civil War era to require a sheriff to sell gold coin, but not other money, has long since disappeared. See N.Y. Laws 1877, c.416; N.Y. Laws 1940, c.63 (deleting gold coin provision).

61.11. Sale of personal property.

(a) Public auction. The interest of the judgment debtor in personal property obtained by a sheriff pursuant to execution or order, other than legal tender of the United States, shall be sold by the sheriff at public auction at such time and

place and as a unit or in such lots, or combination thereof, as in his judgment will bring the highest price, but no sale may be made to that sheriff or to his deputy or undersheriff. The property shall be present and within the view of those attending the sale unless otherwise ordered by the court.

Notes

This subdivision is based upon sections 660, 663, 686, 688 and 706 of the civil practice act. The designation in section 660 of particular hours within which a sale may be held has been omitted in favor of a standard adopted from section 706—which is there applicable to the type of parcels and lots in which the property should be sold—those that "in his judgment will bring the highest price."

The last sentence of this subdivision is virtually identical to a provision of present section 706; the latter is subject to an exception, however, "where the officer is expressly authorized by this article to sell property not in his possession." The only applicable authorization in the article is the provision in section 688 that the sale of pledged property shall be made "without interfering with the lawful possession of the pledgee." There are other situations where it may not be feasible to display the property or have it present during the sale. The proposed subdivision permits the court to relieve the sheriff of his obligation to have the property present at the sale; it would also allow the court to order a pledgee or lessee in possession to permit the sheriff to hold a sale on the premises, upon appropriate terms and conditions.

The exception for "legal tender of the United States" is based upon present section 686. See notes to proposed rule 61.10(b).

The last phrase of the first sentence of this subdivision is based upon present section 663. A similar provision is included in proposed rule 61.13(a) with respect to real property.

Section 695 of the civil practice act, providing that the sheriff shall exhibit property levied upon to any creditor of the judgment debtor, has been deleted as unnecessary.

(b) Public notice. A printed notice of the time and place of the sale shall be posted at least six days before the sale in three public places in the town or city in which the sale is to be held. An omission to so post notice, or the defacing or removal of a posted notice, does not affect the title of a purchaser without notice of the omission or offense.

Notes

The first sentence of this subdivision is based upon the first sentence of section 707 of the civil practice act, with no change in substance intended. The second sentence of this subdivision is based upon section 662 of the civil practice act. A similar provision is included in proposed rule 61.13(c) with respect to real property.

Where personal property is unique, it is not uncommon for the judgment creditor to seek to increase the price it may bring upon the sale by giving wider publicity than that provided by the public notice required by this subdivision. Personal contact and newspaper advertising—especially in trade journals—are frequently used. Indeed, in New York city, the sheriff is required to advertise every sale of personal property in a local newspaper. N.Y.C. Admin. Code §1032-9.0(b). If the personal property is of such a nature that negotiation rather than public auction would be the best way to sell it, the judgment creditor may move for the appointment of a receiver. See notes to proposed rule 61.7(a).

(c) Order for immediate sale or disposition. The court may direct immediate sale or other disposition of property with or without notice if the urgency of the case requires.

Notes

This subdivision is based upon the last sentence of section 707 of the civil practice act. The present section, however, is restricted to perishable property and disposition is limited to immediate sale.

The proposed subdivision affords the court discretion to provide for any appropriate disposition of any property, as particular circumstances require.

While section 707 specifies that the motion be made by the sheriff, other persons may have an interest in preserving the value of perishable property. Therefore, the proposed subdivision is not restricted to any particular mode of application.

61.12. Levy upon real property.

After the expiration of ten years after the filing of the judgment-roll, the sheriff shall levy upon any interest of the judgment debtor in real property, pursuant to an execution other than one issued upon a judgment for any part of a mortgage debt upon the property, by filing with the clerk of the county in which the property is located a notice of levy describing the

judgment, the execution and the property. The clerk shall record and index the notice against the name of the judgment debtor, or against the property, in the same books, in the same manner and with the same effect, as a notice of the pendency of an action.

Notes

This rule is based upon section 512 of the civil practice act. The provision with respect to a judgment on a mortgage debt is derived from section 710 of the civil practice act. See notes to proposed rules 61.9(a) and 61.13(b).

Under present and proposed law, no levy is necessary while real property is subject to a judgment lien. The levy in other cases is made by creating a temporary judgment lien. The lien provided by the last sentence of present section 512 has been covered in proposed section 13.3(a).

Present section 512 is apparently operative whether or not a lien was ever in effect against the particular property. Thus, if the judgment was never docketed in the county where the real property is located, or if the judgment was entered against a deceased person or a municipal corporation, no lien would have been in effect, but section 512 apparently could be utilized to levy upon the property after ten years have expired. Moreover, section 512 could also be used while a lien was still in effect, although it would be unnecessary to so use it, because a lien may be extended beyond the ten-year normal period under sections 515 or 656 of the civil practice act.

In the case of a municipal corporation, the statutory language of section 510(1) of the civil practice act that no lien on real estate is created by docketing would seem inconsistent with section 512, which would permit a temporary lien to be created upon the property after the expiration of ten years. The problem is not a difficult one in practice, but to the extent that municipal real estate may be sold by execution, it is apparently unnecessary for the judgment to be a lien. See notes to proposed section 13.7.

With respect to property of a judgment debtor who dies before entry of judgment, but after verdict or decision, section 478 of the civil practice act expressly states that the judgment does not become a lien upon his real property. Section 656 of the civil practice act, which deals with execution against a decedent's property, provides for the enforcement of a judgment "against any property upon which it is a lien," and thus would apparently not apply to such a judgment. If this is true, there would be no provision of the civil practice act specifying the manner of executing upon such a judgment before the expiration of ten years, but section 512 apparently would permit a levy thereafter. Indeed, the language of section 512 recognizes that the debtor may be dead by

specifically referring to his heirs or devisees. The anomalous result with respect to liens is that no lien is created by docketing such a judgment, but that a temporary lien may be created ten years after filing of the judgment-roll. Yet it would appear to be the intention of the last sentence of section 655, that no property may be levied upon after the death of the judgment debtor except as authorized by the Surrogate's Court. See notes to proposed section 13.8.

Where the death occurred after entry of judgment, it is unclear whether section 521 would permit a levy upon the decedent's property after the expiration of ten years. In this situation, the last sentence of section 655, which prohibits issuance of an execution against the property of a debtor who has died since entry of judgment, except as provided in section 656, would seem to preclude *any* use of section 512 against an heir or devisee of the judgment debtor despite the express inclusion of heirs and devisees in section 512. As previously noted, the provisions of section 656 appear to relate only to enforcement of a judgment "against any property upon which it is a lien" and the provision of section 512 contemplates that a lien, if there ever was one, would have already expired. The temporary lien of the last sentence of section 512 itself would not make section 656 operative because this only arises *after* an execution is issued.

This difficulty with the phrase "against any property upon which it is a lien," which appears in section 656, has been recognized and the section has been construed to accord with both section 512 and the last sentence of section 655 in *Atlas Refining Co.* v. *Smith*, 52 App. Div. 109, 64 N.Y. Supp. 1044 (4th Dep't 1900). After discussing the history of present section 512, the court stated:

> It is contended by the respondent that this section only authorizes the issue of an execution in cases where the judgment is a lien. The effect of such a construction would be to nullify all the provisions of [section 512]. Section [656] must be interpreted, not literally but liberally, with a view to making it harmonize with section [512]. It is manifest that the Legislature intended to authorize the issue of an execution on a judgment after the lien thereof had expired, notwithstanding the death of the judgment debtor; but in order that such an execution might not be issued prematurely or for an excessive amount, or where the judgment had been paid, or any other legal objection existed, it was provided that the consent of the court of law having charge of the judgment should be obtained; and in order that the execution might not be unnecessarily issued, where the personal assets of the decedent might be sufficient to pay the judgment, or where the interests of the decedent's estate or of other creditors might require the suspension of the right to issue the execution for a period, or that the premises be sold otherwise, the consent of the Surrogate's Court was also required. . . .
>
> To carry into effect the clear intent of the Legislature, which the court has implied authority to do . . . , section [656] must yield to the construction that the requirement, as a pre-

> requisite to granting the order, that the judgment shall be an existing lien, only applies when ten years have not elapsed since it was docketed, that being the only case where it could be a lien. A careful analysis of these statutory provisions shows that this construction will not do violence to the language employed in section [656] when properly understood . . . . Its language [in subdivision 2, "Such] . . . an execution shall not be issued unless," etc., relates to an execution on "a final judgment for a sum of money, or directing the payment of a sum of money," referred to in the first sentence [of subdivision 1] and in section [655] and embraces executions issued on judgments which are not, as well as those which are a lien. Inasmuch as section [655] expressly relates forward to section [656] for authority to issue executions in both cases, it would be proper to hold, in order to solve any doubt as to their meaning, that the words "such an execution," contained in the second sentence of the latter section, relate back to section [655] and include both classes of executions. [*Id.* at 116–17, 64 N.Y. Supp. at 1048–49.]

The requirment of permission of both the Supreme Court and the Surrogate's Court has been since deleted and only one court's permission need be secured.

In effect, section 512 revives the expired judgment lien, to protect the creditor until the property may be sold. Of course, if the debtor has conveyed the property after the original lien expired (or while there was no lien because of failure to docket in the county where the property is located), the creditor may not levy or "revive" the lien or sell the property. The further effect of the language of section 512, since, under the *Atlas Refining Co.* case, it may be used against an heir or devisee, would be to revive the lien as against the heir or devisee, unless the heir or devisee conveyed at a time when there was no lien in effect.

This subdivision deletes the heir or devisee language of section 512. As a result, where there is no longer a lien on the property, a judgment against a decedent may be enforced by bringing a suit against the heirs or devisees under section 170 of the Decedent Estate Law or the creditor may file his claim in the Surrogate's Court or he may seek leave of court to issue an execution under proposed section 13.8. In effect, the passage of title to the heirs or devisees is treated as a purchase except for the liability of the heirs or devisees for the debts of the decedent. For further discussion of the provisions relating to execution upon the property of a deceased judgment debtor, see notes to proposed section 13.8.

61.13. Sale of real property.

Preliminary Note

This rule is new. It is designed to replace the enormously cumbersome procedures relating to the sale and redemption of real property which comprise the bulk of sections 708 through 755 of the civil

practice act. Under it, the purchaser at a judicial sale will take immediate title, and the judgment debtor or other creditors will not be able to redeem the property after sale. This should substantially increase the purchase price at the judicial sale and should therefore inure to the benefit of both judgment debtors and creditors.

In discussing the Illinois redemption provisions which are virtually identical to those in New York, one commentator has noted:

> These provisions allow the debtor, his assigns, or any person interested in the premises through or under the debtor, to redeem any real estate sold under execution by paying the amount bid at the execution sale to the successful purchaser within twelve months of the sale. If there is a failure of such redemption, any judgment or decree creditor of the debtor can also redeem within fifteen months of the sale. The purpose of these provisions is to make the purchaser at an execution sale pay a fair price for the realty. Paradoxically, the provisions have probably had an exactly opposite effect. The right of redemption is rarely exercised because of the failure of debtors and their judgment creditors to understand the complicated redemption laws. But would-be execution sale purchasers are reluctant to bid at such sales because of the threat of redemption. Within the fifteen-month period after the sale, they may be deprived of the property and lose the benefit of any bargain they may have acquired. Further, during the fifteen-month period they cannot take possession of the real estate. The net effect of the statutory redemption provisions is the prevention of competitive bidding at execution sales, which depresses the purchase price to the detriment of both the judgment debtor and creditor. [Note, 47 Nw. L. Rev. 548, 550–51 (1952).]

There is no right of redemption after an execution sale in Connecticut, Delaware (see Del. Code Ann. tit. 10, §4977 (1953)), Florida (see Fla. Stat. Ann. §55.48 (1943)), Georgia (see Ga. Code Ann. §39-1303 (1957)), Louisiana, Maryland (see Md. Ann. Code art. 83, §2 (1957)), Mississippi (see Miss. Code Ann. §1936 (1956)), Missouri, New Jersey (see N. J. Rev. Stat. §2A:17-41 (1952)), North Carolina (but see N. C. Gen. Stat. §§1-339.54—1-339.57 (1953) (debtor may pay judgment before time allowed for submitting upset bid)), Ohio (but see Ohio Rev. Code Ann. §2329.33 (Baldwin 1958) (redemption allowed prior to court's confirmation of sale)), Oklahoma (but see *Turk* v. *Mayberry,* 32 Okla. 66, 121 Pac. 665 (1912)), Pennsylvania (see Pa. Stat. Ann. tit. 12, §2445 (1951)), Rhode Island (see R. I. Gen. Laws Ann. tit. 9, c. 26, §19 (1956)), South Carolina (see S. C. Code §§10-2786—10-1789 (1952)), Texas, West Virginia (see W. Va. Code Ann. §§5098—5126 (1955) *passim*), the District of Columbia, Hawaii, Puerto Rico or Canada.

Even in the states which have a redemption procedure, there is great variety. In Kentucky there is a right to redeem only if the purchase price at the sheriff's sale is less than two-thirds of the appraised value of the real property. Ky. Rev. Stat. §426,220

(1958). In some other states, such as New Mexico, other judgment creditors have no right of redemption; the right is limited to the judgment debtor. N. M. Stat. Ann. §24-2-21 (1953).

One rationale for permitting redemption is grounded upon the belief, stated above, that the redemption procedure encourages a higher purchase price. While this does not seem to be the case with regard to purchasers at sheriffs' sales, it may be contended that permitting redemption by creditors and from other creditors results in a second "auction" and the further increase of the purchase price. This may be theoretically true, but multiple redemptions are a rarity and it is not clear whether an outright sale would not have brought a higher price in the first instance. There would also appear to be far better methods for assuring that fair value is obtained. Thus, a number of the states which do not have a redemption procedure provide for appraisers and require that the purchase price be at least two-thirds of the appraised value.

The creditor redemption provisions are seemingly based on the view that judgment creditors have an interest in obtaining the land, rather than the proceeds, if the sale price is low. The same result might better be achieved by giving such creditors notice of the sale, thus permitting them to bid up the price. Subdivision (b) of this rule contains such a provision.

A second rationale of redemption is based upon a desire to give judgment debtors an opportunity to recover their real property, because ownership of real property has a special connotation. Nevertheless, in the one instance in which real property may actually be of particular significance to judgment debtors—where it is being used as a homestead—present sections 676 and 677 provide for a sale of the property, if it is worth more than one thousand dollars, from which there is no right of redemption.

If one of the purposes of redemption is to accord debtors some opportunity to raise funds to satisfy their judgments before they lose their real property, it would seem preferable to have the period of delay before sale rather than after sale. Saskatchewan provides a delay of twelve months before sale and Rhode Island provides for a three-month period. Saskatchewan Rev. Stat. c. 89, §20 (1953); R. I. Gen. Laws Ann. tit. 9, c. 26, §16 (1956).

In New York, an eight-week period would appear to be appropriate. If a judgment debtor can show sound grounds for further delaying sale, he may move for an additional delay pursuant to proposed rule 61.18.

The provision in present section 643 that personal property must be executed upon before real property has been deleted; the proposed rules do not specify priority between real and personal property. See introduction to this title.

Under proposed rule 61.7(a), a receiver may be appointed to sell real property. There are numerous instances in which it is preferable to sell by personal negotiation, as is done generally with real estate, rather than by public auction. See notes to proposed rule 61.7. Since a receivership may involve substantial expenses, however, the courts would balance the considerations.

(a) Time of sale; public auction. Between the fifty-sixth and the sixty-third day after the delivery of an execution to the sheriff, unless the time is extended by order, the interest of the judgment debtor in real property which has been levied upon thereunder or which was subject to the lien of the judgment at the time of such delivery shall be sold by the sheriff pursuant to the execution at public auction at such time and place within the county where the real property is situated and as a unit or in such parcels, or combination thereof, as in his judgment will bring the highest price, but no sale may be made to that sheriff or to his deputy or undersheriff. If the property is situated in more than one county, it may be sold in a county in which any part is situated, unless the court orders otherwise.

Notes

This subdivision provides a delay of eight weeks in lieu of the present redemption provisions. If the judgment lien is still in effect, no levy is necessary in order to sell real property. See notes to proposed rule 61.12.

The notice provisions of subdivision (b) have been drafted to provide public notice for the eight-week period.

The provisions of this subdivision relating to place and manner of sale are derived from sections 660, 663, 712(2) and 715 of the civil practice act. The present provisions have been simplified and made parallel with those governing the sale of personal property. See notes to proposed rule 61.11(a).

(b) Sale of mortgaged property. Real property mortgaged shall not be sold pursuant to an execution issued upon a judgment recovered for all or part of the mortgage debt.

Notes

This provision is derived from section 710 of the civil practice act. No change is intended. See also notes to proposed rule 61.9(a).

Section 1077 of the civil practice act provides that, if a final judgment has been rendered in an action to recover any part of a mortgage debt, no action to foreclose the mortgage may be commenced unless an execution on the judgment has been returned unsatisfied. The effect of sections 1077 and 710 when read together is therefore to require an election of remedies between an action on the mortgage debt and an action to foreclose the mortgage. Section 710 prevents circumvention of the court's power in a foreclosure action under section 1083 of the civil practice act to assess a deficiency judgment based upon the fair market value of the property rather than on the price it brings on sale.

(c) Notice of sale. A printed notice of the time and place of the sale containing a description of the property to be sold shall be posted at least fifty-six days before the sale in three public places in the town or city in which the property is located, and, if the sale is to be held in another town or city, in three public places therein. Every judgment creditor having a judgment which was a lien for at least twenty days prior to the time fixed for the sale upon the real property to be sold shall be served with a copy of the notice personally or by registered or certified mail, return receipt requested, at the address shown upon the judgment docket, at least ten days prior to the time fixed for the sale. A copy of the notice shall be published at least once in each two-week period during the eight succesive weeks preceding the time fixed for the sale in a newspaper published in the county in which the property is located or, if there is none, in a newspaper published in an adjoining county. Notice of postponement of the sale shall be posted and served in the same manner as the notice of sale and shall be published at least once in the

newspaper in which the notice of sale was published. An omission to give any notice required by this subdivision, or the defacing or removal of a notice posted pursuant hereto, does not affect the title of a purchaser without notice of the omission or offense.

Notes

This subdivision is derived from sections 662, 712 and 713 of the civil practice act. The time period for public notice has been lengthened to accord with the delay of eight weeks provided in subdivision (a) for all sales. Notice is required to be served on other judgment creditors in order that they may protect their liens by attending the sale. See notes to proposed rule 61.14.

Under the present provisions, the notice must be posted for six weeks and published six times during that period. The proposed subdivision thus reduces the number of publications necessary.

(d) Conveyance; proof of notice. Within ten days after the sale, the sheriff shall execute and deliver to the purchaser proofs of publication, service and posting of the notice of sale, and a deed which shall convey the right, title and interest sold. Such proofs may be filed and recorded in the office of the clerk of the county where the property is located.

Notes

This subdivision replaces parts of sections 717 and 748 of the civil practice act.

The certificate procedure in present section 717, because it is related to the right of redemption, has been omitted. Instead of the present requirement that the sheriff file the proofs of notice, this subdivision only requires that they be delivered with the deed to the purchaser.

Because the deed will be delivered immediately after the sale, without the fifteen-month delay of present law, present section 755, providing for the appointment of a person to execute a deed when the officer who held the sale is unavailable, has been deleted.

The last sentence of present section 748 has also been omitted. This provision is covered in sections 35 to 37 of the civil practice act, which the advisory committee has recommended be transferred to the Real Property Law. See N.Y. Temp. Com'n on the Courts Rep. II 82, 85, Leg. Doc. 13 (1958). The twenty-year time period

in section 748 was apparently overlooked when all similar real property periods were changed to fifteen years in 1932. See *id.* at 518–20; N.Y. Laws 1932, c. 262–265.

61.14. Disposition of proceeds of sale.

After deduction for and payment of fees, expenses and any taxes levied on the sale, transfer or delivery, the sheriff making a sale pursuant to an execution or order shall distribute the proceeds to the judgment creditors who have delivered executions against the judgment debtor to the sheriff before the sale, which executions have not been returned, in the order in which their judgments have priority under sections 13.2 and 13.3 of the civil practice law. If the property sold had been levied upon pursuant to an order of attachment, the attaching creditor shall share in the proceeds and his priority shall be determined from the date of the levy. Any excess shall be paid over to the judgment debtor.

Notes

This rule is new and replaces provisions found primarily in sections 680, 681 and 687 of the civil practice act. It also covers provisions of present sections 682, 685, 687-a(4), 687-a(6), 795 and 798.

Under present section 680, the priority of judgment creditors upon personal property is determined by the order in which they deliver executions to the sheriff. The section further provides that the priority is determined irrespective of levy, but that a levy *and sale* under a junior execution will defeat a subsequent senior levy. Since proposed section 13.2 establishes a new system of priorities among judgment creditors, based upon the order of docketing, this rule implements the proposed priority system by directing that the proceeds be distributed in accordance with it. Where a creditor with priority has not delivered an execution to the sheriff, however, or where his execution has been returned, he would not share in the proceeds in the first instance, but would have to bring a proceeding within sixty days to set aside the delivery of the proceeds under the provisions of proposed section 13.2(a)(2).

With respect to real property, each creditor upon docketing a judgment in the county in which the property is located acquires a ten-year lien on the property, under present and proposed law. Since there is no right of redemption under the proposed rules, proposed rule 61.13(c) requires that all such judgment creditors be notified of the sale. They are therefore able to deliver executions to the sheriff prior to the sale and can be included when the sheriff distributes the proceeds in accordance with proposed section 13.3, as prescribed by this rule. Failing to so deliver an execution to the sheriff, a creditor with a lien superior to the lien of a recipient of the proceeds would have to bring a proceeding to set aside the delivery of the proceeds under the provisions of section 13.3(a)(1).

Section 681 of the civil practice act allows attachment creditors priority as if they were judgment creditors in the order in which their warrants of attachment are delivered to the sheriff. See also N.Y. Civ. Prac. Act §960. While the proposed rule continues the principle of allowing attachment creditors priority with judgment creditors, the priority of an attachment creditor is determined under the proposed rule from the levy rather than from the delivery to the sheriff. This change avoids an ambiguity in the present law. Under the attachment sections, delivery of a warrant of attachment to the sheriff does not create a lien on personal property; its effectiveness is determined from the time of levy. See, *e.g.*, N.Y. Civ. Prac. Act §§912, 917(2). By contrast, delivery of an execution does create a lien on tangible personal property. See N.Y. Civ. Prac. Act §679(1). Thus, for executions, the priority provisions in section 680 conform to the lien provisions and the senior lienor has senior priority. In the case of attachment, however, sections 681 and 960 specify that the first to deliver a warrant of attachment to the sheriff has "preference," despite the fact that he has no lien.

Section 682 of the civil practice act provides that, if a levy is made pursuant to it, an execution or attachment from a court not of record has preference over an execution not levied upon whether the latter is issued from a court of record or one not of record. The section thus determines priority from the levy and, if no sale was had, it is inconsistent with sections 680 and 681. Section 682 is intended to provide some means of determining the respective priorities where a marshal or constable makes a levy, the sheriff and other marshals or constables being unaware that the mandate had even been delivered to him. While determination of priority from the date of the levy for a court not of record seems to place its mandates in an inferior position to those of a court of record which are determined from the date of delivery, the section has a peculiar effect where two executions are delivered to the sheriff and a third, subsequent execution is delivered to a marshal or constable. In that case, a levy under the second execution in the hands of the sheriff does not give it preference over the first, but a levy under the third execution does.

Accordingly, present section 682 has been omitted and the proposed rule, together with proposed sections 13.2, 13.3 and 15.6,

determines all attachment priorities from the date of the levy and all execution priorities, in the first instance, from the date of proper docketing.

61.15. Failure of title to property sold.

The purchaser of property sold by a sheriff pursuant to execution or order may recover the purchase money from the judgment creditors who received the proceeds if the property is recovered from such purchaser in consequence of an irregularity in the sale or a vacatur, reversal or setting aside of the judgment upon which the execution or order was based. If a judgment for the purchase money is so recovered against a judgment creditor in consequence of an irregularity in the sale, such judgment creditor may enforce his judgment as if no levy or sale had been made, and, for that purpose, he may move without notice for an order restoring any lien or priority or amending any docket entry affected by the sale.

Notes

The first sentence of this rule is derived from section 756 of the civil practice act. Subdivision 2 of section 756 is ambiguous since it implies that the section is operative only if the judgment was vacated, reversed or set aside as a result of an irregularity *in fact*. This ambiguity derives from the apparently inadvertent omission of a comma after the word "irregularity" when the section was transferred to the civil practice act from the Code of Civil Procedure. See N.Y. Code Civ. Proc. §1479.

The second sentence of this rule is derived from section 757 of the civil practice act. The proposed provision, however, requires an order of the court in order that a lien be restored, so that the appropriate docket entry may be made pursuant to proposed rule 50.9(b).

61.16. Directions to the sheriff.

Upon motion of any party, on notice to the sheriff and all other parties, the court may direct the sheriff to dispose of, account for, assign, return or release all or any part of any property or debt, or the proceeds thereof, or to file additional returns, subject to the payment of the sheriff's fees and expenses. As far as practicable, the court shall direct that notice of the motion be given to other judgment creditors at the addresses shown on the judgment docket and to any persons who have secured orders of attachment affecting any property or debt, or the proceeds thereof, sought to be returned or released.

Notes

This rule is new. It replaces provisions found in sections 685, 687-a(4), 687-a(6), 795 and 798 of the civil practice act. To the extent that the present provisions requiring money to be paid to the sheriff are replaced in the proposed rules with requirements of money to be paid directly to the judgment creditor, there is no necessity for accountings from the sheriff.

61.17. Proceeding to determine adverse claims.

Prior to the application of property by a sheriff or receiver to the satisfaction of a judgment, any interested person may institute a special proceeding against the judgment creditor to determine the rights of adverse claimants to the property, by serving a notice of petition upon the sheriff or receiver and upon the judgment creditor in the same manner as a notice of motion. The proceeding may be instituted in the county where the property was levied upon, or in a court or county, specified in rule 61.1(a). The court may vacate the execution or order, void the levy, direct the disposition of the property, or direct that damages be awarded. Where there

appear to be disputed questions of fact, the court shall order a separate trial, indicating the person who shall have possession of the property pending a decision and the undertaking, if any, which such person shall give. If the court determines that the adverse claim was fraudulent, it may require the claimant to pay the judgment creditor the reasonable expenses incurred in the proceeding, including reasonable attorneys' fees, and any other damages suffered by reason of the claim.

Notes

This rule is new and is comparable to proposed rule 72.11 which provides for the determination of adverse claims to attached property. It is designed to replace parts of subdivisions 4, 5 and 6 of section 687-a, and parts of sections 696, 697, 698 and 795 of the civil practice act.

The multiplicity of separate actions, the complex procedures which must be followed before an adverse claim may be disposed of, and the special indemnification requirements, substantially increase the expense of enforcing judgments and often present unnecessary obstacles to persons with bona fide adverse claims. The proposed rule provides for the determination of such claims arising from any enforcement procedure upon a special proceeding. *Cf.* notes to proposed rule 72.11. While the notice of petition is served in the same manner as a notice of motion, the proceeding is denominated a special proceeding rather than a motion to permit it to be commenced in the county where the property was levied upon and to permit an appeal from the judgment finally determining the property rights of the adverse claimant.

Present sections 697 and 698 are virtually identical to sections 925 and 926. Section 925 differs from section 697 only in the length of the period during which an action may be commenced against the sheriff by an adverse claimant. The sole difference between sections 926 and 698 is the provision in the latter section that the sureties must be freeholders of the sheriff's county, a provision which was in section 926 until 1940. N.Y. Laws 1940, c. 625.

The differences between section 696 and subdivision 1 of section 924, its counterpart in the article on attachment, are more substantial. Under section 696, the adverse claim is asserted to the sheriff, who is given broad discretion to determine whether to seek indemnity from the judgment creditor and how long to detain the property or proceeds without indemnity. Under section 924(1), it is asserted to the court upon notice to the parties

and the sheriff, and the court makes the determinations. Section 696 provides that, in lieu of indemnity, the judgment creditor may institute a separate proceeding for the determination of the adverse claim. If the plaintiff fails to indemnify the sheriff under section 924(1), the claim is determined as an adjunct to the original action upon a showing that he is entitled to a hearing. Section 924(1) provides that the parties may demand a jury trial, while section 696 contains no such provision but provides merely that the judge, "in his sole discretion," may impanel a jury.

These distinctions are difficult to justify. Indeed, in subdivision 5 of section 687-a, where an adverse claim procedure is provided for debts and causes of action which have been levied upon under an execution, section 924, 925 and 926, relating to attached property, are specified as the procedure to be followed rather than the parallel execution provisions in sections 696, 697 and 698.

These methods provided in section 687-a for asserting and disposing of adverse claims that arise upon a levy on a debt or cause of action as well as those provided for adverse claims in supplementary proceedings, have substantially added to the confusion and complexity of this area. Thus, the adverse claim of the person against whom the levy was made may be determined only by a separate action instituted by the judgment creditor after obtaining leave of court pursuant to subdivision 6 of section 687-a, but the claim of any other person may be disposed of on motion pursuant to subdivision 5. Subdivision 5 also permits such other person to intervene in an action between the judgment creditor and the purported garnishee, or, as previously noted, to proceed in accordance with the adverse claim procedure in the attachment article.

In supplementary proceedings, if the right of the judgment debtor to the possession of property not in his control is "substantially disputed" on a motion for a payment or delivery order pursuant to section 796, the motion is denied. It is not clear whether a person other than the one against whom the order is sought can dispute the judgment debtor's right. In any event, the judgment creditor is apparently limited to issuing execution against the property whereupon the adverse claim would be determined in accordance with section 696, 697 and 698. But in order for the sheriff to levy upon such property it may be required that the judgment creditor or his attorney specify it and allege that it belongs to the judgment debtor, a risky course which may subject the judgment creditor to an action for damages.

Where an indebtedness is disputed by a purported garnishee on a motion for a payment order pursuant to section 794(2), however, the issue will be determined on the motion unless the garnishee or the judgment debtor shows "such facts as may be deemed by the court sufficient to entitle . . . [him] to a trial of the issue in an action brought by the judgment creditor." There is no provision regarding the manner in which a person other than the one against whom a payment or delivery order is issued or sought, pursuant to section 794(2), may assert an adverse claim and have it determined.

In contrast to the present procedures in which a substantial dispute under section 796 and an issue of fact under section 794(2) results in the denial of the motion, claims or other issues arising on a proceeding for a payment or delivery order pursuant to proposed rules 61.4 or 61.6 will be determined in a manner similar to that provided by the proposed rule.

Under the proposed rule, when the court finds that a determination should be delayed, it is authorized to provide for indemnity and other terms and conditions required by the particular case. *Cf.* N.Y. Civ. Prac. Act. §§696–698.

61.18. Modification or protective order; supervision of enforcement.

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Rule 34.4 is applicable to procedures under this title.

Notes

This rule is new. It is designed to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." See proposed rule 34.3(a). The high incidence of harassment in the enforcement of judgments renders the increased supervision of the courts desirable. The rule is stated as broadly as possible and is designed to replace the diverse, overlapping, overly technical and inconsistent provisions relating to the manner in which enforcement procedures may be modified, vacated and regulated. These provisions are found in sections 649, 684(4), 687-a(4), 687-a(7), 775(1), 779(1), 781, 784-a, 785, 787, 793, 799, 800, 802(1) and 802(3) of the civil practice act.

61.19. Arrest of judgment debtor.

Upon motion of the judgment creditor without notice, where it is shown that the judgment debtor is about to depart from the state, or keeps himself concealed therein, and that there is reason to believe that he has in his possession or control property in which he has an interest, the court may issue a warrant directed to the sheriff of any county in which the judgment debtor may be located. The warrant shall command the sheriff to arrest the judgment debtor forthwith and bring him before the court. The sheriff shall serve a copy of the warrant and the papers upon which it was based upon the judgment debtor at the time he makes the arrest. When the judgment debtor is brought before the court, the court may order that he give an undertaking, in a sum to be fixed by the court, that he will attend before the court for examination and that he will obey the terms of any restraining notice contained in the order.

Notes

This rule consolidates provisions for the arrest of the judgment debtor found in sections 774(3), 775(3), 776 and 783(4) of the civil practice act. The last sentence of present section 776 is omitted as unnecessary; if the debtor should fail to obey the order of the court, he would be punishable for a contempt.

Although civil arrest has been severely limited by the proposed rules (see proposed section 15.2 and proposed title 71), and body execution has been abolished, arrest and imprisonment for contempt of court remain as sanctions for disobedience of a subpoena. See proposed rule 61.20. Proposed rule 61.19 is necessary where, because the judgment debtor avoids service of a subpoena, he cannot be punished for its violation. Moreover, the situation is different than that covered by civil arrest after judgment, pursuant to proposed section 15.2, which is limited to an arrest in order to enforce the provisions of a judgment requiring the performance of an act.

61.20. Disobedience of subpoena, order or restraining notice; false swearing; destroying notice of sale.

Failure of any person to comply with a subpoena or restraining notice issued, or with an installment payment order granted, pursuant to this title; failure of a judgment debtor to comply with any order granted pursuant to this title; false swearing upon an examination or in answering written questions; and

willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court.

Notes

This rule is based upon sections 661, 782-a(7), 788, 801 and parts of sections 781 and 793 of the civil practice act.

The present notorious disregard for court orders and process relating to the enforcement of judgments is due partially to the inadequacies of sanctions and partially to the reluctance on the part of many judges to impose stringent penalties in this area. This rule is designed to increase and consolidate present penalties, and to have them conform to those imposed for similar violations of pre-trial disclosure procedures.

Present provisions are confusing, misleading and inordinately varied in language and location in the civil practice act. While present section 801 contains a blanket provision that failure to comply with orders or subpoenas in supplementary proceedings is punishable as a contempt, some of the sections dealing with particular orders and subpoenas contain a similar provision. Thus, section 781, which is explicitly referred to in section 801, and sections 782-a(7) and 793 contain separate penalty provisions, while sections 775, 779, 782 and 796 apparently rely on the blanket provision in section 801.

There is no provision in the article covering executions equivalent to section 801. As a result, no express sanction is provided for willful violation of at least two sections which contain statutory language imposing a mandatory duty. For example, section 687-a(2), distinguishes between matured and unmatured debts and provides that in the latter case payment to the sheriff is merely permissive while in the former it is mandatory (see N.Y. Law Rev. Comm'n Rep. 364 (1952)), but no penalty is provided for a willful failure to pay a matured and liquidated debt. *Smith* v. *Top Notch Bakers,* 206 Misc. 265, 134 N.Y.S.2d 744 (County Ct. 1954) motion to have garnishee punished for contempt denied); *Elson* v. *Kautzman,* 117 N.Y.S.2d 518 (N.Y.C. Munic Ct. 1952) (motion for order directing compliance denied). Similarly, although section 684(2) provides that it "shall be the duty" of a person served with a garnishee execution to pay the specified amount to the sheriff, if the "duty" is disregarded—even willfully—the judgment creditor's only remedy is a separate suit for the amount withheld. At least in this situation, however, the judgment creditor is not required to obtain leave of the court to bring the action, as he must under section 687-a(6), apparently because the execution itself may be obtained only upon court order.

Even where sanctions are provided, they are frequently ignored in practice: the violator is compelled to do what he was initially supposed to do, with no additional penalties being imposed against him. Thus, although failure to appear for an examination pursuant to a subpoena or court order is punishable as a contempt, judgment debtors have learned that they may willfully flout the order or subpoena, for upon their appearance pursuant to an order to show cause, courts almost invariably require only submission to the examination. In many cases, it is to the debtor's advantage to also ignore a show cause order, for the usual consequences of such repeated disregard of court process is a fining order requiring payment in monthly installments of a fine of no more than $250 to be applied in satisfaction of the judgment. See N.Y. Judiciary Law §773. In effect, the judgment creditor has converted his judgment into an order for payment without proof of the ability of the debtor to pay. But the order may be small benefit to him, for the "easy payment plan" thus forced upon the creditor may have been justifiably rejected by him previously because of the debtor's ability to make larger or more frequent payments.

In courts where failure to appear upon the show cause order results in the issuance of a bailable body attachment, some judges also impose no penalty when the debtor is brought in but merely require him to submit to an examination.

Present section 782-a(7), applicable to financial institutions which default on an information subpoena, sets a fixed penalty of fifty dollars. The general contempt provisions of the proposed rule and of proposed rule 38.6(a) replace this provision; the former is applicable both to default and to false swearing in reply to an information subpoena. The provision that false swearing upon an examination is punishable as a contempt is based upon present section 788.

Under the proposed rule, persons may be punished for contempt even though they were not served personally, since proposed rule 61.2 provides for service of restraining notices by registered or certified mail, return receipt requested, and proposed rule 61.3 provides for service of an information subpoena in the same way. Since the penalties will not be imposed unless violations are willful, the judgment creditor will be required to show actual notice. There is no constitutional requirement of personal service, nor is the imposition of contempt penalties where there has not been personal service novel in New York. As already indicated, section 782-a(7) provides for punishment by contempt although the subpoena pursuant to that section may be served by ordinary mail. See also *People ex rel. Stearns* v. *Marr,* 181 N.Y. 463, 74 N.E. 431 (1905) (injunction); *Underhill* v. *Schenck,* 205 App. Div. 182, 199 N.Y. Supp. 611 (2d Dep't 1923) (interlocutory judgment directing accounting); *People ex rel. New York State Labor Relations Board* v. *Wheeler, Inc.,* 177 Misc. 945, 31 N.Y.S.2d 785 (Sup. Ct. 1941) (order enforcing State Labor Relations Board decision).

Restraining notices and subpoenas are required to set forth the consequences of failing to comply with their direction or furnishing false information. See proposed rules 61.2(a) and 61.3(a).

The provision in this rule for punishment of willful defacing or removal of a posted notice replaces section 661 of the civil practice act. The present section provides for a forfeiture of fifty dollars to each of the parties, but it has apparently never been utilized.

Present section 714, prescribing a forfeiture of one thousand dollars by the sheriff for failure to give notice of a sale of real property has been deleted. It apparently has never been utilized and represents an obsolete approach to the enforcement of the sheriff's duties. *Cf.* N.Y. Penal Law §1857.

This rule is not applicable to a failure to comply with a judgment entered upon a proceeding brought pursuant to this title. The sole penalty for such a failure, as under present section 794(2), is entry of a judgment. The rationale is the same as that governing judgments generally: a person should not be punished for failing to do something which he may be unable to do. A debtor of the judgment debtor unable to pay his debts should not be placed in any worse position than the judgment debtor himself.

Daily Calendar Records
New York City Court, New York County, Special Term, Part II
Month of October, 1957*

EXAMINATION CALENDAR

Date	Debtors Called	Defaults	Appearances	Adjourned or Marked Off
10/1	38	34	1	3
10/2	43	37	3	3
10/3	16	15	1	0
10/4	55	47	8	0
10/7	32	27	3	2
10/8	88	76	9	3
10/9	50	44	5	1
10/10	54	48	5	1
10/11	45	40	4	1
10/14	35	29	3	3
10/15	37	32	2	3
10/16	52	45	4	3
10/17	23	22	1	0
10/18	72	66	5	1
10/21	44	37	5	2
10/22	44	39	3	2
10/23	68	63	4	1
10/24	33	28	4	1
10/25	93	85	7	1
10/28	49	41	7	1
10/29	25	21	3	1
10/30	70	58	10	2
10/31	44	36	7	1
Total	1,110	970	104	36

CONTEMPT MOTION CALENDAR

Date	Debtors Called	Defaults	Appearances	Adjourned or Marked Off
10/1	7	4	1	2
10/2	9	7	2	0
10/3	4	3	1	0
10/4	14	12	0	2
10/7	6	4	1	1
10/8	6	5	0	1
10/9	12	8	1	3
10/10	12	9	0	3
10/11	7	6	1	0
10/14	7	4	1	2
10/15	5	3	2	0
10/16	8	7	1	0
10/17	22	17	1	4
10/18	21	18	1	2
10/21	13	11	1	1
10/22	6	3	1	2
10/23	12	7	3	2
10/24	16	13	2	1
10/25	13	12	1	0
10/28	8	6	2	0
10/29	5	5	0	0
10/30	17	16	1	0
10/31	9	4	3	2
Total	239	184	27	28

* Prepared by a student in the Seminar in Judicial Administration, Law School, Columbia University, 1958

TITLE 71. ARREST

INTRODUCTION

Section 826 of the civil practice act lists nine types of action where the defendant may be arrested before judgment. They are all actions in tort or of a tortious nature. *Cf.* N.Y. Civ. Rights Law §21.

The first five types of actions listed in section 826 are actions to recover a fine or a penalty, to recover damages for a personal injury, to recover damages for an injury to property, to recover damages for misconduct in office or in a professional capacity and to recover damages for fraud and deceit. Although each of these is an action seeking money only, no showing is necessary that the defendant would be unable to pay a judgment if the plaintiff were successful. Historically, at least, the mere nature of the action—more exactly, of the alleged conduct of the defendant—gives the plaintiff access to the provisional remedy of civil arrest. Only the fact that the granting of an order of arrest is discretionary with the court (see 10 Carmody-Wait, Cyclopedia of New York Practice 289 (1954)) operates to prevent utilization of these provisions primarily as a punishment—based on allegations instead of proof—rather than as a method of securing a plaintiff in a case where there is substantial risk that a judgment would be unenforceable. Fortunately, the courts have been reluctant to grant orders of arrest. Nevertheless, most commentators agree that civil arrest, at least in this area, is an anachronistic survival of imprisonment for debt and has no place in a modern jurisprudence.

Similarly, inclusion of the remaining types of actions in section 826 seems to be directed more to the punishment of defendants for tortious conduct that to security for plaintiffs. The sixth, seventh and ninth types of actions in which civil arrest may be secured under section 826 are actions to recover a chattel which has been concealed so that the sheriff cannot seize it, actions to recover for conversion or embezzlement by a fiduciary and actions upon a contract where the defendant incurred the liability by fraud or has or is about to remove his property with intent to defraud creditors. Recovery is precluded unless the concealment, the fiduciary relationship or the fraud or fraudulent intent is proved, but the plaintiff is not barred from seeking to recover in a second action, if he should fail in the first. The plaintiff's failure, however, may have been due to a failure to prove, or overcome a defense to, an element of the principal cause of action and not merely a failure to prove the additional allegations upon which the arrest was based. It seems unfair to require the successful defendant, who was admittedly arrested erroneously, to relitigate such a case. Some of the history of these provisions is set forth in Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 Colum. L. Rev. 158, 169–170 (1929).

The eighth and remaining type of action in which arrest is permitted by section 826 is an action for peculation. This provision, too, seems directed to the punishment of the defendant rather than the security of the plaintiff. It is interesting to note that attachment is also expressly authorized in peculation cases by section 904 of the civil practice act. See notes to proposed section 15.3.

Section 826 does not distinguish between accidental injury and injury involving force, fraud, or wilful misconduct. For example, under subdivisions 2 and 3, injuries to person or property are grounds for an arrest whether or not the injuries are intentional. Arrests are therefore proper in any negligence action. Orders of arrest are seldom granted; certainly they are virtually never granted in negligence actions. But the very existence of the present provisions present far too many opportunities to the unscrupulous. They breed threats, intimidations and coercions and it is impossible to estimate the number—or the effect—of summonses that are served bearing the frightening legend: PLAINTIFF CLAIMS DEFENDANT IS LIABLE TO ARREST AND IMPRISONMENT. To the ignorant, such practices bring unwarranted fear; to the better-informed, they bring disrespect for legal process. In total, they represent a cynical view of the efficacy of our judicial system.

It has been aptly stated of section 826: "It is here that the statutes permit a debtor free of fraud to be punished; it is here that a person may be deprived of liberty before it has been adjudged that he has committed a compensable wrong; it is here that the state's punitive machinery may be employed at the request of an individual who alleges he has suffered a personal injury under circumstances which may have been entirely free of criminal wrong." Buschman & Mayersohn, *Civil Arrest and Execution Against the Person,* 12 Albany L. Rev. 17, 21 (1948).

Over fifty years ago, Charles Evans Hughes eloquently protested use of civil arrest as a punitive measure in the actions now specified in section 826. See Hughes, *Arrest and Imprisonment on Civil Process,* 28 N.Y.S. Bar Ass'n Rep. 151 (1905). For many years before, and in the years since, reformers at regular intervals have sought to abolish or limit civil arrest. See, *e.g., id.* at 168; Medina, *supra* at 168; Note, 26 N.Y.U.L. Rev. 172, 178–182 (1951); 12 N.Y. Jud. Council Rep. 335 (1946); Buschman & Mayersohn, *supra;* Report of the Committee on Law Reform, 11 The Record 402 (Association of the Bar of the City of New York 1956).

The reports of the Judicial Council and of the Committee on Law Reform present cogent arguments for abolition of civil arrest in section 826 cases. Although the Judicial Council declined to recommend action, a decision apparently based, at least in part, upon the then reluctance of the Committee to Co-operate with the Judicial Council of the Association of the Bar of the City of New York (see 14 N.Y. Jud. Council Rep. 74 (1948)), the advisory committee agrees with the 1956 Committee on Law Reform of the Association of the Bar that the reform is long overdue. Accordingly, this draft of title 71 is based upon the amendments recommended in a report of the Committee on Law Reform adopted by the Association of the Bar of the City of New York. Abolition of the

section 826 vestiges of imprisonment for debt should be considered in the light of proposed title 72 and proposed section 15.3, whereby some limitations on the provisional remedy of attachment are deleted, thus partially compensating for the restriction on arrest.

The ground of arrest stated in section 827 of the civil practice act, however, rests "upon extrinisic facts" and represents the only way to assure a plaintiff seeking the performance of an act by the defendant that the defendant will be subject to the power of the court to compel performance of the act. It is the modern counterpart of the *ne exeat* writ and supplements the remedy of attachment. Title 71 also follows the recommendations of the Association of the Bar by retaining civil arrest only in those cases now permited by section 827 and providing the safeguard of a hearing after the arrest. No useful purpose seems to be served, however, by requiring, in addition, a hearing *before* the arrest in every case, as is suggested by the Law Reform Committee. Certainly the court has power to request that proof be made by testimony rather than affidavit, for the remedy is discretionary in any case.

Essentially, proposed title 71 is a belated response to Hughes' 1905 entreaty that "reform should be completed, and, save in cases of contempt of court, and where it may be necessary to arrest the defendant in order to insure the performance of an act, the failure to perform which would be punishable as a contempt . . . , arrest and imprisonment in civil cases should be abolished." Hughes, *supra* at 170.

Restriction of arrest to the one ground stated in section 827 makes many of the provisions in the civil practice act unnecessary. For example, because the arrest may only be granted on a single ground, section 821, requiring an order of arrest to "briefly recite the ground or grounds on which it is granted," has been omitted.

In effect, the restriction virtually limits arrest to four situations: alimony (N.Y. Civ. Prac. Act §1172), payment of money into court in non-contract actions (*id.* §504(4)), wilful defaults of fiduciaries (*id.* §505(5)) and delivery or conveyance of property not situated in New York. *Id.* §§505(1), 505(2). This is because these situations satisfy the two conditions of proposed section 15.2 and proposed rule 71.2(a): that the judgment or order sought is enforceable by contempt and is one which may be rendered ineffectual by reason of a defendant's non-residence or imminent departure from the state. Judgments directing the payment of money are generally enforceable by execution. N.Y. Civ. Prac. Act §504. In rem jurisdiction may be used to effectuate a judgment or order dealing with property within the state and a defendant's absence would ordinarily further, rather than hamper, enforcement of an injunction restraining the performance of an act within the state.

Abolition of civil arrest upon the grounds specified in section 826 has the effect of abolishing execution against the person, since the present law permits such execution only in cases where a civil arrest is authorized by section 826. N.Y. Civ. Prac. Act §764. It

should be noted, however, that civil arrest, and execution against the person, is authorized in certain local courts. See N.Y. Justice Ct. Act §§61, 301. Abolition of execution against the person in all courts would necessitate repeal or amendment of provisions in the Consolidated Laws which refer to this remedy. See, *e.g.*, N.Y. Civil Rights Law §72; N.Y. Indian Law §52. It is contemplated that the advisory committee will recommend repeal of those provisions which refer only to the civil practice act provisions. See, *e.g.*, N.Y. Conserv. Law §952; N.Y. Navig. Law §140(2).

This title is restricted to civil arrest as a provisional remedy. While it includes such arrest after judgment, as does present section 827, it does not cover arrest and commitment for civil or criminal contempt (*cf.* N.Y. Debt. & Cred. Law §§15(16), 170) nor arrest of criminals or parole violators. See, *e.g.*, N.Y. Gen. Munic. Law §371 (traffic violation); N.Y. Educ. Law §4804 (child paroled from home school). Also excepted are certain quasi-criminal arrests permitted by the Consolidated Laws. See, *e.g.*, N.Y. Dom. Rel. Law §§122(6), 123 (paternity); N.Y. Educ. Law §§3213(2)(a), 4111 (truant); N.Y. Gen. Bus. Law §34 (unlicensed peddler; citizen's arrest); N.Y. Mental Hygiene Law §81(5) (person apparently mentally ill); *id.* §151(6) (epileptic escaped from Craig Colony); N.Y. Soc. Welfare Law §434 (runaway ward of state training school).

The Consolidated Laws also contain provisions authorizing arrest in actions to recover a fine or penalty or for misconduct in public office. These grounds, presently covered by subdivisions 1, 4, 7 and 8 of section 826 of the civil practice act, are abolished by proposed title 71. Section 61 of the Justice Court Act, however, provides for arrest in identical cases. It is therefore inadvisable to repeal the Consolidated Law provisions until consideration may be given to abolishing civil arrest in the Justice Court and other local courts. See, *e.g.*, N.Y. Loc. Fin. Law §166.00 (action for damages against municipal officer); N.Y. Village Law §339 (action to recover penalty for violation of ordinance; incorporates Justice Court Act provisions). Similarly, article 4 of the Debtor and Creditor Law, which authorizes a proceeding to exempt an insolvent debtor from civil arrest for his debts, should be repealed when civil arrest is wholly abolished.

The advisory committee strongly recommends repeal of these remaining arrest provisions.

There is wide variation in other jurisdictions on the grounds for civil arrest and body execution. For example, in Mississippi and Texas, imprisonment for debt is barred by the Constitution and no statutory provision authorizes civil arrest; while Oklahoma, which has a similar constitutional provision, does not authorize civil arrest on mesne process but permits body execution against an absconding debtor or one who conceals, removes or disposes of his assets. The grounds for civil arrest in the United States, including Alaska and the District of Columbia, are tabulated at pp. 797–805 *infra*.

TABLE OF RULES IN TITLE 71

RULES—TITLE 71. ARREST

71.1. Order of arrest.

An order of arrest as a provisional remedy may be granted, in the discretion of the court, without notice, before or after service of summons and at any time before or after judgment. It shall specify the amount of bail, be indorsed with the name and address of the plaintiff's attorney and be directed to the sheriff of any county in which the defendant may be located. The order shall command the sheriff to arrest the defendant forthwith, keep him in custody and bring him before the court, in the county where the arrest is made, for a hearing within a time specified in the order, not exceeding forty-eight hours, exclusive of Sundays and public holidays, from the time of the arrest.

Notes

The first sentence of this rule is derived from sections 815 and 818 and the last sentence of section 827 of the civil practice act. The second sentence is based upon sections 838 and 839 of the civil practice act and rule 82 of the rules of civil practice. Subscription by the plaintiff's attorney has been replaced with an indorsement of his name and address. See proposed rule 32.1(d) and notes. The express authority of the last two sentences of present section 838, permitting a plaintiff's attorney to limit the time during which an arrest can be made, has been omitted as unnecessary.

The last sentence of this rule is derived from section 840 and rule 82. The provision of this sentence for bringing the defendant into court within a specified time, not exceeding forty-eight hours, is new; it is based upon recommendations made by the Association of the Bar of the City of New York after a study of the problem of civil arrest by the Association's Committee on Law Reform. See 11 The Record 402 (1956). Under the present law, the defendant who is arrested has the burden of initiating a hearing on the validity of the arrest. *Cf.* proposed rule 71.8. A poor or ignorant defendant may find difficulty in assuming this initiative. Since an arrest under present section 826 may be based upon allegations in the complaint, a hearing is unnecessary in many cases. By abolishing the grounds in section 826 and retaining only that of section 827, however, the proposed rules contemplate that any civil arrest will be based upon a factual determination as well as upon the nature of the relief demanded. This change makes an immediate hearing desirable in every case.

At the hearing, the court may alter the amount of security required from the plaintiff, alter the amount of bail or modify or vacate the order. See proposed rules 71.2(b), 71.8; *cf.* N.Y. Civ. Prac. Act §842.

71.2 Motion papers; undertaking.

(a) Affidavit; other papers. On a motion for an order of arrest the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, that he has demanded and would be entitled thereon to a judgment or order requiring the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt and either that the defendant is not a resident of the state or that he is about to depart therefrom, by reason of which non-residence or departure there is a danger that such judgment or order will be rendered ineffectual. The

plaintiff shall also show sufficient facts from which the amount of bail may be determined.

Notes

This subdivision replaces section 833 of the civil practice act; it is based upon the proposals of the Association of the Bar of the City of New York. Since only the one ground of arrest of section 827 has been retained, the particular requirement of that section has been set forth.

The provision in this subdivision for "affidavits and such other evidence as may be submitted" is based upon present section 816. It is intended that such "other evidence" would include testimony at an ex parte preliminary hearing if the court should deem it desirable. *Cf.* Report of the Committee on Law Reform, 11 The Record 402, 409–410 (Association of the Bar of the City of New York 1956); Report of the Commission on the Administration of Justice in New York State 305, 306 (1934).

The last sentence of this subdivision is based upon rule 81 of the rules of civil practice.

(b) Undertaking. Before granting an order of arrest, the court may require the plaintiff to give an undertaking in an amount fixed by the court that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the arrest if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to arrest the defendant.

Notes

This subdivision is derived from sections 819, 835 and 836 of the civil practice act. There is no express present provision for a deposit in lieu of a bond on the undertaking, although such a deposit is permitted as bail. See, *e.g.*, N.Y. Civ. Prac. Act §847. Throughout the proposed rules, cash deposits are permitted in lieu of bonds as security. See proposed rule 123.1. Such matters as service and filing, justification, additional security and discharge are covered in proposed title 123.

The proposed subdivision makes the requirement of an undertaking discretionary. This accords with present law. For, while present section 819 requires the giving of security except where it is "expressly dispensed with by statute," section 836 permits it to be "dispensed with" where the order of arrest "can be granted only by the court." The order of arrest under section 827 "can be granted only by the court."

Two minimum amounts are specified for bonds in present section 835. One is that the amount be not less than one-tenth the bail; the other is that it be at least two hundred fifty dollars. But section 835 is applicable to civil arrest only on any of the grounds specified in section 826 and not on the ground in section 827. The latter is the only one retained in the proposed draft. Present section 836 gives the court complete discretion as to whether security shall be required for a section 827 arrest and, if so, its amount. Accordingly, no minimum has been set in the proposed subdivision.

The condition of the bond has been stated, however, in much the same terms as present section 835. The phrase "it is finally decided that the plaintiff was not entitled to the order of arrest" has been changed to "it is finally decided that the plaintiff was not entitled to arrest the defendant" to make it clear that it does not include a technical defect in the plaintiff's papers in seeking the particular order of arrest, but is applicable only if the plaintiff had no right to any order of arrest.

71.3. Service of order; hearing; burden of proof.

(a) Service of order; notice. The plaintiff shall deliver to the sheriff the order of arrest, the affidavit and other papers upon which the order was based and the summons and complaint, if not already served. The sheriff shall serve such papers upon the defendant at the time of making the arrest. At least twenty-four hours prior to the hearing or within such shorter time as is specified in the order, the sheriff shall notify the plaintiff, by telephone or by leaving a notice at a place designated in the plaintiff's papers, to appear at the hearing. If, within the time specified in the order, the sheriff shall not have brought the defendant before the court or judge for a hearing, he shall immediately release the defendant from custody.

Notes

The first two sentences of this subdivision are derived from present section 839. Service of an order of arrest with the summons is presently covered in section 818.

The last two sentences of this subdivision are new. They are based upon a recommendation of the Committee on Law Reform of the Association of the Bar of the City of New York. See introduction to proposed title 71; notes to proposed rule 71.1. Rather than the lengthy notice provision of that recommendation, use of the telephone is recognized as the usual method of notice in practice. Moreover, the court is given power to require, in the order of arrest, notice of less than twenty-four hours. Notice of hearing to the plaintiff is required because it may be fixed with reference to the time of arrest and the plaintiff may not know when the arrest was made.

(b) Burden of proof. Upon the hearing, the plaintiff shall have the burden of establishing his right to the arrest and detention of the defendant.

Notes

This subdivision is new and is also based upon the recommendations of the Association of the Bar. The Association proposal explicitly provided that plaintiff have the burden of establishing "the legality and justice" of the order and detention "by a fair preponderance of the credible evidence." These phrases have been omitted. The justice of granting the order depends upon more than a balancing of probabilities and the matter is best left to the court's discretion.

71.4 Privileged persons.

If the court, or a county judge in the county where the arrest is made, finds at any time after the arrest that the defendant is privileged from arrest, it shall discharge him from custody and vacate the order of arrest. If the court finds at or after the hearing that the defendant should not be continued in custody, it may discharge him from custody and vacate the order of arrest.

Notes

The first sentence of this rule is derived from present section 841. The second sentence replaces present section 830, and gives the court broad power to release the defendant if it appears at or after the hearing that justice requires it. *Cf.* proposed rule 71.3(b).

The provision in present section 829 that a woman cannot be arrested is inapplicable by its terms to a section 827 arrest. It has therefore been omitted. The privilege of a representative contained in section 831 apparently derives from the punitive aspects of arrest and it has also been omitted; if the judgment demanded requires the performance of an act by a representative, he should be as amenable to arrest as any other defendant.

It has been indicated that a marshal may not claim the privilege for a debtor. *Family Finance Corp.* v. *Starke,* 36 N.Y.S.2d 858 (Sup. Ct. 1942). Similarly, a sheriff may not claim it and would be guilty of contempt for not making the arrest on a court order because of an assumed privilege. *Fiorini* v. *Fiorini,* 122 Misc. 325, 203 N.Y. Supp. 785 (Sup. Ct. 1924). *Cf.* N.Y. Civ. Rights Law §26.

A compilation of privileges from arrest based on New York statutory and decisional law is set forth at pp. 807–811 *infra.*

Reference to both a county judge and "the court" permits flexibility which may not otherwise be possible under proposed rules 33.3(c) and 33.4(b).

The provision of section 832 for a new order of arrest when a sick prisoner escapes while at or in transit to or from a hospital appears wholly unnecessary and has been omitted. The escape of any prisoner at any time or place should be sufficient cause for his apprehension on the old order or the granting of a new one.

71.5. Bail; release from custody.

A defendant who has been arrested shall be given reasonable opportunity to procure bail and shall be released upon giving to the sheriff an undertaking, in the amount specified as bail in the order of arrest, approved by the court, that the defendant will perform the act required by a judgment or order which may be entered against him in the action or, in default of such performance, will at all times render himself amenable to proceedings to punish him for the default. The sheriff shall immediately release the defendant, give him a receipt for any money deposited and deposit the money with the clerk of the court or, within three days, serve a copy of the undertaking upon the plaintiff, whereupon the sheriff shall be

exonerated from all liability. Except as provided in this title, the rules of title 123 apply to the acceptance of bail and justification of bail surety. If the bail is not allowed, the court shall remand the defendant to the custody of the sheriff.

Notes

The first sentence of this rule is derived from present sections 847, 849 and 850. The second sentence of this rule is derived from present sections 850, 851, 856 and 857. The third sentence refers to the general rules on security which apply to bail. These general provisions cover the present provisions of sections 852, 853, 854 and 863 as well as the first sentence of section 855. The fourth sentence of this rule is based upon the last sentence of present section 855.

Although release with jail liberties is expressly provided for in the civil practice act, the provisions are duplicated in the Consolidated Laws. *E.g.*, N.Y. Correction Law §515. Moreover, such a procedure is seldom utilized, presumably because a bond for jail liberties must be twice the amount of a bail bond. All references to such a release and undertaking have been deleted.

It should be noted that the restriction of civil arrest to the *ne exeat* situation makes the setting of bail difficult, for, should forfeited bail be an adequate substitute for the performance of the act demanded, in most cases the arrest would not be authorized and attachment would be a sufficient protection to the plaintiff. A notable exception to this inherent inadequacy of bail is the alimony situation, where failure to pay specific sums of money constitutes a contempt and hence bail may be determined in relation to a preliminary determination of the amount of alimony which may be awarded.

"Approval" of bail is an *ex parte* act of a judge; it is required for bail, although not generally for other surety under proposed title 123. Failure of the plaintiff to "accept" bail so approved results in justification, after which the bail may be "allowed" by order of the court, pursuant to proposed title 123.

71.6. Exoneration of bail surety.

(a) Upon surrender of the defendant. If the defendant is surrendered to the sheriff, and a written demand of the bail surety or the defendant to take him into custody and a copy of the undertaking are delivered to the sheriff, or if the defendant is remanded to the custody of the sheriff, the sheriff shall take the defendant into custody and provide the bail surety with a

certificate of custody of the defendant. Upon motion by the surety or defendant made upon the certificate and upon notice to the plaintiff, the surety shall be exonerated. At any time before the surety is finally charged, he may arrest the defendant, for the purpose of surrendering him, or, by written authority indorsed upon the copy of the undertaking, may empower another person to do so.

Notes

This subdivision is derived from sections 865, 866, 867, 868 and 875(3) of the civil practice act.

In order to distinguish the two meanings of "bail" in the civil practice act, the word has been confined to the sum of money in the proposed rules and the surety is designated as the "bail surety." This language change also indicates that the general security rules apply to bail.

The provisions of present section 870 and the first sentence of present section 871 have been deleted from this title. It is contemplated that general provisions will be drafted to cover actions against sureties including bail sureties. *Cf.* proposed rule 123.11. The remainder of present section 871 and all of present sections 872 and 873 provide that certain executions are prerequisites for an action against the bail. These provisions do not apply to "a case where the order of arrest could be granted only by the court"—*i.e.*, an arrest under section 827. See *Russ* v. *Concord Casualty & Surety Co.*, 147 Misc. 683, 264 N.Y. Supp. 507 (N.Y.C. Ct. 1933). Since only the section 827 arrest is retained in the proposed rules, these provisions are also deleted.

Present section 855 provides that, where bail is not allowed, the defendant should be remanded to the sheriff's custody. This provision is included in the last sentence of proposed rule 71.5. Present section 863, however, provides that the bail which is not allowed nevertheless continues to be liable until other bail are given and allowed. See proposed rules 123.7(b), 123.8. The proposed subdivision makes it clear that the continued liability of the bail also ceases if the defendant is retaken into custody.

(b) Upon death of the defendant. If the defendant dies and bail has been given by a person other than the defendant, upon motion by the bail surety upon notice to the plaintiff, the surety shall be exonerated.

Notes

This provision is derived from section 875(1) of the civil practice act. The provisions of section 875 for exoneration after an action against the bail is commenced are covered by subdivision (d).

(c) Upon imprisonment of the defendant. If the defendant is imprisoned on a criminal charge and bail has been given by a person other than the defendant, the court, upon motion by the bail surety upon notice to the plaintiff, may make such order as justice requires.

Notes

This subdivision is based upon section 874 of the civil practice act. There is no reason why the court in which the principal action is pending should not have power to relieve the bail in such a situation. The restriction of present section 874 to the court in which an action against the bail is pending has therefore been deleted.

(d) Exoneration after action against bail surety. If the defendant surrenders or dies after the commencement of an action against the bail surety, the court may condition its order exonerating the surety upon such terms as justice requires.

Notes

Exoneration of bail, under the present provisions, is restricted to a surrender, imprisonment or death "before the expiration of the time to answer" in an action against the bail. See N.Y. Civ. Prac. Act §§865, 874, 875. As to imprisonment, there seems no need for this restriction, since present section 874, as well as proposed rule 71.6(c), permits the court wide discretion in relieving the bail and setting terms. Moreover, the last paragraph of present section 875 limits the restriction on exoneration because of surrender or death to permit a similar discretion if exoneration is sought after the commencement of an action against the bail. It is from this latter paragraph that the proposed subdivision is derived. In light of its provisions, the restriction quoted above has been deleted.

71.7. Liability of the sheriff.

If the defendant escapes after arrest, or the sheriff fails to deposit into court money paid him as bail, the sheriff shall be liable as a bail surety. The sheriff shall be discharged from such liability upon the allowance of bail given by him or upon recapture of the defendant at any time before he is finally charged as such surety.

Notes

This rule is derived from section 861 of the civil practice act. The exception in section 861 for replevin actions is omitted, since arrest under the proposed rules and act may not be granted in a replevin action. Similiarly, subparagraph 2 of section 861 has been omitted, since it applies only to section 826 arrests, which have been eliminated.

Since bail sureties other than the sheriff may be exonerated by a surrender of the defendant at any time before they are finally charged, the right of the sheriff to be discharged from his liability upon recapture before he is finally charged is expressly stated in the proposed rule. *Cf.* N.Y. Correction Law §528. The same time limitation is adopted for his giving of other bail, in lieu of the language of subparagraph 1 of section 861: "at any time before the court directs the performance of the act specified in the order."

Present section 862, which provides that after an execution on a recovery against the sheriff as bail surety is returned unsatisfied, "the official bond of the sheriff may be prosecuted as in any other case of delinquency" has been omitted. Execution against the sheriff is today an unnecessary step.

Present section 869 has also been omitted. The provision of the first sentence which recites that a sheriff liable as bail surety "has all the rights and privileges and is subject to all the duties and liabilities" of other bail sureties, is unnecessary. The remainder of the first sentence provides that bail given by the sheriff in discharge of his liability "must be regarded as the bail of the defendant in the action." This provision does not add anything to the other provisions, since all bail is "of the defendant" in the sense that it is posted for his release. The second sentence of section 869 states that the section is inapplicable to replevin and to defenses in an action against a bail surety other than the sheriff. Neither of these exceptions is necessary.

There are in New York two remedies against a sheriff for the escape of a civil prisoner. The liability of the sheriff as bail is a statutory remedy. In addition, section 526(1) of the Correction Law is the embodiment of the common law tort action for damages sustained as a result of the escape. See also N.Y. Correction Law §514.

The choice of remedy is apparently with the plaintiff. Thus, in *Smith* v. *Knapp*, 30 N.Y. 581, 591 (1864), the court stated:

> The plaintiff has an election which of these remedies he will adopt, and that election is manifested by the complaint. If he proceeds against the sheriff as bail, he must set forth the proceedings to and including the escape, and allege that the

defendant is bail; and it must demand the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendant as bail would be omitted, as wholly irrelevant to the cause of action for the escape.

Where the nature of the action was unclear, however, one court considered the amount claimed to be determinative of the nature of the action. See *Bensel* v. *Lynch,* 44 N.Y. 162 (1870). In the *Bensel* case, the plaintiff sought an amount equal to the bail set in the arrest order, but less than the amount properly recoverable in an action for damages, and the court held it to be an action against the sheriff as bail despite the lack of allegations to that effect.

Where an arrest is made pursuant to section 826, an action against the sheriff as bail may not be instituted until an execution has been returned wholly or partly unsatisfied. N.Y. Civ. Prac. Act §871. Except in a replevin action, an execution against property so returned must be followed by an execution against the person returned "not found." *Id.*; see *Buczynski* v. *Anderson,* 174 App. Div. 790, 161 N.Y. Supp. 697 (4th Dep't 1916). Since the proposed rules eliminate section 826 arrests, and no such requirement is made by section 871 with respect to section 827 arrests, this distinction between actions for damages and actions against the sheriff as bail has been eliminated.

A sheriff sued as bail cannot raise the insolvency of the debtor as a defense or in mitigation of damages. *Metcalf* v. *Stryker,* 31 N.Y. 255 (1864). Insolvency may be shown in mitigation of damages, however, in an action for damages for escape. *Smith* v. *Knapp, supra*; *Buczynski* v. *Anderson, supra.* It should be noted that this distinction does not exist if the escape was from imprisonment on final process, since the amount of the damages is then the amount of the judgment plus interest, and insolvency of the debtor may not be raised as a defense or in mitigation of damages. *Dunford* v. *Weaver,* 84 N.Y. 445 (1881). It is not clear whether the same rule would apply where the arrest is on mesne process but the arrest, the action against the bail, or the escape, takes place after judgment has been entered.

It appears that no proof of the negligence or voluntary release by the sheriff is necessary in either action, it being sufficient to show that a body execution was returned "not found" (*Bensel* v. *Lynch, supra*) or that the debtor was at large. *Cf. Dunford* v. *Weaver, supra.*

In either type of action the sheriff may raise as a defense the illegal issuance of the arrest order, although such irregularities as would make the process merely voidable, but not void, do not constitute a defense. *Bensel* v. *Lynch, supra*; *cf. Goodwin* v. *Griffis,* 88 N.Y. 629 (1882).

71.8. Vacating or modifying order of arrest; reducing bail.

Whether or not he is in the sheriff's custody, the defendant may move at any time to vacate or modify the order of arrest or to reduce bail. The court shall give the plaintiff a reasonable opportunity to comply with these rules or to make any correction or amendment which will tend to uphold the validity of the arrest. The failure of the plaintiff diligently to prosecute the action in which the order of arrest was granted shall be a ground for vacating the order of arrest.

Notes

This rule is based upon sections 822, 844 and 845 of the civil practice act and rule 83 of the rules of civil practice. *Cf.* N.Y. Civ. Prac. Act §842. These provisions have been simplified.

The last sentence of this rule is derived from section 846 of the civil practice act. Although the present section does not apply to section 827 arrests, failure to prosecute should be a ground for vacating any arrest.

The second sentence of this rule expresses a policy similar to that of proposed rule 26.14. *Cf.* N.Y. Civ. Prac. Act §843.

TITLE 72. ATTACHMENT

INTRODUCTION

This title is designed to simplify the New York law of attachment. The 74 sections of the civil practice act relating only to the provisional remedy of attachment—sections 902 through 973—as well as numerous other sections which affect attachments have been placed in four sections of article 15 of the civil practice law, and in fifteen rules in this title.

Sections 928 to 939, 957, 962 and 963 of the civil practice act, which create a special procedure where a vessel is attached, have been deleted. These sections are virtually unchanged since the Revised Statutes, and there are no reported decisions under them; the procedure does not substantially differ from other attachment procedure and the advisory committee is advised that it is seldom, if ever, used. Moreover, attachment of a vessel presents no problem that is greatly different from attachment of any unique, mobile but unwieldly property.

Section 961 of the civil practice act provides that a junior warrant of attachment generally may not be levied upon either a vessel or an interest in a partnership until a prior warrant has been vacated or annulled. The portion of this section relating to vessels is abolished in accordance with abolition of other special sections relating to vessels. To the extent that section 961 relates to an interest in a partnership, it is omitted as unnecessary, for the attachment of an interest in a partnership does not have any effect on the continued operation of the partnership. See N.Y. Civ. Prac. Act §916(7). For similar reasons, present section 858 has been deleted. See notes to proposed rule 72.12. The portion of section 961 which relates to a partnership interest was originally part of a statutory scheme for the attachment of property of a partnership as distinguished from an interest therein, in an action against an individual member of the partnership for a non-partnership obligation. The other provisions in this statutory scheme have been repealed and an interest in a partnership is now subect to attachment. See 7 N.Y. Jud. Council Rep. 447 (1941); N.Y. Civ. Prac. Act §§915-a, 916(7). There is no reason why an interest in a partnership deserves any more favorable treatment than any other property interest which has been attached.

The substance of section 966 of the civil practice act, which relates to the rights of third and subsequent attaching creditors, is implicit in the other attachment provisions, both under existing law and under the proposed rules and act. Furthermore, to the extent that the section relates to vessels, its special provisions are unnecessary. Section 966 is therefore deleted.

TABLE OF RULES IN TITLE 72

RULES—TITLE 72. ATTACHMENT

72.1. Order of attachment.

An order of attachmment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction

at any time before final judgment upon such property and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

Notes

The first sentence of this rule is derived from sections 817 and 818 of the civil practice act; the words "without notice" replace section 815.

While there is no indication in the language of section 817, it is clear from section 818 that a warrant of attachment may be issued prior to the commencement of an action. See also N.Y. Civ. Prac. Act §905. The proposed rule makes this explicit.

The order may be granted anywhere in the state where a motion in the action may be made and no venue provision is necessary. Thus proposed rules 33.3(a), 33.3(b), 33.4(a) and 33.4(b) apply. Where the action is triable in more than one county, any one of them may be used. See proposed article 4. This accords with section 817. See Carmody, New York Practice 769 n. 46 (7th ed., Forkosch 1956). For a discussion of the use of the word "order" in place of the present "warrant," see notes to proposed section 15.3.

The requirement in the second sentence of this rule for the indorsement of the attorney's name and address is derived from rule 84 of the rules of civil practice. Indorsement, rather than subscription, is required in conformity with the similar change made by the proposed rules with respect to papers served or filed. See notes to proposed rule 32.1(d). The remainder of present rule 84 concerning subscription by the judge is covered in proposed rule 33.10(a).

The remainder of the second sentence as well as the third sentence of the proposed rule is a simplification of the first paragraph of section 910 of the civil practice act, with no change in meaning intended.

72.2. Motion papers; undertaking; filing; demand.

(a) Affidavit; other papers. On a motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 15.3 of the civil practice law that exist and the amount demanded from the defendant.

Notes

This subdivision is derived from section 816 and the first paragraph of section 903 of the civil practice act. The remainder of section 903 appears in proposed section 15.3.

Throughout the proposed rules, the words "motion" or "petition" are used in place of the present word "application." See notes to proposed section 15.3. The motion for an order of attachment is made *ex parte*. See proposed rule 72.1.

The last phrase in the first sentence of present section 903, provides that the plaintiff must show "if the action is to recover damages for breach of contract, that the plaintiff is entitled to recover a stated sum, over and above all counterclaims known to him."

Prior to 1866, sections 227 and 229 of the Code of Civil Procedure authorized attachment only in contract actions. In 1866, the remedy was extended to include actions for conversion; in 1877, it was further extended to other tort actions and the quoted language was inserted into section 903 (then section 636 of the Code of Civil Procedure). See N.Y. Code Civ. Proc. §§635–712, preliminary note (Throop ed. 1880).

The quoted language was apparently limited to contract actions because, at the time of its enactment, the permissible scope of contract counterclaims was far broader than the scope of other counterclaims.

Originally, careful distinctions were made between counterclaims, recoupments and set-offs. These distinctions are discussed in *Boston Mills* v. *Eull,* 6 Abb. Pr. (n.s.) 319 (N.Y. Super. Ct. 1869). The Field Code, however, embraced all three under the single designation of counterclaim. See *Pattison* v. *Richards,* 22 Barb. 143 (N.Y. Sup. Ct. 1856). Nevertheless, the two subdivisions of section 150 of the Field Code authorized different specie of counterclaims: under subdivision 1, a counterclaim could be set up in any action if it arose from the same contract or transaction or was connected with the subject matter of the principal action; under subdivision 2, any contract counterclaim could be set up in a contract action. See *Andrews* v. *Artisan's Bank.* 26 N.Y. 298 (1863); *Parsons* v. *Sutton,* 66 N.Y. 92 (1876). This distinction was continued when the revisions of 1877 retained section 150 of the Field Code as section 501 of the Code of Civil Procedure.

Under section 266 of the civil practice act, however, the distinction is abolished. See also proposed rule 26.10(a). It is therefore no longer necessary to distinguish between counterclaims in contract actions and other counterclaims.

Moreover, requiring the plaintiff to specify the counterclaims known to him in any case is of doubtful utility. The plaintiff need specify only counterclaims which he "is willing to concede as just." See *Bard-Parker Co.* v. *Dictograph Products, Inc.,* 258 App. Div. 638, 640, 17 N.Y.S.2d 588, 590-91 (1st Dep't 1940). Furthermore, under proposed rule 72.13, an attachment may be vacated or modified upon a showing by the defendant that it is unneces-

sary to the security of the plaintiff, either because of the existence of valid counterclaims or otherwise.

Accordingly, the quoted phrase of section 903 has been omitted.

(b) Undertaking. On a motion for an order of attachment, the plaintiff shall give an undertaking, in an amount fixed by the court, but not less than two hundred fifty dollars, that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees.

Notes

This subdivision is derived from present section 907. *Cf.* N.Y. Civ.Prac. Act §819.

Inasmuch as present section 904, authorizing attachment in peculation cases, has been deleted (see notes to proposal section 15.3), present section 908, which provides that no security be given in such cases, has also been deleted. *Cf.* N.Y. Civ. Prac. Act §§162, 820. Present section 908 apparently applies only to the undertaking required by section 907. *Cf. Hodson* v. *Bialostozkay,* 38 N.Y.S.2nd 226 (Sup. Ct. 1942).

The two hundred fifty dollar minimum of section 907 has been retained. The motion provided for in proposed rule 123.8 will permit application for an increased indemnity. The motion may be made by the sheriff, a garnishee or any person having an interest in the property levied upon. It is derived from the motion to increase security, presently included in section 948, which is expanded by the last part of the last sentence of section 907. The proposed provision is broader than present provisions in that it permits the court to require a change in both the kind and amount of security. *Cf.* N.Y. Civ. Prac. Act §§151, 152.

According to the provisions of present section 949, notice of a motion to increase security may be dispensed with by the judge if the motion is made on the original papers. While proposed rule 123.8 requires notice to all parties, a judge may specify the manner of notifying parties in an unusual case. See proposed rule 33.5(e).

The condition of the undertaking has been changed from the language of section 907 "if the warrant is vacated" to "if it is finally decided that the plaintiff was not entitled to attach the defendant's property." The latter language is adopted from section 835, which deals with civil arrest, in order to make it clear that the undertaking is not to be used to pay the defendant if an attachment is vacated for merely technical defects. Nor should the undertaking be applied where, under proposed rule 72.13, an attachfent, which the plaintiff was originally entitled to, is vacated because it is no longer necessary.

The undertaking to the sheriff provided for in the last clause of the first sentence of this subdivision is based upon a suggestion made in *McCloskey* v. *Bril,* 286 App. Div. 143, 142 N.Y.S.2d 5 (1st Dep't 1955), *aff'd without opinion,* 1 N.Y.2d 755, 135 N.E.2d 53 (1956).

The Appellate Division in the *McCloskey* case, in unanimously affirming a judgment holding an attorney personally liable for sheriff's fees, added that "it would seem therefore that if an attorney in a situation such as this is to be protected, legislative action would be required. Perhaps the undertaking of the attachment plaintiff may, by statute, be extended to assure payment to the sheriff of any fees or charges to which he may become entitled, as well as to indemnify the attachment defendant." *Id.* at 145, 142 N.Y.S.2d at 7.

While the Court of Appeals affirmed the Appellate Division's decision, despite an argument that the rule of personal liability for attorneys be changed, its decision must be regarded as determined by long-established and definitive precedent. As early as 1810, attorneys were held liable, on a theory of implied contract, for sheriff's fees. See *Adams* v. *Hopkins,* 5 Johns. 252 (N.Y. Sup. Ct. 1810) (execution fees).

This exception to the general rule that an agent of a disclosed principal is not personally liable was justified in the *Adams* case as based upon the "general practice of looking to the attorney [which] repels every presumption of credit being extended to the client." *Id.* at 255. It has also been stated that "[n]o practical injustice results," since attorneys act "in view of the liability they incur." *Campbell* v. *Cothran,* 56 N.Y. 279, 281 (1874) (execution fees).

On the other hand, it has been recognized that the rule is harsh, since, from the very nature of the business done, the sheriff is aware of the principal and that the attorney acts only in his capacity as attorney. See, *e.g., Judson* v. *Gray,* 11 N.Y. 408, 412 (1854) ("the rule is in conflict with principle and with the whole current of authority elsewhere on the subject"); *cf. Preston* v. *Preston,* 1 Dougl. 292, 293 (Mich. Sup. Ct. 1844). Indeed, in *Van Kirk* v. *Sedgewick,* 87 N.Y. 265 (1881), an attorney was held not to be liable for execution fees unless he or his client prevented the sheriff from enforcing the execution.

While the sheriff ordinarily receives his fees in advance, section 1558(22) of the civil practice act authorizes poundage fees upon

property levied upon where the attachment is vacated or set aside. See *McCloskey* v. *Bril, supra.*

Inasmuch as the sheriff is protected by the undertaking in the proposed subdivision (*cf. Adams* v. *Hopkins, supra* at 254–55), the personal liability of the attorney has been abolished by the second sentence. Moreover, the sheriff may seek further security under proposed rule 123.8.

(c) Filing. Within ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it was based and the summons and complaint in the action. Unless the time for filing has been extended, the order shall be invalid if not so filed.

Notes

The first sentence of this subdivision is derived from the first sentence of section 906 of the civil practice act. The language has been substantially simplified but no change in meaning is intended. Since the present "warrant" has been designated an "order" it is filed and copies of it are served. See proposed rule 33.11.

Pursuant to proposed rules 32.2 and 33.11(a), the papers are filed with the clerk of the court in which the action is pending or will be brought.

The second sentence of the subdivision changes the present rule, which is contained in the second sentence of section 906, and in rule 84 of the rules of civil practice.

The opening phrase of the second sentence of the proposed subdivision, however, is in accord with the second paragraph of present section 906. An extension may be granted either before or after the original time has expired.

Although no specific filing requirement is made for arrest or injunction, it is necessary for attachment since a person interested in property levied upon may not be one who is served with the papers.

(d) Demand for papers. At any time after property has been levied upon, the defendant may serve upon the plaintiff a written demand that the papers upon which the order of attachment was granted and the levy made be served upon him. Not more than one day after service of the demand, the plaintiff shall cause the papers demanded to be served at the address specified in the demand. A demand under this subdivision shall not of itself constitute a general appearance in the action.

Notes

This subdivision is derived from the last two paragraphs of section 906 of the civil practice act. The penalty provisions of that section are discretionary. Since a court may make any order that justice requires upon the motion of a party who has been prejudiced by a failure to comply with the rules, deletion of the penalty provisions is not intended to change the law.

The papers upon which the order was granted include those set forth in subdivisions (a) and (b); papers upon which the levy was made may also include a notice if one is served under proposed rule 72.5(b).

72.3. Service of summons.

An order of attachment granted before an action is commenced is effective only if, within sixty days after the order is granted, service of a summons upon the defendant is completed. If the defendant dies before service must be completed under this rule, the summons may be served upon his personal representative within sixty days after letters are issued.

Notes

This rule is derived from section 905 of the civil practice act; the language has been simplified and the time has been extended to sixty days. This is in accordance with proposed section 5.3(b)(2). See also notes to proposed section 5.3(b).

Since substituted service is not contemplated by the proposed rules, the reference to it has been deleted. Under proposed rules 25.4 and 25.5 service by publication will be seldom used; when it is used, it will be completed within twenty-eight days after it is commenced. The provision of the proposed rule extending the time to serve a summons to sixty days has little effect on publication since service must be completed within the period, rather than commenced within the period, as required by the present section. Personal service, however, may be made at any time during the sixty-day period.

A general rule will be drafted to make voluntary appearance equivalent to completion of service.

72.4. Levy on real property.

The sheriff shall levy upon real property by filing with the clerk of the county where it is situated a notice of attachment indorsed with the name and address of the plaintiff's attorney and stating the names of the parties to the action, the amount of the plaintiff's claim and a description of the property levied upon. The clerk shall record and index the notice in the same books, in the same manner and with the same effect, as a notice of the pendency of an action.

Notes

This rule is derived from subdivision 1 of present section 917. Only minor language changes have been made. The effect of filing a notice of pendency is treated in proposed section 15.8; other notice of pendency provisions are contained in proposed title 75.

Although the proposed rule and the present section both state that the filing of a notice of attachment has the same effect as a notice of pendency, the statement is not wholly accurate. See introduction to proposed title 75.

72.5. Levy on other than real property by service of order.

(a) Method of levy. The sheriff shall levy upon property other than real property by serving a copy of the order of attachment personally upon the garnishee, or upon the defendant if the property is in the defendant's possession or custody, in the same manner as a summons except that such service shall not be made by delivering a copy to a person authorized to receive service of summons solely by a designation filed pursuant to law.

Notes

This subdivision is derived from the first paragraph of subdivision 2 of present section 917. Rather than the latter's prolix requirement

of methods of service, dependent upon the nature of both the property and the garnishee, the order is required to be served in accordance with the methods of proposed rule 25.2 for the service of a summons. Thus, for example, service on a private corporation may be made by serving an officer, director, or managing or general agent. See proposed rule 25.2(h). In order to avoid any real change in the practice, however, proposed section 15.4, which is also derived in part from section 917, specifies the garnishee for particular intangible property. The last clause of the proposed subdivision is added to prevent service on the secretary of state or another person who has no custody or control over property in the garnishee's possession.

Since the original order is filed (see proposed rule 72.2(c)), there seems no reason to continue the requirement that the copy served be certified.

(b) Effect of levy; prohibition of transfer. All property then or thereafter in the possession or custody of a person served with an order of attachment in which he knows or has reason to believe the defendant has an interest, or which has been specified by the plaintiff as such property in a notice which shall be served with the order, and all debts of such a person to the defendant, shall be subject to the levy. The person served with the order shall immediately turn over to the sheriff any such property capable of manual delivery and, for ninety days after the service of the order of attachment upon him, or for such further time as is provided by any subsequent order of the court served upon him, is forbidden to make or suffer any sale, assignment, transfer or interfere with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court. A garnishee, however, may collect or redeem an instrument received by him for such purpose and he may sell or

transfer in good faith property held as collateral or otherwise pursuant to pledge thereof or at the direction of any person authorized to direct sale or transfer, provided that the proceeds in which the defendant has an interest be retained subject to the levy.

Notes

The first sentence of this subdivision is derived from the second paragraph of present section 9172. Contrary to present law, however, the levy is also effective against property coming into the hands of the garnishee after service of the order. This is the present effect of a restraint in supplementary proceedings. See proposed rule 61.2(b) and notes. The second sentence is derived from the third paragraph of section 917(2), except that the last sentence of the third paragraph is covered by proposed section 15.5. In addition to the prohibition against transfer, the garnishee or defendant served with an order is expressly directed to turn property over to the sheriff.

The exception for items held for collection or collateral in the fourth paragraph of present section 917(2) has been included in the last sentence of this subdivision. Other situations where disposition or transfer is necessary, such as those involving perishable property now covered by section 923, are covered by the last sentence of proposed rule 72.8(a). Although it is apparent that the defendant's equity in the proceeds would have to be retained by the garnishee if he sold or transferred the property, since there is "reason to believe" that it belongs to defendant, it is expressly stated that the proceeds in which the defendant has an interest be retained subject to the levy. The final phrase in the fourth paragraph of subdivision 2 of present section 917, which states that the section does not diminish the rights of the holder of the property or any rights granted to a creditor of the defendant, is omitted. Since the proposed rules may not diminish substantive rights, this provision is unnecessary.

To some extent, the provision of the first sentence, regarding a notice to be served, represents a return to the method of attaching personalty incapable of manual delivery under section 917 prior to 1940. It replaces many provisions introduced in 1940 for the specification of particular property. For example, the last paragraph of section 910 of the civil practice act contains a provision permitting the plaintiff to specify in writing particular property to be attached as the property of the defendant. The writing must be served on the garnishee and filed and it may be used to confine the sheriff to attaching the particular property. The provision, one of those adopted in 1940 (N.Y. Laws 1940, c. 625), was "intended to do no more than codify the rule of practice approved by the Court of Appeals." Finn, *Streamlining Attachment Procedure,* 9 Ford. L. Rev. 1, 17 (1940), *citing* *Cotnareanu* v. *Chase Nat'l Bank,* 271 N.Y. 294, 2 N.E.2d 664 (1936).

Although the practice of specifying property is undoubtedly a sound one, the provision of section 910 is misleading and far broader than a codification of a rule of practice. In the *Cotnareanu* case, a notice, then required by section 917(3) to be served with the warrant in levying upon personalty incapable of manual delivery, was cast in general terms which did not sufficiently identify to the garnishee the property sought to be attached. The property was held in another's name and the court held that the plaintiff acquired no lien. The requirement of serving notice, which is reintroduced by the proposed subdivision permissively in all cases, was deleted in the same revision which adopted the present specification procedure. N.Y. Laws 1940, c. 625. While notice to the garnishee sufficiently identifying the property attached is certainly a fair requirement, especially in cases where the property is not in the defendant's name, the wisdom of permitting a plaintiff to limit the sheriff to attaching particular property of the defendant may be seriously questioned; it presents far too many opportunities for harassment and oppression without offering any further protection. Moreover, requiring the specification to be filed seems of little value and creates another area for dispute over technical irregularity. Under proposed rule 72.2(d), a copy of the notice may be demanded.

A corollary provision was also adopted in 1940 which permitted the true owner of attached property to recover damages from a plaintiff who had incorrectly specified it as belonging to the defendant. N.Y. Civ. Prac. Act §924(1). This provision is also misleading since plaintiffs who incorrectly direct attachment of property may be liable in damages to the true owner whether the property was "specified" pursuant to the rule or not. See *e.g.,* *Hill* v. *White,* 46 App. Div. 360, 61 N.Y. Supp. 515 (3d Dep't 1899), *aff'd,* 170 N.Y. 566, 62 N.E. 1096 (1902); *cf. Dyett* v. *Hyman,* 129 N.Y. 351, 29 N.E. 261 (1891).

As indicated in the *Cotnareanu* case, a notice specifying property must be detailed enough to identify to the garnishee the particular property claimed. See also *Clarke* v. *Goodridge,* 41 N.Y. 210 (1869).

(c) Seizure by sheriff. Where property or debts have been levied upon by service of an order of attachment, the sheriff shall take into his actual custody all such property capable of manual delivery and shall collect and receive all such debts.

Notes

This subdivision is derived from the second sentence of the second paragraph of present section 912. Rather than "collect, receive and enforce," the proposed subdivision requires the sheriff to "collect and receive" debts. Omission of the word "enforce"

is intended to make it clear that the sheriff is not required to bring an action in order to collect debts. "Debts" is defined in proposed sections 13.1(b) and 15.4 to include causes of action.

(d) Proceeding to compel delivery. Where property or debts have been levied upon by service of an order of attachment, the plaintiff may institute a special proceeding against the person served with the order to compel the payment, delivery, transfer or assignment to the sheriff of such property or debts. Notice of petition shall also be served upon the sheriff. A garnishee may interpose any defense or counterclaim which he might have interposed against the defendant if sued by him.

Notes

This subdivision represents a substantial modification of present practice. It replaces the provisions of present section 922 for an action or special proceeding by the sheriff, as well as the joint-suit provisions of sections 943, 944, 945 and 946. The last sentence of this subdivision is derived from present section 944-a.

Although present sections 943, 944, 945 and 946 set up an alternative procedure to that of section 922, the latter is seldom used. The two procedures differ only formally: under section 922, the sheriff brings the action, but he is indemnified by the plaintiff for his costs and expenses; under section 943, the sheriff and the plaintiff bring the action jointly, the plaintiff having sole liability for costs and expenses. Since the plaintiff usually prefers to utilize his own attorney and since it is difficult to fix the indemnity, the joint action seems the more straightforward approach.

Rather than an action, however, the proposed provision contemplates a special proceeding, but all of the provisions of sections 943, 944, 945 and 946 for leave of and control by the court are eliminated. The proceeding is brought by the plaintiff for the delivery of the property to the sheriff. Thus, the cost and expense of the proceeding are borne by the plaintiff, while the sheriff, who is to hold the property, is given notice of the proceeding.

The proceeding provided for in this subdivision may be based on the garnishee's statement and disclosure (see proposed rules 72.9 and 72.10) although it need not be. An analogous procedure is presently utilized in supplementary proceedings. See N.Y. Civ. Prac. Act §796; *cf.* proposed rule 61.4.

If any party is entitled to a jury trial, such a trial would be directed by the court. See proposed rule 27.8. Other rules of proposed title 27, relating to special proceedings, including the garnishee's right to ask for other relief (*compare* N.Y. Civ. Prac. Act §944-a, *with* proposed rule 27.3), would also apply to this proceeding.

The garnishee has a duty to hold the property of the defendant for the first ninety days as well as for any further period covered by an order extending the plaintiff's time to bring a proceeding under this rule. See subdivisions (b) and (e) of this rule. If an order is served upon the garnishee after the ninety days or an extension thereof have expired but while the property is still in the garnishee's possession, he would be obligated to keep it. There is no reason why the copy of the extension order served upon the garnishee need be certified and this requirement of the third paragraph of subdivision 1 of section 922 has been omitted.

(e) Failure to proceed. At the expiration of ninety days after a levy is made by service of the order of attachment, or of such further time as the court, upon motion of the plaintiff, has provided, the levy shall be void except as to property or debts which the sheriff has taken into his actual custody, collected or received or as to which a proceeding under subdivision (d) has been brought.

Notes

This subdivision is derived from subdivision 2 of present section 922. The elaborate provisions of the last paragraph of subdivision 1 of section 922 for the extension of the ninety-day period have been omitted in favor of a statement that the "court, upon motion of the plaintiff," may provide additional time. *Cf.* proposed rule 72.5(b).

72.6. Levy on other than real property by seizure.

If the plaintiff shall so direct and shall furnish the sheriff indemnity satisfactory to him or fixed by the court, the sheriff, as an alternative to the method prescribed by rule 72.5, may levy upon property capable of manual delivery by taking the property into his actual custody. The sheriff shall forthwith

serve a copy of the order of attachment in the manner prescribed by subdivision (a) of rule 72.5 upon the person from whose possession or custody the property was taken.

Notes

The first sentence of this rule is based upon subdivision 3 of present section 917; the second sentence is based upon the first sentence of the second paragraph of present section 912.

Since the amount of the indemnity to be provided will depend upon circumstances—taking a machine in actual use into custody would require more than taking a machine in storage—the amount is set by the sheriff. This is also true under section 917(3) of the civil practice act. The proposed subdivision, however, allows the court to fix the indemnity, thus protecting a plaintiff from an unreasonable demand by the sheriff.

Present section 917(3) when read with the second paragraph of present section 912 seems to indicate that indemnity is required if tangible property is levied upon by taking it into custody and the warrant of attachment served thereafter but no indemnity is required if the levy is made by serving the warrant and the property is then taken into custody. This distinction is retained in the proposed rule. *Compare* proposed rule 72.5(c), *with* proposed rule 72.6. If levy has been made by service and the garnishee resists seizure or fails to deliver property, the sheriff may proceed under proposed rule 72.5(d); on the other hand, the garnishee may allow seizure and make his claim under proposed rule 72.11.

72.7. Additional undertaking to carrier garnishee.

A garnishee who is a common carrier may transport or deliver property actually loaded on a conveyance, notwithstanding the service upon him of an order of attachment, if it was loaded without reason to believe that an order of attachment affecting the property had been granted, unless the plaintiff gives an undertaking in an amount fixed by the court, that the plaintiff shall pay any such carrier all expenses and damages which may be incurred for unloading the property and for detention of the conveyance necessary for that purpose.

Notes

This rule is derived from section 920 of the civil practice act, which covers the master or owner of a vessel. Since no reason appears why a master of a vessel should enjoy more protection than any other common carrier who may be damaged by the detention and unloading of his ship, airplane, truck or other conveyance, this rule broadens the provisions of present section 920 to include any common carrier transporting the property. A common carrier is in a substantially different position from other garnishees, and is almost certain to incur expense and suffer damages as a result of the attachment; where the property is being shipped out of the state, detention and unloading are necessary to protect the plaintiff and in such case at least this additional undertaking seems a sound requirement. Section 920, however, is limited to interstate shipments, and it thus appears that a plaintiff under present law may attach property being transported intrastate, detaining and unloading it without any indemnity. Curiously, detention of an intrastate shipment is not required for the plaintiff's protection, for he is still able to attach the goods at their destination after delivery. The proposed rule is not limited to interstate shipment; rather it operates to protect all common carriers transporting property of the defendant. Under it, a plaintiff who seeks to attach property being shipped intrastate has a choice of halting the shipment by furnishing indemnity or attaching it after deivery to its destination.

72.8 Sheriff's duties after levy.

(a) Retention of property. The sheriff shall hold and safely keep all property or debts paid, transferred, assigned or delivered to him or taken into his custody to answer any judgment that may be obtained against the defendant in the action, unless otherwise directed by the court or the plaintiff, subject to the payment of the sheriff's fees and expenses. If the urgency of the case requires, the court may direct sale or other disposition of property, specifying the manner and terms thereof, with or without notice.

Notes

This subdivision replaces section 940 of the civil practice act. The last sentence is based upon present section 923. Under it, the

court may direct disposition of any property, whether perishable or likely to decrease in value for any reason. Moreover, the court may direct any manner of sale and is not restricted to public auction by the sheriff.

(b) Return; inventory. Within five days after service of an order of attachment or forthwith after such order has been vacated or annulled, the sheriff shall file a return which shall include an inventory of property manually seized, a description of real property levied upon, the names and addresses of all persons served with the order of attachment, and an estimate of the value of all property levied upon.

Notes

This subdivision is derived from section 921 and the first sentence of section 973 of the civil practice act. The second sentence of section 973 is contained in proposed rule 72.14. No substantive change is intended; while intangibles would not be included in the inventory, since they cannot be manually seized, their value would be indicated.

As to disclosure and the garnishee's obligation to file a statement, see proposed rules 72.9 and 72.10.

Frequently, because of the expense of valuation, plaintiffs waive an inventory of property seized. It is not intended that this subdivision interfere with this practice. The names and addresses of all persons served with the order are required, whether or not they admit that they have property of the defendant, in order to effectuate the disclosure provisions of proposed rule 72.10.

72.9. Garnishee's statement.

Within ten days after service upon a garnishee of an order of attachment, or within such shorter time as the court may direct, the garnishee shall serve upon the sheriff a statement specifying all debts of the garnishee to the defendant, when the debts are due, all property in the possession or custody of the garnishee in which the defendant has an interest, and the amounts and value of the debts and property specified. If the garnishee has money belonging to the defendant in at least the amount of the attachment, he may limit his statement to that fact.

Notes

This rule is a redrafting and simplification of the provisions of section 918 of the civil practice act. The word "statement" has been used instead of the word "certificate" and a twenty-day limit is imposed. The court, however, may direct that a statement be served in a shorter time, which, in effect, is the present law. Prompt compliance is necessary in order that plaintiffs be able to allege that property has been levied upon in compliance with service by publication or mail provisions. See proposed rules 25.4(3), 25.5, 72.3. *Cf.* N.Y. Civ. Prac. Act §§232(3), 905.

If the garnishee fails or refuses to serve a statement, disclosure under proposed rule 72.10 could be utilized to reveal property of the defendant in his possession or custody.

72.10. Disclosure.

Upon motion of any interested person, at any time after the granting of an order of attachment and prior to final judgment in the action, upon such notice as the court may direct, the court may order disclosure by any person of information regarding any property in which the defendant has an interest, or any debt owing to the defendant.

Notes

This rule is a simplified and expanded procedure, replacing that of section 919 of the civil practice act. In addition, it replaces the action authorized by subdivision 3 of section 922. Title 34, governing disclosure, is incorporated by this rule, but, unlike the usual disclosure procedure, disclosure under this rule requires leave of court. Disclosure may be had at any time, whether or not the person examined has been served with the order of attachment or has served a statement under proposed rule 72.9.

72.11. Proceeding to determine adverse claims.

Prior to the application of property which has been levied upon to the satisfaction of a judgment, any interested person

may institute a special proceeding against the plaintiff to determine the rights of adverse claimants to the property, by serving a notice of petition upon the sheriff and upon all parties in the same manner as a notice of motion. The court may vacate or discharge the attachment, void the levy, direct the disposition of the property, direct that undertakings be provided or released, or direct that damages be awarded. Where there appear to be disputed questions of fact, the court shall order a separate trial, indicating the person who shall have possession of the property pending a decision and the undertaking which such person shall give. If the court determines that the adverse claim was fraudulent, it may require the claimant to pay the plaintiff the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees, and any other damages suffered by reason of such claim.

Notes

This rule replaces the complex procedures of sections 925, 926, 927 and the first and second paragraphs of subdivision 1 of section 924 of the civil practice act. The third paragraph of section 924(1) has been eliminated. See notes to proposed rule 72.6(b). The first two sentences of the fourth paragraph of section 924(1) are also deleted; they contain provisions relating to appeal which are covered by the general appeals rules. The remaining sentence of this paragraph, containing a treble-damage penalty for false claims, is replaced by the last sentence of this rule. Since the claim is supported by affidavits, there is no substantial difference between a false claim and a falsified motion for summary judgment and a special rule does not appear to be warranted. If a claim is fraudulent, the court should determine this forthwith and not require, as at present, a separate action for treble damages. Immediate liability for damages including attorneys' fees is a more effective remedy than the right to sue for three times problematical damages at some future date. Contempt, perjury and a separate action for damages remain as further sanctions against fraudulent claimants.

Subdivision 2 of section 924, providing for intervention in actions brought under sections 922 or 943, is unnecessary since these actions have been replaced by a proceeding under proposed rule 72.5(d). See proposed rule 27.1 and notes.

The proposed rule has been drafted to give the court wide discretion. The indemnity given by the plaintiff to the sheriff, referred to in subdivision 1 of present section 924 and in sections 925 and 926 is one of the possible undertakings covered by this rule. The indemnity of section 927, given by the claimant, is also included.

A proceeding under this rule may be brought by "any interested person," which would include junior attaching creditors; hence, the special provisions for application by such creditors in present sections 964 and 965 are unnecessary.

The provision of present section 924(1) for trial by jury are covered by proposed rule 27.8, which provides for a jury trial of issues raised on a proceeding. Similarly, the five-day notice provision of section 924(1) would be replaced by the general eight-day notice of proceeding provision of proposed rule 27.2(b).

Although section 924 refers only to "personal property" and section 927 to "goods or effects" claimed by an adverse claimant, no reason is apparent for such a limitation, and this rule applies to all property which has been levied upon.

The third paragraph of section 924(1) provides that any order in the attachment proceeding which determines title to the property under the section shall not impair the right of any person to pursue any remedy which he might otherwise have with respect to the property attached. This provision apparently is only intended to indicate that a claimant need not elect between the remedies available to him. Thus, under present law, he may proceed under section 924 and, should he fail to regain the property, he may sue the sheriff under section 925 or bond and discharge the attachment under section 927 or move to vacate the attachment under section 948. Indeed, section 927 contains language identical to that in the third paragraph of section 924(1). The proposed rule, by combining the remedies of sections 924, 925 and 927 permits all the relief to be granted in the proceeding. The attachment may also be vacated under the proposed rules or by motion under proposed rule 72.13.

72.12. Discharge of attachment.

A defendant whose property has been levied upon may move, upon notice to the plaintiff and the sheriff, for an order discharging the attachment as to all or a part of the property upon payment of the sheriff's fees and expenses. On such a motion, the defendant shall give an undertaking, in an amount equal to the value of the property sought to be discharged,

that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the undertaking. Making a motion or giving an undertaking under this rule shall not of itself constitute a general appearance in the action.

Notes

This rule replaces sections 952 through 959 of the civil practice act.

Although section 952 permits a defendant to discharge an attachment only if he has appeared in the action, a plaintiff would not be prejudiced by a discharge of attachment by a defendant who has not appeared, since a discharge merely replaces attached property with an undertaking of the same value. The plaintiff is given notice under this subdivision and may dispute any valuation at the hearing. *Cf.* N.Y. Civ. Prac. Act §958.

Notice to the plaintiff on the motion also covers the provisions of sections 954, 955 and 959 for notice under particular circumstances.

The undertaking provided for in present section 953 is included in this subdivision. The last sentence of section 953, providing that upon an application to discharge an attachment after final judgment, "the defendant must give the security required to perfect an appeal to the court of appeals from a final judgment, of the same amount or to the same effect, and to stay the execution thereof," has been deleted. The meaning of this sentence is unclear. Moreover, security for costs on an appeal are covered by proposed rule 80.8.

Section 954 states that unless one of the defendants, in a case involving more than one, shows that property attached was his separate property, his indemnity must provide for the payment of any judgment against any of the defendants. The provision has been omitted because the plaintiff will have notice under the proposed subdivision of the defendant's motion and the interest of other defendants can be shown.

The provisions for justification of sureties of section 955 are covered in proposed rules 123.6 and 123.7.

As noted in the introduction to this title, section 957 is deleted along with other special provisions for vessels. In any case, the power granted by the section to stay attachment can be exercised by the court on a motion under this subdivision.

Section 958, which was enacted in 1941 (N.Y. Laws 1941, c. 253), is deleted. It provides for discharge of an attachment of a partnership interest upon the application of any partner. The Judicial Council recommended it as "in accord with the redemption provisions of the Partnership Law in respect to charging orders." 7

N.Y. Jud. Council Rep. 446 (1941). A charging order, however, is secured by a judgment creditor of a partner and the partner's interest may be sold, and the partnership dissolved. N.Y. Partnership Law §§54, 62(2). On the other hand, attachment of a partnership interest does not interfere with the continuation of the partnership business unless a receiver is appointed. N.Y. Civ. Prac. Act §§915-a, 916(7).

The provisions of subdivision 3 of present section 958 for the taking of testimony or directing a reference in order to value a partner's interest or to determine the sufficiency of sureties is covered by proposed rule 33.9 for the trial of isues raised on a motion.

The provisions of present sections 970, 971 and 972 providing specifically for the return of attached property and the cancellation of notices of attachment upon an order of attachment being vacated, annulled or discharged are covered by proposed rule 72.14. The word "annulled" is defined in subdivision 4 of section 7 of the civil practice act.

This subdivision covers a motion to discharge made by the defendant. A person other than the defendant, claiming an interest in the property, may move to discharge the attachment under proposed rule 72.11.

72.13. Vacating or modifying attachment.

Prior to the application of property which has been levied upon to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property may move, on notice to all parties and the sheriff, for an order vacating or modifying the order of attachment. Such a motion shall not of itself constitute a general appearance in the action. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment.

Notes

This rule is derived from sections 822 and 948 through 951 of the civil practice act. To the extent that the provisions of this

rule cover a motion to vacate or modify by a person, other than a defendant, claiming an interest in the property, they duplicate the provisions of proposed rule 72.11. The remedy under this rule may be more expedient where the attachment is clearly invalid.

Motions to increase security, which are dealt with in the present sections cited, are treated in proposed rule 123.8.

The third sentence of this rule, derived from present section 822, is intended to overcome the strict interpretation that any defects are "jurisdictional." Proposed rule 26.13, providing for liberal construction of pleadings is akin to this rule; a similar approach to the plaintiff's allegation that he has a sufficient cause of action (see proposed rule 72.2(a)) is intended. *Cf. California Packing Corp.* v. *Kelly Storage and Distributing Co.*, 228 N.Y. 49, 126 N.E. 269 (1920).

The defendant's remedies after an attachment is vacated (present sections 970 to 972) are covered by proposed rule 72.14. See also proposed title 123.

The last sentence of this rule is intended to permit vacatur of an attachment that was sought solely, or primarily, for jurisdictional reasons, after that function has been served. See notes to proposed section 15.3.

72.14. Return of property; directions to clerk and sheriff.

Upon motion of any interested person, on notice to the sheriff and all parties, the court may direct the clerk of any county to cancel a notice of attachment and may direct the sheriff to dispose of, account for, assign, return or release any property or debt, or the proceeds thereof, or any undertaking, or to file additional returns, subject to the payment of the sheriff's fees and expenses. The court shall direct that notice of the motion be given to the plaintiffs in other orders of attachment, if any, and to the judgment creditors of executions, if any, affecting any property or debt, or the proceeds thereof, sought to be returned or released.

Notes

This omnibus rule provides for enforcement of the sheriff's duties under the attachment, cancellation of notices, return of

property and flexibility for the unusual situation, such as disposition of perishable property. See also proposed rule 72.8(a). It replaces sections 923, 941, 942, 947, 970, 971, 972 and the last sentence of section 973 of the civil practice act.

The motion provided for in this rule may be made at any time, either before or after judgment.

The last two sentences of present section 971, providing for the substitution of the defendant for the sheriff on undertakings or in other proceedings, is covered by proposed rule 23.18.

72.15. Disposition of attached property after execution issued.

Where an execution is issued upon a judgment entered against the defendant, the sheriff's duty with respect to custody and disposition of property acquired by levy pursuant to an order of attachment is the same as if he had acquired it by levy pursuant to the execution.

Notes

This rule replaces section 969 of the civil practice act, which is an extended reiteration of section 645. The latter section appears in that portion of the civil practice act relating to executions where the procedure is more appropriately dealt with.

TITLE 73. INJUNCTION

INTRODUCTION

Articles 46, 51, 52 and 53 of the civil practice act and rule 80 of the rules of civil practice contain the present law on the provisional remedy of injunction.

Injunction, as a provisional remedy, is variously called—in the civil practice act and elsewhere—"injunction pendente lite," "preliminary injunction" (*e.g.*, N.Y. Civ. Prac. Act §882), "temporary injunction" (*e.g., id.* §876), "injunction order" (*e.g., id.* §877) and "injunction" (*e.g., id.* §884). The first of these terms is unnecessarily in Latin. The second has been adopted because the third is too easily confused with a temporary restraining order and the remaining terms are descriptive of both permanent injunctions and injunctions granted as provisional remedies. *But cf.* 10 Carmody-Wait, Cyclopedia of New York Practice 516–17 (1954).

The proposed rules are designed to clarify terminology while retaining the present structure of permanent injunction, preliminary injunction and temporary restraining order. A preliminary injunction is a provisional remedy which may be granted in certain cases, including certain actions for injunctive relief (*i.e.*, actions for a permanent injunction) and a temporary restraining order is in the nature of a stay until a hearing on the application for a preliminary injunction may be had.

Section 876 of the civil practice act, abolishing the writ of injunction and creating the order for a temporary (*i.e.*, preliminary) injunction and section 881, providing that an injunction may be granted upon proof of sufficient grounds, have both been omitted as unnecessary. Present sections 876-a and 882-a, governing injunctions in labor disputes, are specialized legislation which should not be in a general practice act. The provisions affect permanent injunctions as well as the provisional remedy of injunction. Accordingly, it is recommended that these sections be transferred as article 22-A (sections 807 and 808) of the Labor Law without change.

The grounds for a preliminary injunction are stated in present sections 877 and 878 and have been incorporated into section 15.7 of the proposed act. They are reiterated as facts which must be shown in proposed rule 73.2(a).

The New York injunction provisions, notably those of present section 882, are substantially similar to Federal rule 65, a similarity which has been preserved in the proposed rules.

TABLE OF RULES IN TITLE 73

RULES—TITLE 73. INJUNCTION

73.1. Preliminary injunction.

A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a state officer or board from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

Notes

The first sentence of this rule is derived from section 818 and the first sentence of section 882 of the civil practice act with no substantive change intended. The remainder of present section 882, concerning temporary restraining orders, is covered in proposed rule 73.3(a).

The second sentence of this rule is derived from section 879 of the civil practice act with no substantive change intended. In view of the provision for notice in the first sentence of this rule, the final phrase of present section 879 has been deleted; its application to temporary restraining orders is covered by an exception in the final phrase of proposed rule 73.3(a). See notes to proposed rule 73.3(a).

73.2. Motion papers; undertaking.

(a) Affidavit; other papers. On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is

doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

Notes

This subdivision is derived from sections 816, 877 and 878(1) of the civil practice act. *Cf.* N.Y. Civ. Prac. Act §881. See notes to proposed section 15.7.

(b) Undertaking. On a motion for a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, including,

1. if the injunction is to stay proceedings in another action, on any ground other than that a report, verdict or decision was obtained by actual fraud, all damages and costs which may be, or which have been, awarded in the other action to the defendant as well as all damages and costs which may be awarded him in the action in which the injunction was granted; or,

2. if the injunction is to stay proceedings in an action to recover real property, or for dower, on any ground other than that a verdict, report or decision was obtained by actual fraud,

all damages and costs which may be, or which have been, awarded to the defendant in the action in which the injunction was granted, including the reasonable rents and profits of, and any wastes committed upon, the real property which is sought to be recovered or which is the subject of the action for dower, after the granting of the injunction; or,

3. if the injunction is to stay proceedings upon a judgment for a sum of money on any ground other than that the judgment was obtained by actual fraud, the full amount of the judgment as well as all damages and costs which may be awarded to the defendant in the action in which the injunction was granted.

Notes

This subdivision is based upon sections 819, 884, 885, 886, 889, 890, 892 and 893 of the civil practice act. Sections 887, 888, 891, 896 and 900 state general rules with respect to security, and have been incorporated in proposed title 123. *Cf.* N.Y. Civ. Prac. Act §§148–162; N.Y. R. Civ. P. 25–27.

Since there is no common law liability for damages from an injunction erroneously granted, other than liability for malicious prosecution, the undertaking "creates, and is the sole basis for, the liability." See 10 Carmody-Wait, Cyclopedia of New York Practice 624, 776 (1954). In the case of a municipal corporation, which is exempt from the giving of security under present section 162, liability is expressly provided by section 820. Sections 162 and 820 are covered in proposed rule 123.12.

The opening paragraph of this subdivision is derived from section 893 which sets forth the general condition of the undertaking, *viz.*: to pay the defendant the damages he sustained by the injunction if it is determined that the plaintiff was not entitled to it. Although the particular provisions of present sections 884, 885, 886, 889, 890 and 892 are treated as exceptions to section 893, in reality they are elaborations on the damages that a defendant could sustain in the particular situations outlined. The list of exceptions in section 893 is, indeed, unaccountably incomplete, containing sections 884 and 886, for example, and not section 885.

Subparagraph 1 of this subdivision is derived from present sections 884 and 885. The stay of proceedings in another action, which

is treated here, should be distinguished from a stay of proceedings in the action in which the stay is granted. The latter is not an "injunction" and the court has wide discretion as to whether to require security. See N.Y. Civ. Prac. Act §167.

The exception for fraud cases in present section 892 has been incorporated into each of the subparagraphs of this subdivision. It is apparently designed to permit a court to set the amount of security at less than the amount of the judgment or award, where circumstances indicate that the posting of full security would be a hardship upon a defrauded defendant.

Subparagraph 2 of this subdivision is derived from sections 889 and 890. *Cf.* N.Y. Civ. Prac. Act §990. Although present sections 889 and 890 are phrased in terms of an "action of ejectment," the civil practice act has long utilized "action to recover real property" in preference to the older phrase. See N.Y. Civ. Prac. Act §§990–1011. The reference in terms of an "action of ejectment" is therefore obsolete and the newer phrase has been substituted.

Subparagraph 3 of this subdivision is derived from present section 886.

Although present sections 885 and 886 provide for a deposit of money, section 891 permits an undertaking to be utilized in lieu of a deposit. The proposed subdivision has been drafted in terms of an undertaking, since proposed rule 123.1 defines an undertaking to include a deposit.

Proposed rule 123.8 permits modification of security. *Cf.* N.Y. Civ. Prac. Act §900; proposed rule 73.4.

73.3. Temporary restraining order.

(a) Generally. If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time. No temporary restraining order may be granted in an action arising out of a labor dispute as defined in section eight hundred seven of the labor law, nor upon an application made by the attorney-general in a proceeding under article twenty-three-a of the general business law, nor against a state officer or board to restrain the performance of statutory duties.

Notes

This subdivision is derived from section 882 of the civil practice act, with simplification of language but no intended change in substance. See also proposed section 15.7. The last phrase has been inserted to preclude a restraining order without notice against a state officer or board; this is in accord with the last phrase of present section 879.

When a temporary restraining order is granted, the hearing on the application must be set down "at the earliest possible time." The restraining order is therefore usually included in an order to show cause, for the notice of motion procedure would result in an unnecessary delay. The quoted words are a simplification of the language of section 882 with no intended change in meaning.

(b) Service. Unless the court orders otherwise, a temporary restraining order together with the papers upon which it was based, and a notice of hearing for the preliminary injunction, shall be personally served upon the defendant in the same manner as a summons.

Notes

This subdivision replaces section 883 of the civil practice act, which provides that an "injunction order" be served by "delivering a copy thereof." That personal delivery is contemplated may be inferred from the second sentence of section 883, which provides for service upon a corporation "as prescribed by law for making personal service of a summons." In the case of a court order, a certified copy is to be delivered; a judge's order is served by exhibiting the original and delivering a copy. Under proposed rule 73.1 as well as present section 882, however, a preliminary injunction may not be granted except upon notice. If the defendant has had notice of the motion, no reason appears why the order cannot be served in the manner of any other intermediate order—ordinarily by serving it with a notice of entry by mail upon the defendant's attorney. See proposed rule 32.3. Similarly, the requirement of certification of a court order and exhibiting a judge's order is unnecessarily stringent; other orders are binding without such formality. Under proposed rule 33.11(b), all orders are served in the same manner. See notes to proposed rule 33.11(b).

A temporary restraining order, on the other hand, may be granted without notice (see proposed rule 73.3(a); N.Y. Civ. Prac. Act

§882) and personal service in the manner of a summons seems appropriate.

Accordingly, the proposed subdivision is limited to service of a temporary restraining order. The provisions of proposed rule 32.3, governing service of papers generally, are therefore applicable to preliminary injunctions.

The present New York statutory law does not expressly indicate, as does the Federal rule, that an injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). The New York decisional law, however, is substantially identical to this Federal provision. Thus an injunction may be binding even though not served. See generally 10 Carmody-Wait, Cyclopedia of New York Practice 649, 761–772 (1954). The proposed subdivision is not intended to change this.

73.4. Vacating or modifying preliminary injunction or temporary restraining order.

A defendant enjoined by a preliminary injunction may move at any time, on notice to the plaintiff, to vacate or modify it. On motion, without notice, made by a defendant enjoined by a temporary restraining order, the judge who granted it, or in his absence or disability, another judge, may vacate or modify the order. An order granted without notice and vacating or modifying a temporary restraining order shall be effective when, together with the papers upon which it is based, it is filed with the clerk and served upon the plaintiff. As a condition to granting an order vacating or modifying a preliminary injunction or a temporary restraining order, a court may require the defendant to give an undertaking, in an amount to be fixed by the court, that the defendant shall pay to the plaintiff any loss sustained by reason of the vacating or modifying order.

Notes

Two sections of the civil practice act specifically deal with applications to vacate or modify preliminary injunctions: section 897 governs applications without notice and section 898 governs applications upon notice.

Section 897 requires the motion to be made on the original papers and "to the judge or justice who granted the order or who held the term of court where it was granted." The restriction to the original papers is a reiteration of the first sentence of section 822 while the restriction to the original judge is the same as that prescribed by section 131 for vacating or modifying an order other than one for a provisional remedy.

Section 897 applies only if the order attacked was granted without notice. With respect to an injunction granted upon notice, the defendant has already had an opportunity to oppose it or to ask a modification and there does not seem to be any justification for a subsequent motion without notice to vacate or modify. An order to show cause can be used if speed is essential.

Prior to 1930, a preliminary injunction could be granted without notice before the defendant answered. In that year, section 882 was amended to require notice for all preliminary injunctions. N.Y. Laws 1930, c. 378. A further amendment in 1940 qualified this requirement, permitting notice to be dispensed with for a temporary restraining order granted to enjoin the defendant until a hearing could be had on the application for a preliminary injunction. N.Y. Laws 1940, c. 659. Thus, since 1930, a preliminary injunction without notice, to which section 897 applies, has been prohibited. Section 897, which is derived from section 626 of the Code of Civil Procedure without change, is only meaningful today as applied to temporary restraining orders.

There may be occasions where relief from a temporary restraining order cannot await the hearing on the motion for a preliminary injunction. Section 897, read in the light of section 882 to apply to temporary restraining orders, would permit a motion without notice to vacate or modify the temporary restraining order. It has therefore been retained in this limited application in the second and third sentences of the proposed subdivision. The additional alternative is section 897—that the motion may be made to a term of the Appellate Division of the Supreme Court—seems unnecessary, since the section permits application to another judge if the the judge who granted the order is absent or disabled. The motion before the Appellate Division has therefore been deleted, while that before another judge in the absence or disability of the original judge has been retained. Since this absence or disability permits a motion without notice it adds an alternative to proposed rule 33.12(2) (requiring a motion on notice to vacate an order made by another judge).

A further provision of section 897 requires the affidavit showing the absence or disability to show that "the applicant will be exposed to great injury by the delay required for an application upon notice." This provision is not presently directed to the solu-

tion of any practical problem. A temporary restraining order is only operative until a hearing on the application for a preliminary injunction may be had—which section 882 requires to be set down "at the earliest possible time and [to] take precedence of all matters except older matters of the same character." Thus an application upon notice to vacate or modify a temporary restraining order would require a hearing held after the temporary restraining order expires. See notes to proposed rule 73.3(a). Moreover, where application is made under section 897 to the judge who granted the order, the defendant is expressly restricted to the original papers, while before another judge in case of disability or absence, he has the burden—and hence the opportunity—of showing, by affidavit, that he "will be exposed to great injury." While the provision of section 897 for a showing of "injury by the delay required for an application on notice" thus appears obsolete, there seems no reason why the defendant cannot go beyond the original papers and show that continuation of the order will unnecessarily injure him; the judge who granted the restraining order has discretion to modify or vacate it accordingly. To give the judge flexibility, the power to require security as a condition, contained in the last sentence of section 900, has been retained as the last sentence of the proposed subdivision.

Section 898, which governs a motion upon notice to vacate or modify, also remains virtually unchanged since the Code of Civil Procedure. It is restricted to "injunction orders" granted either without notice or with notice where leave to apply to vacate or modify was given. The first restriction is thus wholly obsolete for, as previously noted, the only "injunction order" which may be granted without notice is a temporary restraining order, which is only effective until a hearing, which is to be held "at the earliest possible time."

The second restriction of section 898—that a motion to vacate or modify an order granted upon notice may only be made if the order was granted with leave to apply to vacate or modify—was added to the Code of Civil Procedure in 1879. N.Y. Laws 1879, c. 542. The section previously began:

> Where the injunction order was granted upon notice, the party enjoined may also apply, upon notice, to the judge who granted it, or to the court . . . . [N.Y. Code Civ. Proc. §627 (1878).]

This paralleled the opening of the previous section (which survives virtually verbatim as present section 897):

> Where the injunction order was granted without notice, the party enjoined may apply, upon the papers upon which it was granted, for an order vacating or modifying the injunction order. Such an application may be made, without notice, to the judge who granted the order, or who held the term of the court where it was granted; or to . . . . [N.Y. Code Civ. Proc. §626 (1878).]

It is difficult to discover the reason for the 1879 amendment. The leave of court contemplated is apparently that granted at the time the order was granted, and would seem to represent the court's anticipation of changed circumstances. Yet changed circumstances, anticipated or not, may dictate vacating or modifying an injunction, and so long as the motion is made upon notice, no one can be prejudiced. Therefore the requirement that a motion to vacate an order granted upon notice may only be made if leave to so move was granted, has been deleted. The first sentence of the proposed subdivision states the essence of present section 898, with the changes noted.

TITLE 74. RECEIVERSHIP

INTRODUCTION

This title is based upon article 60 of the civil practice act, which contains seven sections, and title 23 of the rules of civil practice, which contains seven rules.

Three of the present sections and three of the present rules have been omitted from this draft. Sections 977-a and 977-c relate only to foreclosure actions and will be considered with article 65 of the civil practice act. Section 977-b, containing 25 subdivisions, relates only to receivers of the local assets of foreign corporations and rule 178 governs the venue of motions for sequestration of corporate property and for the appointment of receivers of such property. These provisions should be dealt with in connection with the contemplated revision of New York corporation law, which already contains numerous provisions relating to receivers. See, *e.g.*, N.Y. Gen. Corp. Law §§61, 74, 93, 96, 110, 111, 117, 118, 140, 150–192; N.Y. Stock Corp. Law §§68, 98, 106(3).

To the extent that the present sections and rules apply to receivers other than those appointed as a provisional remedy, they have been covered elsewhere. Thus, present rule 177 has been covered by proposed rule 62.11. *Cf.* N.Y. Civ. Prac. Act §§804–810. Similarly, present rule 176 has been treated in proposed title 150, security for costs.

Although many provisions of the civil practice act relating to certain special proceedings contain references to receivers, no attempt has been made to integrate them with this title. They will be treated with their particular subject matter. See, *e.g.*, N.Y. Civ. Prac. Act §1171 (receiver of sequestered property in marital action); *id.* §1414(8) (receiver may institute summary proceedings).

Similarly, the Consolidated Laws contain many references to receivers in particular actions and proceedings or for particular circumstances or property. In addition to the sections in the General and Stock Corporation Laws cited above, see, *e.g.*, N.Y. Dec. Est. Law §210; N.Y. Ins. Law §§517–522; N.Y. Real Prop. Tax Law §§1070–1078; N.Y. Tax Law §§191, 209(3).

Receivers appointed to effectuate the collection of money judgments, now encompassed in the supplementary proceedings article of the civil practice act, are treated in proposed rule 61.7. Receiverships in connection with the enforcement of non-money judgments, under subdivision 2 of present section 974, are covered in proposed rule 60.6. This draft is thereby limited to receivers appointed as a provisional remedy. Subdivision 3 of section 974, however, has been included; it contemplates a receiver to preserve property pending an appeal. This receiver's function is virtually identical to that of the receiver appointed as a provisional remedy.

In order to emphasize that this title is so restricted, the term "temporary receiver," derived from sections 1547 and 1547-a of the civil practice act, has been used. This title, however, contains the bulk of the rules relating to receivers and, where necessary, it will be made applicable to other titles by a reference in the latter. More specific rules would control over these general rules.

Since the duties of a temporary receiver and the powers he should possess vary with the type of property involved, the type of action and other facts, the present wide discretion in the courts has been continued in this draft.

TABLE OF RULES IN TITLE 74

RULES—TITLE 74. RECEIVERSHIP

74.1. Appointment and powers of temporary receiver.

(a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.

Notes

The first sentence of this subdivision is derived from subdivisions 1 and 3 of section 974 of the civil practice act. Subdivision 2 of section 974 is treated in proposed rule 60.6.

The notice provisions of the present law have been omitted since they are covered elsewhere. Proposed rule 33.5(c) requires notice of a motion to be served upon all parties not in default for failure to appear. It thus covers the substance of present section 975, which only requires notice "to the adverse party" as well as the notice provisions of present rule 180 which, unless the court requires otherwise, are limited to notice to the person on whose behalf or on whose application the receiver was appointed. The last sentence of the latter rule, prohibiting allowances to a receiver for expenses incurred without authorization, is omitted as unnecessary. The provision of present rule 180 for notice to other persons if the court so directs is also omitted. The court has inherent power to direct that other persons have notice before granting discretionary relief.

The last sentence of present section 975 applies only to mortgage foreclosure actions and it will therefore be considered with the foreclosure provisions. The provision of the second sentence of present section 975, permitting the court to dispense with notice where service of the summons was made by publication, is covered by the second sentence of proposed rule 33.5(c). The last sentence in present section 974, defining "property," will be the basis of a definition section applicable to the entire civil practice act and rules.

The restriction in present section 974, permitting only a party to seek appointment of a receiver, has been deleted and the proposed rule permits any person having an interest in the property to make the motion. Despite the language of present section 974, other provisions indicate that a motion by any person interested would be entertained today. See, *e.g.*, N.Y. R. Civ. P. 180. Similarly, the requirement that the property be in the possession of an adverse party has been omitted; a receiver of property in the possession of a third person, which property is the subject of an action, could therefore be appointed under the proposed rule.

Although, in the usual case persons having an interest in or possession of property which is the subject of an action would be parties to the action, the last sentence of the proposed subdivision expressly provides for the joinder and appearance of any person not already a party.

The phrase "beyond the jurisdiction of the court" in present section 974 has been altered to "from the state" with no intent to change the meaning, since the proposed subdivision, like present section 974, is expressly limited to Supreme and County Court actions. *Cf.* N.Y. Civ. Prac. Act §72.

(b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and person property, and sue for, collect and sell debts or claims, upon such trusts and for such purposes as the court shall direct. A

receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.

Notes

The first sentence of this subdivision is derived from section 977 of the civil practice act and rule 175 of the rules of civil practice; the second sentence is derived from rule 180 of the rules of civil practice; the third sentence is based in part on the second sentence of rule 179 of the rules of civil practice.

Although section 977 is restricted to real property, the proposed subdivision applies to both real and personal property. There is no present provision prescribing the authority that may be given a temporary receiver of personal property. Moreover, the provision of section 977 gives the court unlimited discretion. While the primary function of a temporary receiver is to preserve the property pending the outcome of the litigation, there are circumstances that will require repair, improvement or sale of real or personal property.

Present rule 175 applies to the receiver of a "debtor's estate" and would thus seem to be limited to receivers appointed after final judgment; it has been made generally applicable to receivers under this title. Unlike the present rule giving the receiver power to "sue for and collect all debts, demands and rents of the debtor" unless "restricted by the special order of the court," the proposed subdivision requires the receiver to receive explicit authority before exercising any such powers. *Cf.* proposed rule 61.7(a).

The substance of the latter part of present section 977, "subject to the direction of the court, from time to time, respecting the disposition thereof," is covered in the beginning of the last sentence of the proposed subdivision, which expresses a provision implicit in the present law.

(c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

Notes

This subdivision is new. Present law requires a separate order after final judgment to continue the receivership. *Colwell* v. *Gar-*

field National Bank, 119 N.Y. 408, 23 N.E. 739 (1890); *Baksi* v. *Wallman*, 272 App. Div. 752, 69 N.Y.S.2d 208 (1st Dep't 1947); *Ireland* v. *Nichols*, 9 Abb. Pr. (n.s.) 71 (N.Y. Super. Ct. 1870). The proposed rule would allow the court to direct the continuation of the receivership in the original appointing order.

74.2. Oath.

A temporary receiver, before entering upon his duties, shall be sworn faithfully and fairly to discharge the trust committed to him. The oath may be administered by any person authorized to take acknowledgements of deeds by the real property law.

Notes

The first sentence of this rule is derived from the first sentence of section 126 of the civil practice act. The second sentence of this rule is in accordance with the present law. See notes to proposed rule 38.7(a).

The second sentence of present section 126, relating to waiver of oath, has been omitted. Its requirements of full age, presence or representation, and recording, are far more burdensome than the taking of the oath. There seems little to recommend an express provision for waiver, when the oath may be easily taken before any notary.

74.3. Undertaking.

A temporary receiver shall give an undertaking in an amount to be fixed by the court making the appointment, that he will faithfully discharge his duties.

Notes

This rule is derived from section 976 of the civil practice act. The provision of the second sentence of section 976 for removal of the receiver is covered by proposed rule 74.5; the provision of the same sentence for an additional security is covered by proposed rule 123.8. The provision of the first sentence of present section 976 for filing the undertaking is covered by proposed rule 123.5. The last two sentences of section 976 deal with notice upon presentation of a receiver's accounts. They are covered in proposed rule 74.4.

74.4. Accounts.

A temporary receiver shall keep written accounts itemizing receipts and expenditures, and describing the property and naming the depository of receivership funds, which shall be open to inspection by any person interested in the property. Upon motion of the receiver or of any person interested in the property, the court may require the keeping of particular records or direct or limit inspection or require presentation of a temporary receiver's accounts. Notice of a motion for the presentation of a temporary receiver's accounts shall be served upon the sureties on his undertaking as well as upon each party not in default for failure to appear.

Notes

This rule is based in part upon present rule 181, which is limited to receiverships of improved real property. Since no provision appears in the civil practice act or rules for the keeping of accounts generally, the provision has been broadened to include all receivers and to include the presentation of accounts.

The detailed description of property required by present rule 181 has been omitted. In most cases, a description of the property generally will suffice, since only a person already interested in the property can inspect the records. This general description would ordinarily be in the order appointing the receiver, but the proposed rule also requires that the receiver keep it on record. The specifications of present rule 181 describing persons who may inspect the receiver's accounts have been replaced by the general phrase "any person interested in the property." Should the receiver refuse permission to inspect records to a particular person, he can move to compel the receiver to open the records to him.

The provision of the last sentence of the proposed rule requiring the sureties to be served with notice is derived from the last two sentences of section 976 of the civil practice act. Eight days is the notice of motion requirement for all motions. See proposed rule 33.5(b).

74.5. Removal.

Upon motion of any party or upon its own initiative, the court which appointed a receiver may remove him at any time.

Notes

This rule is derived from the first sentences of rule 179 of the rules of civil practice and of section 81 of the civil practice act. The second sentence of rule 179 is covered by the third sentence of proposed rule 74.1(b). The second sentence of present section 81 is unnecessary in the case of receivers; the court has power to appoint a successor without such express authorization.

While the first sentence of present rule 179 specifies that removal of a receiver be sought in the judicial district where the receiver was appointed, the proposed rule restricts the motion to the court which appointed him. *Cf.* proposed rule 33.8.

TITLE 75. NOTICE OF PENDENCY

INTRODUCTION

At common law and in equity, a purchaser of property which was the subject of litigation was charged with knowledge of the dispute. The commencement of the action was itself implied notice and a transfer by the defendant was not valid as to the plaintiff. This doctrine of lis pendens—developed so that effective judgments could be rendered—placed an almost intolerable burden upon prospective purchasers, requiring search and analysis of pending litigation as well as of recorded conveyances. At least with respect to real property, the common law doctrine has been largely replaced by statutory provisions, such as those in article 11 of the civil practice act, requiring a notice of pendency to be filed.

The notice of pendency itself is sometimes called a lis pendens, probably as a contraction for "notice of lis pendens," the term used in section 132 of the Field Code. Aside from the disadvantage of using Latin terminology where English will do, however, the use of the term to designate a statutory notice is confusing. The earlier decisions are easily misunderstood unless it is borne in mind that the term "lis pendens" is used to denote the common law doctrine in contrast to the statutory notice. Despite the more recent use of "lis pendens" in practice texts and opinions to denote a statutory notice, the civil practice act uses only the term "notice of pendency" and this terminology has been retained in the proposed act and rules. *Cf.* Va. Code §8-142 (1950) ("lis pendens" used in the common law sense); Conn. Gen. Stat. §2956d (Supp. 1955) (both senses). See also Bennett, Lis Pendens 80 (1887) ("notice of lis pendens" used to mean a pending action, not a statutory notice).

Except in certain specified actions or proceedings, such as foreclosure actions under section 1080 of the civil practice act or proceedings to quiet or register title under sections 366 or 382 of the Real Property Law, plaintiffs are not *required* to file a notice of pendency. They are *permitted* to do so by section 120 of the civil practice act in any "action brought to recover a judgment affecting the title to, or the possession, use or enjoyment of real property." Concurrently, section 121 abolishes the concept of implied notice by commencement of such an action, and provides that filing of a notice is the only method by which a prospective purchaser may be charged with constructive notice of the pendency of the action.

It would appear that mere commencement of an action not specified in section 120 would still operate as implied notice. See generally 3 Merrill, Notice 98–99 (1952). While the present statute appears to have wholly replaced the common law doctrine with respect to real property actions commenced in the state courts, two other areas present significant problems. First, since section 120 has been held inapplicable to actions in the Federal courts affecting New York real property (*In re 1610 Avenue P, Inc.*, 168 Misc. 918, 6 N.Y.S.2d 241 (Sup. Ct. 1938); *but cf. Frederick* v.

Baxter Arms Corp., 39 F. Supp. 609 (E.D.N.Y. 1941)), it may be that the common law doctrine would operate to prevent a transfer, valid against the plaintiff, of property involved in Federal litigation. See Beckett, *Lis Pendens and the Federal Courts* in Current Trends in State Legislation 1955–1956 429, 448–454 (1957); 3 Merrill, Notice 103–04 (1952). This possibility emphasizes that the antecedent common law doctrine must always be considered and that despite descriptions of the notice of pendency statute as granting a right to the plaintiff (see, *e.g., Israelson* v. *Bradley*, 308 N.Y. 511, 127 N.E.2d 313 (1955)), it is primarily a substitution of a limited right for the plaintiff's broader common law right, and is designed to protect prospective purchasers.

Because of the possible existence of a common law doctrine with respect to Federal actions, and because the alternative view—that no deterrent to transfer by the defendant can be effectuated—may tend to render Federal judgments ineffectual, proposed section 15.8 specifically extends the present statute to cover actions in the Federal courts. This extension follows the trend of recent legislation in other states. See Beckett, *supra* at 451–58. It also implements the recent Federal lis pendens statute. 28 U.S.C. §1964, 27 U.S.L. Week 107 (Aug. 26, 1958).

The second area of uncertainty concerns the application of the common law doctrine to actions involving personal property. While there is decisional authority in New York and elsewhere that the doctrine still exists with regard to personalty, both the proposed title and the present statute are confined to real property actions. For further discussion of the doctrine as applied to personal property, see Bennett, Lis Pendens 126 (1887); 3 Merrill, Notice 72–75 (1952); 14 Carmody-Wait, Cyclopedia of New York Practice 41–42 (1954); Notes, 47 Harv. L. Rev. 1023 (1934), 12 Ore. L. Rev. 68 (1932), 12 Colum. L. Rev. 361 (1912).

Article 11 of the civil practice act was the subject of recent studies by both the Judicial Conference and the Law Revision Commission. See 2 N.Y. Jud. Conference Rep. 107–127 (1957); N.Y. Law Rev. Comm'n Rep. 55-73 (1957). As a result of the recommendations, extensive amendments were enacted. See N.Y. Laws 1957, c. 876, 877; N.Y. Laws 1958, c. 116; see also N.Y. Laws 1956, c. 793. Proposed title 75 therefore does not substantially alter the present law; it is primarily designed to reorganize the provisions conveniently and consistently with other provisional remedies.

Although a notice of pendency is not designated in the civil practice act as a provisional remedy, it bears so many features common to the traditional provisional remedies that it has been treated with them in the proposed article and rules. See proposed section 15.1. The present separation is historically derived, for, while orders of arrest, injunction and attachment are the present counterparts of common law writs, the notice of pendency is a creature of statute, replacing a common law doctrine that had embodiment only in a complaint. Among the provisional remedies, the notice is most closely related to attachment of real property.

The latter, however, differs from a notice of pendency in several ways. Primarily, a notice of pendency can only be filed against property which is the subject matter of the litigation, while any real property may be utilized to acquire jurisdiction or to secure a plaintiff under the attachment statutes. Even where the property attached is the subject matter of the litigation—whether by coincidence or in order to acquire jurisdiction in rem—differences exist. In order to secure an attachment of real property, a plaintiff must show certain facts, he must provide an undertaking, and he must make a motion to the court for a warrant pursuant to which the sheriff can file a notice with the county clerk. By contrast, a plaintiff may file a notice of pendency in the cases specified in the statute without further ado. A filed lis pendens is not a direct interference with rights in the property; it is "constructive notice" to a purchaser who is "bound . . . to the same extent as if he was a party to the action." Levying upon real property by filing a notice of attachment, however, creates a lien. Nevertheless, the practical effect is usually the same. Indeed, under section 132 of the Field Code, a levy upon real property by virtue of an attachment was made by filing a notice of lis pendens. While the present statute distinguishes the two notices, notices of attachment are in substantially the same form as, and are filed and indexed in the same place as, notices of pendency. See N.Y. Civ. Prac. Act §917(1).

The provisions of section 125 of the civil practice act, permitting a defendant to file a notice of pendency with respect to a counterclaim, are included in the general provision of proposed section 15.1 governing all provisional remedies. *Cf.* N.Y. Civ. Prac. Act §824.

TABLE OF RULES IN TITLE 75

RULES—TITLE 75. NOTICE OF PENDENCY

75.1. Filing, content and indexing of notice of pendency.

(a) Filing. In a case specified in section 15.8 of the civil practice law, the notice of pendency shall be filed in the office

of the clerk of any county where property affected is situated, before or after service of summons and at any time prior to judgment. Unless it has already been filed, the complaint shall be filed with the notice of pendency.

Notes

This subdivision is derived from part of the first sentence of section 120 of the civil practice act. The specification in section 120 of the type of action in which a notice of pendency may be filed appears in proposed section 15.8. The remainder of section 120 appears in subdivision (b) and in proposed rule 75.2.

The requirement of section 120 that the complaint be verified has been deleted in view of proposed rule 26.11, which eliminates verified pleadings in most cases. Equivalent protection is provided in the requirement of certification. See notes to proposed rule 26.11.

(b) Content; designation of index. A notice of pendency shall state the names of the parties to the action, the object of the action and a description of the property affected. A notice of pendency filed with a clerk who maintains a block index shall contain a designation of the number of each block on the land map of the county which is affected by the notice. Except in an action for partition, a notice of pendency filed with a clerk who does not maintain a block index shall contain a designation of the names of each defendant against whom the notice is directed to be indexed.

(c) Indexing. Each county clerk with whom a notice of pendency is filed shall immediately record it and index it against the blocks or names designated. A county clerk who does not maintain a block index shall index a notice of pendency

of an action for partition against the names of each plaintiff and each defendant not designated as wholly fictitious.

Notes

The first sentence of proposed subdivision (b) is virtually identical with the last clause of the first sentence of present section 120. The remainder of subdivision (b) and all of subdivision (c) are derived from present section 122. The requirement of section 122 for subscription by the attorney for the plaintiff is covered by the more general rule for indorsement of all filed papers. See proposed rule 32.1(d) and notes.

The last sentence of section 122, concerning erroneous or missing designations, has been deleted. See notes to proposed section 15.8.

75.2. Service of summons.

A notice of pendency filed before an action is commenced is effective only if, within sixty days after filing, service of a summons upon the defendant is completed. If the defendant dies before service must be made under this rule, the summons may be served upon his personal representative within sixty days after letters are issued.

Notes

This rule is derived from the last two sentences of present section 120. The 1957 recommendation of the Judicial Conference to reduce the period for service of summons to thirty days (see 2 N.Y. Jud. Conference Rep. 109–112 (1957)) was not enacted by the Legislature. The proposal was intended to parallel section 905 of the civil practice act, which provides thirty days where a warrant of attachment has been granted. While the proposed rule retains the sixty-day period of the present section, it requires that service by publication be *completed* within the period. Under section 120, service by publication must only be commenced within sixty days, but in view of the shortening of publication requirements effected by proposed rule 25.5, no hardship appears in requiring completion of service. A similar change is made in the counterpart of present section 905. See proposed rule 72.3.

Express listing of the possible methods of service has been omitted; any method appropriate to the case may be utilized. See proposed title 25. Similarly, the proposed rule omits as unnecessary the recitation in present section 120 of examples of the types

of representatives who may be served if the defendant dies before being served but after a notice is filed.

Under the first sentence of section 123 of the civil practice act, the court may order a notice of pendency cancelled if the plaintiff has failed to serve a summons within the time limited by section 120. See proposed rule 75.4(a). While an order of cancellation presents a method of clearing the record, the proposed rule makes it clear that the notice is ineffective, whether or not cancelled, if the summons is not timely served.

75.3. Duration of notice of pendency.

A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period.

Notes

This rule is derived from section 121-a of the civil practice act, which was added in 1957, upon recommendation of the Judicial Conference. See N.Y. Laws 1957, c. 877, §2; 2 N.Y. Jud. Conference Rep. 114–16 (1957).

The phrase "as notice" in the first sentence of section 121-a has been deleted. It appears to distinguish the effect of a notice of pendency as "constructive notice" from its effect of binding subsequent purchasers or incumbrancers "to the same etxent as if . . . [they were parties] to the action." See N.Y. Civ. Prac. Act §121. Such a distinction is wholly unwarranted, for the second statement of effect is simply an amplification of the first. Under common law principles, a purchaser with notice of the pendency of an action takes subject to its consequences. See, *e.g.*, 2 N.Y. Jud. Conference Rep. 125 (1957).

It should be noted that the notice of pendency statute is intended only to replace a constructive notice occasioned by commencement of an action with a constructive notice occasioned by the filing, recording and indexing of a paper. Actual notice to a prospective purchaser would subject him to the consequences of a suit, whether or not an effective statutory notice is on file. See 2 N.Y. Jud. Conference Rep. 125 (1957); 14 Carmody-Wait, Cyclopedia of New York Practice 93 (1954); 3 Merrill, Notice 97–98, 119 (1952); *cf.* Note, 12 Tulane L. Rev. 308 (1938). Under section 121-a of the civil practice act, a prospective purchaser, who has not examined the notice of pendency records and hence has no actual notice of a suit, cannot be charged with constructive notice if a filed notice is over three years old. But the operation of section 121-a would be thwarted if a purchaser who examined the records and discovered a stale notice could be considered to have been thereby actually notified of a pending suit or charged with a duty to investigate whether the suit was still pending. Clearly, a stale notice of pendency should be wholly ineffective for any purpose whatever. By omitting the words "as notice" and leaving the present phrase "shall be effective," the proposed rule is designed to accomplish this objective.

The details in present section 121-a for marking a copy of the extended notice for filing, have been deleted. Since the order will recite the particulars of the notice it extends, filing of the order should suffice.

Authority under the proposed rule to extend a notice "for good cause shown" for an additional three-year period includes the authority to extend a notice for less than three years.

The last paragraph of section 121-a is a transitional provision, which will have no function after September 1, 1960. It has therefore been deleted.

75.4. Motion for cancellation of notice of pendency.

(a) Mandatory cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by rule 75.2; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if a final judgment against the plaintiff has not been stayed pursuant to rule 80.9.

(b) Discretionary cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency,

if the plaintiff has not commenced or prosecuted the action in good faith.

(c) Costs and expenses. The court, in an order cancelling a notice of pendency under this rule, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.

Notes

This rule is derived from section 123 of the civil practice act, as amended in 1957 upon recommendation of the Judicial Conference. See N.Y. Laws 1957, c. 877, §3; 2 N.Y. Jud. Conference Rep. 117–120 (1957). The rule follows the Judicial Conference's distinction between mandatory and discretionary cancellation. It also incorporates the provisions of present section 586 covering rights of parties after appeal from a judgment in favor of the owner of real property.

Subdivision (a) is based upon the first sentence of section 123; no change of substance is intended. The final clause in the proposed subdivision embodies the substance of most of present section 586. The first two sentences of that section provide that the judgment determining title to real property is effective for all purposes including the right of the person adjudged owner to transfer title to a purchaser in good faith unless stayed on appeal. This is the effect of proposed rule 80.9, stay of enforcement pending appeal. The final sentence of present section 586 permits the person in whose favor judgment was rendered to obtain an order cancelling a lis pendens and also cancelling and discharging of record a filed contract which tends to defeat his title unless a stay has been obtained. The cancellation of the lis pendens in the absence of a stay is explicitely provided for in the proposed subdivision. The power of the court to order the contract cancelled is clear since the gist of the action is the obtaining of this relief through the court's exercise of traditional equity powers.

Subdivision (b) is based upon the second sentence of section 123. Under proposed rule 31.7, a court on its own initiative may dismiss an action where the plaintiff "unreasonably neglects to proceed in the action." The quoted words, which appear in present section 123 are also grounds for dismissal under present section 181, except that the latter section requires the motion to be made by a defendant "against whom he so neglects to proceed," while section 123 permits "any person aggrieved" to apply for the relief. Apparently the purpose of making failure to proceed a discretionary ground for cancellation under section 123 was to permit the customary conditional order granting the motion unless

the next procedural step is taken within a limited time. Since such an order is permissible upon motion of a "person aggrieved" under proposed rule 31.7, and since an order dismissing the action, would, after the time to appeal expired, be a mandatory ground for cancellation under subdivision (a), failure to proceed has been omitted in subdivision (b).

The third and fourth sentences of section 123, stating the method of cancelling a notice, are omitted as unnecessary. If an order is granted directing a county clerk to cancel a notice, it would seem obvious that it must be filed with the clerk to be effective. The details of the clerk's method of obeying the order are immaterial.

Subdivision (c) of the proposed rule is based upon the second paragraph of section 123 of the civil practice act, which was added in 1957 upon the Judicial Conference's recommendation. It is intended to relieve defendants who are "substantially without remedy under the present law as to losses sustained by reason of the filing of a notice of pendency." 2 N.Y. Jud. Conference Rep. 120 (1957).

The last sentence of present section 121 originally followed the cancellation provisions. It was added in 1905 to section 1671 of the Code of Civil Procedure. N.Y. Laws 1905, c. 60. It states: "After a notice of pendency of action has been cancelled, neither the proceedings in the action nor any judgment which may be rendered therein shall affect the real property described in any such cancelled notice." This sentence obviously cannot be read literally; if it has any meaning, it is the self-evident one that a cancelled notice has no effect as to persons not otherwise bound." See 14 Carmody-Wait, Cyclopedia of New York Practice 81 (1954). Hence it "ceases to be a statutory notice to purchasers . . ., and it is not negligence or evidence of bad faith on the part of the purchaser not to search for the papers which had been filed in the action, and such purchaser is not chargeable with either a statutory or implied notice." *Ibid.* Nor does it seem that a purchaser who searched and found a recorded notice which had been cancelled could be held to have thereby acquired actual notice of a pending action. See notes to proposed rule 75.3. It should be observed, however, that cancellation of a notice instigated by a prospective purchaser has questionable effect on him, since he would obviously have actual notice of the litigation.

75.5. Undertaking for cancellation of notice of pendency; security by plaintiff.

In any action other than one to foreclose a mortgage or for partition or dower, the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, upon such

terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking, in an amount to be fixed by the court, and if

1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or

2. in an action for specific performance of a contract to convey real property, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he may incur if the notice is not cancelled.

Notes

This rule is derived from section 124 of the civil practice act, which was amended by the addition of subdivision 2 in 1957 upon recommedation of the Law Revision Commission. N.Y. Laws 1957, c. 876; N.Y. Law Rev. Comm'n Rep., Leg. Doc. 65(B) (1957); see also N.Y. Law Rev. Comm'n Rep. 203–226 (1951); 2 N.Y. Jud. Conference Rep. 121–26 (1957).

The provision of section 124 for cancellation by the giving of security dates from the Code of Civil Procedure. Because the courts were reluctant to cancel notices in cases involving unique property, the last sentence of subdivision 1 of section 124 was added in 1930. N.Y. Laws 1930, c. 287. The sentence, "read literally, adds nothing to the existing law." 14 Carmody-Wait, Cyclopedia of New York Practice 80 (1954). Because it has apparently solved a problem of construction, however, it has been retained in the phrase, "whether or not the judgment demanded would affect specific real property." See *63rd St. Theatres, Ltd.* v. *Mansion Estates, Inc.* 137 Misc. 285, 243 N.Y. Supp. 204 (Sup. Ct.), *aff'd without opinion,* 230 App. Div. 827, 245 N.Y. Supp. 767 (1st Dep't 1930); 2 N.Y. Jud. Conference Rep. 121–22 (1957). *But see* N.Y. Law Rev. Comm'n Rep. 218 (1951) ("it does not seem to have been notably effective" in preventing unfounded suits)

Attempts to amend section 124 of the civil practice act in 1951 (see N.Y. Law Rev. Comm'n Rep. 203–226 (1951)), in 1952 (see 2 N.Y. Jud. Conference Rep. 124 n. 57 (1957)) and in 1957 (see *id.* at 121–26) have all centered around a need to provide security and protection to a defendant owner of realty, in analogy to the

security required for provisional remedies. Opposition to the suggested amendments was apparently motivated by the consideration that substantial burdens could be placed upon meritorious claimants. Except for the successful recommendation (see N.Y. Law Rev. Comm'n Rep., Leg. Doc. 65(B) (1957)), each of the proposals permitted the court to cancel a notice of pendency upon the failure of the plaintiff to comply with an order directing him to provide security. The successful recommendation requires that such cancellation may be ordered upon the plaintiff's failure only if the defendant provides an undertaking. The substance of this provision, contained in the first and third sentences of subdivision 2 of present section 124, has been incorporated into subparagraph 2 of the proposed rule. The second sentence of subdivision 2 of section 124 permitting the court to consider affidavits in making its decision has been omitted as unnecessary. *Cf.* proposed rule 33.5(b). The fourth sentence of subdivision 2 governing modifications in security and the last paragraph of the subdivision governing actions for award of damages from the person who filed the undertaking will be incorporated into general rules governing security. The second paragraph of subdivision 2 of section 124 has been omitted as repetitive.

TITLE 110. ACTIONS OR PROCEEDINGS BY THE STATE

INTRODUCTION

This title is a reorganization and consolidation of present articles 74, 75, 75-a and 76 of the civil practice act. No changes in substance have been made. Some actions have been omitted where they are redundant or where their substance is covered elsewhere in the proposed law and rules.

It is recommended that present articles 75, 75-a and 76 of the civil practice act, dealing primarily with the substantive powers of the Attorney General, be transferred to the Consolidated Laws with minor changes in language but none in substance. Thus, sections 1208 through 1216 of the civil practice act, governing actions by the Attorney General against persons who usurp, intrude into or unlawfully hold a public office, franchise, or office in a domestic corporation or who do such acts as to work a forfeiture of public office, and sections 1222 through 1229, relating to actions by the Attorney General against persons who have illegally received or disposed of public funds or other property, are to be transferred to the Executive Law. Such actions are of particular concern to the Attorney General rather than to the general practitioner.

Present sections 1208 through 1216 of the civil practice act appear to be more of a substantive than a procedural nature. Thus, section 1208 of the civil practice act has been held to provide the exclusive remedy for trying the title to public office. *Seneca Nation* v. *Jimeson,* 62 Misc. 91, 114 N.Y. Supp. 401 (Sup. Ct. 1909). *Seavey* v. *Van Hatten,* 276 App. Div. 961, 99 N.Y.S.2d 984 (4th Dep't 1949). Similarly, a voter's residence can be questioned only by *quo warranto* under section 1208 of the civil practice act. *Ferguson* v. *Gapa,* 135 N.Y.S.2d 699 (Sup. Ct. 1954).

The sole purpose of present sections 1222 through 1229 of the civil practice act is to give state authorities the same rights as were previously possessed by the counties. Enactment of these provisions was the result of an ineffectual attempt of the Attorney General to recover at common law money claimed to have been illegally obtained from the county of New York by faithless officials thereof. Originally the state could not maintain such an action, for the reason that the title to the money paid was in the county, and not in the state. See 20 Carmody-Wait, Cyclopedia of New York Practice 50 (1956); *People* v. *Ingersol,* 58 N.Y. 1 (1874). In addition, these sections do not take away the cause of action existing in favor of the county or municipality, nor do they create a new cause of action. They simply authorize intervention by state authorities in favor of municipal corporations. *People* v. *Wood,* 121 N.Y. 522, 24 N.E. 952 (1890).

In view of the nature of present sections 1208 through 1216 and 1222 through 1229, a more appropriate place for their inclusion is in that part of the Executive Law prescribing the general duties of the Attorney General. See N.Y. Executive Law §63. The Attorney General is the individual most directly concerned with the initiation of the kinds of actions herein described. Moreover, section 63 of the Executive Law, while general in scope, presently contains provisions authorizing the Attorney General to bring actions in certain specific situations. See, *e.g.,* N.Y. Executive Law §63(9) (action by Attorney General for enforcement of laws against discrimination); *id.* §63(11) (action for recovery of moneys received or expended by officers or employees of state agency in violation of public trust); *id.* §63(12) (injunction against continuance of fraudulent businesses).

Similarly, sections 1217 through 1221 of the civil practice act, prescribing actions by the Attorney General against persons who unlawfully exercise corporate rights, are to be placed in the General Corporation Law. The actions described in these sections are analogous to actions for annulment or dissolution of a corporation presently contained in the General Corporation Law. See, *e.g.,* N.Y. Gen. Corp. Law §§71, 72, 73, 90, 91.

Sections 1221-a through 1221-d of the civil practice act, providing for actions against persons rendering legal services prohibited by law, are to be included in the Judiciary Law adjacent to section 476 which provides for actions against an attorney for lending his name in suits.

TABLE OF RULES IN TITLE 110

RULES—TITLE 110. ACTIONS OR PROCEEDINGS BY THE STATE

110.1 Actions in behalf of the people to be brought in the name of the state.

An action brought in behalf of the people, except an action to recover a penalty or forfeiture expressly given by law to a particular officer, shall be brought in the name of the state.

Notes

This rule is the same as section 1202 of the civil practice act except that "the state" has been substituted for "the people of the state" as the named party. *Cf* proposed section 5.1.

110.2. Action brought on relation of a person.

Where an action is brought by the attorney-general on the relation or information of a person having an interest in the

question, the complaint shall allege, and the title of the action shall show, that the action is so brought. As a condition of bringing an action for the benefit of a person having an interest in the question, the attorney-general shall require the relator to give an undertaking to indemnify the state against costs and expenses.

Notes

The first sentence of this rule is the same as section 1203 of the civil practice act.

The second sentence is derived from section 155 of the civil practice act with no change in substance. Proposed title 123, covering undertakings, prescribes how an undertaking shall be given.

110.3. Procedure in action brought by the state.

Except as otherwise specially prescribed by statute or rule the proceedings in an action brought by the state shall be the same as in an action by a private person.

Notes

This rule is the same as section 1206 of the civil practice act.

Present section 1204, joinder of causes of action in favor of or against the same person, is omitted. The general rules on joinder in proposed title 23, joinder of parties, and proposed title 24, joinder of claims, will apply. Thus the present provision which states that the "attorney-general must join" certain causes of action is replaced by the permissive joinder procedure for actions generally. There is no reason why the state should be denied the procedural flexibility available to parties generally. For the same reason present section 1205, consolidation of actions in behalf of people against several defendants, is omitted. Present section 1207, judgment or order against the people in action or special proceeding brought in their behalf, requires the same judgments as in actions and proceedings generally. It is omitted in view of the general provision of the proposed rule.

SECTIONS TO BE TRANSFERRED TO EXECUTIVE LAW

63-a. Action by attorney-general for forfeiture of public office.
63-b. Action by attorney-general against usurper of office or franchise.
63-c. Action by the people for illegal receipt or disposition of public funds or other property.

SECTIONS TO BE TRANSFERRED TO GENERAL CORPORATION LAW

83. Action by attorney-general for unlawful exercise of corporate rights.
84. Service of process upon foreign corporations in actions by attorney-general for unlawful exercise of corporate rights.
85. Injunction in action by attorney-general for unlawful exercise of corporate rights.
86. Immunity of witnesses in action by attorney-general for unlawful exercise of corporate rights.
87. Costs against corporation or usurpers of franchise of corporation.
88. Action triable by jury.

SECTIONS TO BE TRANSFERRED TO JUDICIARY LAW

476-a. Action for unlawful practice of the law.
476-b. Injunction to restrain defendant from unlawful practice of the law.
476-c. Investigation by the attorney-general.

EXECUTIVE LAW

63-a. Action by attorney-general for forefeiture of public office.

The attorney-general may maintain an action, upon his own information or upon the complaint of a private person, against a public officer, civil or military, who has done or suffered an act which by law works a forefeiture of his office.

Notes

This section is identical with section 1210 of the civil practice act.

63-b. Action by attorney-general against usurper of office or franchise.

1. The attorney-general may maintain an action, upon his own information or upon the complaint of a private person, against a person who usurps, intrudes into, or unlawfully holds or exercises within the state a franchise or a public office, civil or military, or an office in a domestic corporation.

The attorney-general may set forth in the complaint, in his discretion, the name of the person rightfully entitled to the office and facts showing his right thereto. Judgment may be rendered upon the right of the defendant and of the party so alleged to be entitled, or only upon the right of the defendant, as justice requires. Where two or more persons claim to be entitled to the same office or franchise, the attorney-general may bring the action against all to determine their respective rights thereto.

2. If the complaint sets forth the name of the person rightfully entitled to the office and the facts showing his right thereto, a provisional order to arrest the defendant may be granted by the court if the defendant by means of his usurpation or intrusion has received any fees or emoluments belonging to the office.

3. Where a defendant is adjudged to be guilty of usurping or intruding into or unlawfully holding or exercising an office, franchise or privilege, final judgment shall be rendered, ousting and excluding him therefrom, and in favor of the state or the relator, as the case requires, for the costs of the action. As a part of the final judgment in an action for usurping or intruding into or unlawfully holding or exercising an office, franchise or privilege, the court, in its discretion, also may award that the defendant, or, where there are two or more defendants, that one or more of them, pay to the state a fine not exceeding two thousand dollars. The judgment for the fine may be docketed and execution may be issued thereupon in favor of the state, as if it had been rendered in an action to recover the fine.

4. Where final judgment has been rendered upon the right and in favor of the person alleged in the complaint to be entitled to an office, he may recover, by action against the defendant, the damages which he has sustained in consequence of the defendant's usurpation, intrusion into, unlawful holding or exercise of the office.

Notes

The first sentence of proposed subdivision 1 is identical with section 1208 of the civil practice act. The second and third sentences are derived from present section 1211 with no change in substance. The last sentence is identical with present section 1209.

Proposed subdivision 2 contains the substance of section 1212 of the civil practice act. References to proof upon affidavits and to the general statutes or rules concerning arrest have been omitted as unnecessary since the order of arrest is denominated "provisional." See proposed section 15.1.

The first and second sentences of proposed subdivision 3 are sections 1215 and 1216 of the civil practice act, respectively, with minor language changes.

Proposed subdivision 4 is identical with section 1214 of the civil practice act.

Present section 1213 of the civil practice act (assumption of office by person entitled; delivery of books and papers) has been omitted since it adds nothing to the rights presently given by section 80 of the Public Officers Law.

63-c. Action by the people for illegal receipt or disposition of public funds or other property.

1. Where any money, funds, credits, or other property, held or owned by the state, or held or owned officially or otherwise for or in behalf of a governmental or other public interest,

by a domestic municipal, or other public corporation, or by a board, officer, custodian, agency, or agent of the state, or of a city, county, town, village or other division, subdivision, department, or portion of the state, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damages or other compensation for so obtaining, receiving, paying, converting, or disposing of the same, or both, may be maintained by the state in any court of the state, or before any court or tribunal of the United States, or of any other state, or of any territory of the United States, or of any foreign country, having jurisdiction thereof, although a right of action for the same cause exists by law in some other public authority, and whether an action therefor in favor of the latter is or is not pending when the action in favor of the state is commenced. The attorney-general shall commence an action, suit or other judicial proceeding, as prescribed in this section, whenever he deems it for the interests of the state so to do; or whenever he is so directed, in writing, by the governor.

2. Upon the commencement by the state of any action, suit or other judicial proceeding, as prescribed in this section, the entire cause of action, including the title to the money, funds, credits, or other property, with respect to which the suit or action is brought, and to the damages or other compensation

recoverable for the obtaining, receipt, payment, conversion or disposition thereof, if not previously so vested, is transferred to and becomes absolutely vested in the state.

3. Any court of the state in which an action is brought by the state, as prescribed in this section, may direct, by the final judgment therein, or by a subsequent order, that any money, funds, damages, credits, or other property, recovered by or awarded to the plaintiff therein, which, if that action had not been brought, would not have vested in the state, be disposed of, as justice requires, in such a manner as to reinstate the lawful custody thereof, or to apply the same or the proceeds thereof to the objects and purposes for which they were authorized to be raised or procured; after paying into the state treasury out of the proceeds of the recovery all expenses incurred by the state in the action.

4. Any corporation, board, officer, custodian, agency, or agent, in behalf of any city, county, town, village, or other division, subdivision, department, or portion of the state, which was not a party to an action, brought as prescribed in this section, and which claims to be entitled to the custody or disposition of any of the money, funds, damages, credits, or other property, recovered by, or awarded to the plaintiff, by the final judgment in the action, or any of the proceeds thereof, and not disposed of as prescribed in subdivision three,

may bring a special proceeding against the attorney-general at any time after the actual collection of the money and its payment into the state treasury, or the actual receipt of the property by the state, in the supreme court, county of Albany, seeking disposition of the money or other property.

Notes

The first sentence of proposed subdivision 1 is a combination of sections 1222 and 1224 of the civil practice act with minor language changes. The second sentence is the same as section 1229 of the civil practice act with minor language changes.

Proposed subdivisions 2, 3 and 4 are the same as sections 1225, 1227 and 1228 of the civil practice act, respectively, with minor language changes. Proposed subdivision 4 refers generally to a special proceeding, making proposed title 27 applicable, instead of detailing the procedure thereof.

Present section 1223, authorizing the court to grant a stay of proceedings and joinder of parties where another action brought for the same cause is pending, has been deleted. Such authority is included in the broad power of the court provided for in proposed rule 24.2. Section 1226 of the civil practice act (limitation of action) has also been omitted. It is specifically dealt with in proposed section 5.13. The time within which an action for spoliation or misappropriation of public property may be brought has been reduced from ten years to five years, to commence from the date of discovery of the wrong and not from the date of the wrong. See notes to proposed section 5.13.

GENERAL CORPORATION LAW

ARTICLE 7-A—ACTION FOR UNLAWFUL EXERCISE OF CORPORATE RIGHTS

83. Action by attorney-general for unlawful exercise of corporate rights.

The attorney-general may maintain an action upon his own information or upon the complaint of a private person:

1. Against one or more persons who act as a corporation within the state without being duly incorporated; or exercise

within the state any corporate rights, privileges or franchises not granted to them by the law of the state.

2. Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises not granted to it by the law of this state; or which within the state has violated any provision of law, or, contrary to law, has done or omitted any act or has exercised a privilege or franchise not conferred upon it by the law of this state, where, in a similar case, a domestic corporation in accordance with section ninety-one, would be liable to an action to vacate its charter and to annul its existence; or which exercises within the state any corporate rights, privileges or franchises in a manner contrary to the public policy of the state.

84. Service of process upon foreign corporations in actions by attorney-general for unlawful exercise of corporate rights.

1. The legislature declares that the welfare and rights of the citizens of this state are jeopardized and endangered by acts committed in violation of the laws of this state by foreign corporations which have not designated the secretary of state in the manner specified in section two hundred and ten as their agent upon whom process in any action or proceeding may be served within the state and that it is in the public interest to subject such corporations to the jurisdiction of the courts of this state. In furtherance of such public interest, the legisla-

ture herein provides, for the purposes of this section, a method of substituted service of process upon such foreign corporations and declares that in so doing it exercises its power to protect its residents and to define, for the purposes of this section, what constitutes doing business in this state.

2. Any of the following acts in this state by a foreign corporation which has not designated the secretary of state in the manner specified in section two hundred and ten as its agent upon whom process in any action or proceeding may be served within the state, shall be deemed equivalent to and shall constitute an appointment by such foreign corporation of the secretary of state to be its true and lawful attorney, upon whom may be served all lawful process in any action or proceeding brought by the attorney-general as prescribed by section eighty-three:

(a) As used in this section the term "resident" shall include individuals, domestic corporations and foreign corporations authorized to do business in the state.

(b) Any act done, or representation made as part of a course of the solicitation of orders, or the issuance, or the delivery, of contracts for, or the sale of, property, or the performance of services to residents which involves or promotes a plan or scheme to defraud residents in violation of the laws or the public policy of the state.

(c) Any act done as part of a course of conduct of business in the solicitation of orders from residents for property, goods or services, to be delivered or rendered within this state to, or on their behalf, where the orders or contracts are executed by such residents within this state and where such orders or contracts are accompanied or followed by an earnest money deposit or other down payment or any installment payment thereon or any other form of payment, which payment is either delivered in or transmitted from the state.

(d) Any act done as part of the conduct of a course of business with residents which defrauds such residents or otherwise involves or promotes an attempt by such foreign corporation to circumvent the laws of this state.

3. Service of process upon any such foreign corporation in any such proceeding in any court of competent jurisdiction within this state may be made by serving the secretary of state with two copies thereof. The secretary of state shall forward a copy of such process by registered mail to the defendant at its last known principal place of business as furnished by the attorney-general, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by the attorney-general to the defendant at its last known principal place of

business by registered mail with return receipt requested. The attorney-general shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court, in case there be no clerk, an affidavit of compliance herewith, a copy of the process, and either a return receipt purporting to be signed by the defendant in accordance with the rules and customs of the post office department; or, if acceptance was refused by the defendant or its agent, the original envelope bearing a notation by the postal authorities that receipt was refused. Service of process so made shall be deemed to have been made within the territorial jurisdiction of any court in this state.

The papers referred to in this subdivision shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the attorney-general. Service of process shall be complete ten days after such process and the accompanying papers are filed in accordance with this section.

4. Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any such foreign corporation in any manner now or hereafter permitted by law.

85. Injunction in action by attorney-general for unlawful exercise of corporate rights.

In an action brought as prescribed in section eighty-three, the final judgment in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary restraining order to restrain the commission or continuance thereof may be granted upon proof, by affidavit, that the defendant or defendants have violated any of the provisions of such section. The provisions of statute or rule relating generally to injunctions as provisional remedies in actions apply to such a restraining order and the proceedings thereupon.

86. Immunity of witnesses in action by attorney-general for unlawful exercise of corporate rights.

In the trial of an action brought as prescribed in section eighty-three, the court may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of the penal law.

87. Costs against corporation or usurpers of franchise of corporation.

Where final judgment in an action brought in behalf of the people, pursuant to this article, is rendered against a corporation or person claiming to be a corporation, the court may direct the costs to be collected by execution against any of the persons claiming to be a corporation; or by order of attach-

ment or other process against the person of any director or other officer of the corporation.

88. Action triable by jury.

An action brought as prescribed in this article is triable by a jury in like manner as if it were an action in which the complaint demands judgment for a sum of money only.

Notes

Proposed sections 83, 84, 85, 86, 87 and 88 of the General Corporation Law are the same as sections 1217, 1217-a, 1218, 1219, 1220 and 1221 of the civil practice act, respectively, with minor language changes. The General Corporation Law presently provides for analogous actions for dissolution and annulment of a corporation. See, *e.g.*, N.Y. Gen. Corp. Law §§71, 72, 73, 90, 91. In certain circumstances such actions must be brought by the Attorney General. *Id.* §134. Moreover, section 1217(2) of the civil practice act contains specific reference to section 91 of the General Corporation Law:

> The attorney-general may maintain an action upon his own information or upon the complaint of a private person . . . [a]gainst a foreign corporation . . . where, in a similar case, a domestic corporation in accordance with section ninety-one of the general corporation law, would be liable to an action to vacate its charter and to annul its existence . . . .

Thus it appears that such a close relation exists between actions to annul or dissolve a corporation and actions against persons unlawfully exercising corporate rights, as to warrant the inclusion of all such actions within the same statute. See also section 1217-a (referring to section 210 of the General Corporation Law). These sections will constitute Article 7-A of the General Corporation Law.

Indeed, sections 71 and 72 of the General Corporation Law, regarding actions to dissolve a corporation, and sections 90 and 91, relating to actions by the Attorney General to annul a corporation, were originaly a part of the Code of Civil Procedure as were sections 1217 to 1221 of the civil practice act.

In transferring these sections to the General Corporation Law, subdivision 3 of present section 1217 has been omitted as unnecessary. Proposed title 34, governing disclosure, and proposed title 38, regulating the use of subpoenas, give ample authority to the Attorney General to take proof as provided in subdivision 3 of section 1217.

Proposed section 86 of the General Corporation Law is the same as present section 131 thereof. The other sections of article 10 of the General Corporation Law—sections 130, 132–140—are not applicable to proposed article 7-A.

Proposed section 84 of the General Corporation Law has not been amended although its details should be reconsidered in connection with proposed section 3.2 of the Civil Practice Law. See *Jurisdiction Over Non-Residents Not Personally Served Within the State*, N.Y. Temp. Comm'n on the Courts Rep. II 455, Leg. Doc. 13 (1958).

JUDICIARY LAW

476-a. Action for unlawful practice of the law.

1. The attorney-general may maintain an action upon his own information or upon the complaint of a private person or of a bar association organized and existing under the laws of this state against any person, partnership, corporation, or association, and any employee, agent, director, or officer thereof who makes it a practice or business to render legal services which are prohibited by law as constituting the unlawful practice of the law.

2. Such an action may also be maintained by a bar association organized and existing under the laws of the state of New York, upon an application to the supreme court of the state of New York, or a justice thereof, for leave to bring the same by such bar association on good cause shown therefor and proof that a written request was made upon the attorney-general to bring such an action and that more than twenty days have elapsed since the making of such request and he has failed or refused to bring such an action.

476-b. Injunction to restrain defendant from unlawful practice of the law.

In an action brought as prescribed in section four hundred seventy-six-a, the final judgment in favor of the plaintiff

shall perpetually restrain the defendant from the commission or continuance of the act complained of. A temporary restraining order to restrain the commission or continuance thereof may be granted upon proof, by affidavit, that the defendant has violated any of the provisions of such section. The provisions of statute or rule relating generally to injunctions as provisional remedies in actions apply to such a temporary restraining order and the proceedings thereupon, except that the plaintiff shall not be required to file any undertaking before the issuance of such temporary restraining order, shall not be liable for costs and shall not be liable for damages sustained by reason of the restraining order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

476-c. Investigation by the attorney-general.

1. The attorney-general is empowered to conduct an investigation of any complaint of unlawful practice of the law and in connection therewith, the attorney-general, his deputy, assistant, special assistant or other officer designated by him for such purpose is empowered to subpoena witnesses, compel their attendance, examine them under oath before him or the supreme court of the state of New York, or a justice thereof, and require the production of any books or papers which he deems relevant or material to the inquiry. Such power of subpoena and of examination shall not abate or terminate by reason of the commencement or pendency of any action or proceeding brought by the attorney-general under section four hundred seventy-six-a.

2. No person shall be excused from attending such inquiry in pursuance to the mandates of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee or mileage, unless at the time of such appearance or production, as the case may be, such witness makes demand for such payment as a condition precedent to the offering of testimony or production required by the subpoena and unless such payment is not thereupon made. Such provisions for payment of witness fee or mileage do not apply to any officer, director or person in the employ of any person, partnership, corporation, company, trust or association whose conduct or practices are being investigated.

3. It shall be the duty of all public officers, their deputies, assistants, subordinates, clerks or employees and all other persons to render and furnish to the attorney-general, his deputy or other designated officer when requested all information and assistance in their possession or within their power. Any officer participating in such inquiry who shall disclose to any person other than the attorney-general the name of any

witness examined or any other information obtained upon such inquiry except as directed by the attorney-general shall be guilty of a misdemeanor.

Notes

Proposed sections 476-a, 476-b and 476-c are the same as sections 1221-a, 1221-b and 1221-d of the civil practice act; respectively.

Sections 1221-a through 1221-d are primarily directed to restricting the practice of law to those persons duly authorized. They are not procedural rules of general practice. These sections were added to the civil practice act in 1935 and amended in 1958. N.Y. Laws 1935, c. 387; N.Y. Laws 1958, c. 261. An examination of the nature of the actions prescribed by section 1221-a reveals a marked similarity between such actions and those provided by section 476 of the Judiciary Law, dealing with actions against an attorney for lending his name in suits. In essence, both actions are concerned with the unlawful practice of law. In each instance, a person is holding himself out as a duly authorized attorney, without, in fact, being so constituted. Since the gravamen of each action is the same, it is desirable to include them both in the same statute.

Moreover, the Penal Law presently treats both of these actions in the same article. See N.Y. Penal Law §§270, 277, 280. By transferring civil practice act sections 1221-a, 1221-b and 1221-d to the Judiciary Law, the civil actions relating to the illegal practice of law will be brought into juxtaposition with the Penal Law provisions covering such activities.

Section 1221-c of the civil practice act, providing for examination before trial, has been omitted in transferring these sections to the Judiciary Law. Proposed title 34 provides for full disclosure and encompasses the situation provided for by section 1221-c. See proposed rule 34.1(a).

TITLE 121. DISPOSITION OF PROPERTY IN LITIGATION

INTRODUCTION

This title covers all of article 61 of the civil practice act, except section 980-a. The latter section, covering disposition of an infant's or incompetent's cause of action for personal injuries, has been incorporated in proposed rule 91.6.

The present provisions have been simplified and clarified. In a number of instances the discretion of the court in dealing with property in litigation has been enlarged. The power of the court to order property in litigation sold has been expanded to cover those cases where presently it may order property disposed of by delivery to a person or paid into court. Similarly, in cases where property may be ordered sold because no party is willing to accept custody, it may, under the proposal, be ordered paid into court or turned over to a person.

The phrase "personal property capable of delivery" is used throughout the title. Thus this phrase, presently found in present section 978, is substituted for "goods, wares or merchandise" used in present sections 979-a and 980.

TABLE OF RULES IN TITLE 121

RULES—TITLE 121. DISPOSITION OF PROPERTY IN LITIGATION

121.1. When court may order disposition of property.

The court, upon motion or on its own initiative, with such notice as it deems proper, may order personal property capable of delivery paid into court, or delivered to such person as it may direct, with or without security and subject to its further direction, if

1. a party has such property in his possession or custody and it is the subject of the litigation and is held by him as trustee for another party, or belongs or is due to another party; or

2. a party has such property in his possession or custody and it belongs or is due to another party, where special circumstances make it desirable that payment or delivery to such other party should be withheld; or

3. the ownership of such property will depend on the outcome of a pending action and no party is willing to accept possession or custody of it during the pendency of the action.

Notes

This rule is derived from sections 978 and 979-a of the civil practice act. Section 978 is incorporated in proposed subparagraphs 1 and 2, with some change in substance. The sale provisions have been combined in proposed rule 121.2.

The first sentence of section 978 provides that property described in subparagraph 1 of the proposed rule shall be paid into court or to the party to whom it belongs or is due. The present requirement of an admission by pleading or on examination has been omitted. There seems to be no reason to limit the means by which the court may become aware of such a situation. See, *e.g.*, proposed rule 34.23; N.Y. Civ. Prac. Act §322. The proposed rule allows the court to have the property paid into court, or to any person the court directs. This not only covers the present provision, but takes into account the possibility that the property will be of a nature which requires storage under the provisions of proposed rule 122.2. The proposed rule also allows the court to appoint a trustee for such property rather than have it stored during the pendency of the action.

The second sentence of section 978 deals with the circumstances described in subdivision 2 of the proposed rule. The present clause, "and it shall appear that such party would not have the benefit or use or control of the money or other property due him," has been omitted. This clause was not only confusing as written, but also unnecessary in view of the immediately following clause which gives the court broad discretion where "special circumstances make it appear desirable that such payment or delivery should be withheld." Where the second sentence of section 978 provides that property described therein may be ordered paid into court, the proposed rule allows the payment into court or to such other person as the court may direct. This change was made for the same reason as the similar change discussed in relation to the first sentence of section 978. The words "for the benefit of such party or other persons who may thereafter appear to be entitled thereto" have been omitted as unnecessary. Property paid into court is administered for the benefit of the parties interested therein and may only

be paid to the person entitled to receive it. See proposed rules 122.5–122.8.

Although section 978 does not directly give the court power to order the sale of property which falls within the ambit of that section, it does provide that such property may be ordered paid into court. Since proposed rule 122.1(d) gives the court power to direct transfer or investment of money or securities paid into court "as it deems proper," and proposed rule 122.2 gives the court power to make any disposition of other property paid into court as "it deems proper," property paid into court pursuant to section 978, could thereupon be sold. The court apparently has this power under present provisions. See N.Y. Civ. Prac. Act §§134-a, 136; notes to proposed rule 122.1(d), 122.2.

The last sentence of present section 978 has been omitted since proposed rule 122.7 provides that no property paid into court shall be paid out except by order of the court.

Section 979-a of the civil practice act has been incorporated in subparagraph 3 of the proposed rule and, by reference, in proposed rule 121.2. The words "neither party" have been changed to "no party" to account for actions in which there are more than two parties. The requirement in section 979-a that an application for an order to sell must be made by a party has been omitted in view of the fact that the introductory clause of the proposed rule permits the court to make an order on motion or on its own initiative. There is no apparent reason why the court should await a motion by a party to dispose of the property when no party is willing to accept the custody of such property. Although section 979-a provides for the sale of property in dispute, the proposed rule taken with proposed rule 121.2 gives the court broader discretion. The court may order such property paid into court, sold, or delivered to a trustee. In view of this broad discretion, the last sentence of section 979-a, providing for disposition of proceeds, has been omitted as unnecessary. See proposed rules 122.1 and 122.2 and notes thereto. In cases where, under present section 979-a, the court could only order the property sold, it may, under the proposal, also order it delivered to a person or paid into court.

121.2. Sale of property.

On motion of any party, the court may order the sale, in such manner and on such terms as it deems proper, of any personal property capable of delivery which is the subject of the action if it shall appear likely that its value will be substantially decreased during the pendency of the action or in any case provided in rule 121.1. Any party to the action may purchase

such property at a judicially-directed sale held pursuant to this rule without prejudice to his claim.

Notes

This rule incorporates sections 979-a and 980 of the civil practice act. See the discussion of sale provisions in notes to proposed rule 121.1. The words "by any person or persons named in such order" have been omitted as unnecessary. The phrase "in such manner and on such terms" should be sufficient to allow designation of the person to make the sale. The words "if it shall appear likely that its value will be substantially decreased during the pendency of the action" have been used in place of "which may be of a perishable nature or likely to be injured from keeping." The words employed in section 980 have been given a broad construction. It has been held that such varied items as storage batteries (*Dictograph Products* v. *Yardney Electric Corp.,* 100 N.Y.S.2d 657 (Sup. Ct.), *aff'd,* 277 App. Div. 1029, 101 N.Y.S.2d 225 (1st Dep't 1950)), livestock (*Riegel* v. *Franzel,* 202 App. Div. 778, 194 N.Y. Supp. 907 (4th Dep't 1922), *reversing* 191 N.Y. Supp. 126 (Sup. Ct. 1921)), and shares of corporate stock (*Ballantine* v. *Ferretti,* 255 App. Div. 606, 8 N.Y.S.2d 436 (1st Dep't 1938)) may be considered "of a perishable nature or likely to be injured from keeping." These cases suggest that section 980 would apply where it appears that loss would result to the parties from any decrease in value of the property during the pendency of the action, and the proposed rule has been drafted to make that the controlling consideration.

121.3. Enforcement of order directing disposition of property.

Where the court has directed disposition of personal property capable of delivery and the direction is disobeyed, the court by order, in addition to punishing the disobedience as a contempt, may require the sheriff to take and dispose of the property in accordance with its direction.

Notes

This rule is derived from part of section 979 of the civil practice act. Those portions of section 979 which apply to equitable judgments ordering the delivery of property are covered by proposed rule 60.2.

TITLE 122. PROPERTY PAID INTO COURT

INTRODUCTION

Article 14 of the civil practice act contains six sections under the caption "Payment into and out of court." N.Y. Civ. Prac. Act §§133–137. Title 5 of the rules of civil practice, captioned "Payment into court," contains six rules. N.Y. R. Civ. P. 29–34. Proposed title 122 covers the material in the sections of present article 14 and all except rule 29 of the rules of present title 5.

In the main, the aim of this title has been to consolidate and clarify the present provisions. Recurrent phrases in the rules and the notes thereto have been given standard meanings. The custodian of property paid into court is the person responsible for the administration thereof, and may be a person other than the depository of such property. The term "delivery" is employed only to indicate the passing of property into the hands of a custodian, while "deposit" refers to its transmission to the person who will maintain possession thereof. The term "paying in" is used to refer to the subjection of property to the supervision of a court.

The present sections and rules make no provision for the administration of property other than money or securities, except to declare that such property may not be delivered to the county treasurer and that it may be placed in storage. N.Y. Civ. Prac. Act §134-a. This situation is remedied by including such property in the proposed rules requiring orders for the payment of property out of court (proposed rule 122.7), court control of property paid into court (proposed rule 122.2), responsibility for the cost of administration of such property (proposed rule 122.3), and the requirement of annual statements from the depositories of such property (proposed rule 122.5).

The present general plan of administration of property paid into court has been retained. It provides a reasonable, fairly trouble-free means of keeping track of such property.

TABLE OF RULES IN TITLE 122

RULES—TITLE 122. PROPERTY PAID INTO COURT

122.1. Payment of money or securities into court.

(a) Discharge of party paying money into court. A party paying money into court pursuant to the direction of the court is discharged thereby from all further liability to the extent of the money so paid in.

Notes

This rule is derived from section 133 of the civil practice act with no change in substance. The word "bringing" has been changed to "paying" for the sake of consistency. *Cf.* N.Y. Civ. Prac. Act §134.

(b) Delivery of money and securities to county treasurer; treasurer of city of New York. All moneys and securities paid into court shall be delivered either by the party making the payment into court, or when an officer other than the county treasurer first receives them, by that officer, to the county treasurer of the county where the action is triable or to such other county treasurer as the court specially directs. Where money or securities are received by an officer other than the county treasurer, he shall deliver them to the county treasurer within two days after he receives them. The treasurer of the city of New York shall be considered the treasurer of each of the counties included within that city.

Notes

This rule embodies part of sections 134, 134-a, 136 and 137 of the civil practice act. The words "transferred or deposited" in the first sentence of section 134 have been omitted as unnecessary. The phrase "must be paid or transferred" in that sentence has been changed to "shall be delivered" to avoid confusion between the concept of paying money into court and the subsequent disposition of such money. The clause "either directly or by an officer required by law first to receive it" has been changed to "by the party making the payment into court, or when an officer other than the county treasurer first receives them, by that officer." This change was made for the sake of clarity, and to take into consideration a situation in which an officer might receive property before the county treasurer although not required by law to do so. This situation might arise for example, if a court order to pay property into court is not obeyed, and a sheriff subsequently seizes the property to enforce the order.

The words "delivered to" in the second sentence of section 134 have been changed to "received by" to maintain the distinction between delivery of property to a custodian and any other disposition of such property.

The last sentence of the proposed rule is derived from the portion of sections 134, 134-a, 136 and 137 of the civil practice act which specifically refer to the treasurer of the city of New York, and serves to eliminate repetition throughout the title.

(c) Title to funds paid into court. Title for the benefit of interested parties is vested in the county treasurer to whom any security is transferred pursuant to this title. Any security purchased by the county treasurer as an investment of money paid into court shall be purchased in the name of his office. He may bring an action upon or in relation to a security in his official or representative character.

Notes

This rule is based on civil practice act section 135 and the last sentence of section 134.

The words "or other officer, or guardian, committee, or other trustee" of section 135 have been eliminated to bring the rule up-to-date. Section 745 of the code of civil procedure, from which section 134 of the civil practice act was derived, gave the court power to specially direct that money paid into court should be placed in the custody of someone other than the county treas-

urer. This discretion was abolished in 1908 (N.Y. Laws 1908, c. 183), and no such discretion is provided for in the civil practice act or in the proposed rules. Section 747 of the code of civil procedure gave the Supreme Court power to direct that money paid into court be transferred to "a general or special guardian, committee, or other trustee. . . ." Although section 747 of the code was completely eliminated in 1892 (N.Y. Laws 1892, c. 651), the corresponding language in section 749 was left untouched, and was eventually incorporated verbatim into section 135 of the civil practice act. Under proposed rule 122.1(b) all money paid into court must initially be turned over to the county treasurer.

The words "is taken" and "is transferred, delivered, made, or given, pursuant to law" have been replaced by the phase "transferred pursuant to this title," which includes a direct payment of securities to the treasurer, or the purchase by him of securities with money paid into court. See notes to proposed rule 122.1(d). The phrase "for the purposes of the trust" has been replaced by "for the benefit of interested parties." There is neither a trust nor a trustee referred to in this article of the civil practice act, and though the county treasurer does function as a fiduciary, it seems likely that the use of the term is another remnant of section 747 of the code of civil procedure.

The last sentence of present section 134 is covered by the second sentence of the proposed rule. The word "taken" has been replaced with the word "purchased" in the proposed rule for the sake of clarity, and the clause "by the county treasurer" has been inserted in the third sentence for the same purpose. The word "security" has been used in place of enumerations of security instruments throughout the title.

(d) Subsequent control of money or securities paid into court. A court may direct that money or securities in the custody of a county treasurer pursuant to this rule be transferred or invested as it deems proper.

Notes

This rule is based on the first two sentences of section 136 of the civil practice act. The second sentence of section 136, requiring an order based "upon proper and sufficient evidence satisfactory to the court," has been omitted as unnecessary, as has the phrase "in any action or proceeding brought therein" in the first sentence. Instead of enumerating the ways in which the court may specifically control funds paid into court, the court has been given the power to order such funds "transferred or invested as it deems proper."

In the absence of any specific direction of the court, the county treasurer may, at his own discretion, either deposit or invest all funds or moneys paid into court. N.Y. State Finance Law §182.

122.2. Payment into court of property other than money or securities; deposit with warehouse or safe deposit company.

Property paid into court, other than money or securities, shall not be delivered to the county treasurer. The court may direct that such property be deposited in a warehouse or safe deposit company upon the filing of a bond for the cost of such storage by the party paying the property into court. It may make such other or subsequent disposition as it deems proper.

Notes

This rule is derived from section 134-a of the civil practice act. The words "other than money or securities" have been inserted to reconcile the rule with the specific mandate of proposed rule 122.1(b). The word "property" has been substituted for the enumeration of articles in the section, and for the word "articles" itself. The last nine words of the section have been replaced by the sentence "It may make such other or subsequent disposition as it deems proper," in order to make clear that the exact disposition of such property is left to the discretion of the court.

122.3. Cost of administration of property paid into court.

A party entitled to the income of any property paid into court shall be charged with the expense of administering such property and of receiving and paying over the income thereof.

Notes

The rule is based on the first sentence of rule 30 of the rules of civil practice. The phrase "yearly interest" has been omitted since the term "income" adequately covers interest. The words "and invested in permanent securities" have been omitted. There is no need to limit to any specific investments the responsibility of the beneficiary for the payment of expenses. If any such expenses are incurred it is reasonable to expect the person entitled to the income to absorb the costs. The word "sum" has been replaced by "property" to broaden the scope of the section, and the phrase "expense of investing" has been changed to "expense of administering" for the same purpose.

122.4. Calculation of gross sum in lieu of income.

A gross sum payable to a party in lieu of the income of a sum of money paid into the court for his benefit shall be calculated according to the then value of an annuity at the rate of four per centum on the principle sum, compounded annually, during the probable life of such person, according to the American Experience Table of Mortality, together with Craig's Extension thereto for ages under ten. If in any case, such tables fail to provide required data, other tables accepted by actuarial practice shall be employed.

Notes

This rule is the second sentence of rule 30 of the rules of civil practice with only minor changes in language. The words "yearly interest" have been omitted as unnecessary. The parenthetical reference to rule 243 providing for the calculation of a gross sum in an action for dower, has been omitted, since an inconsistent special statute or rule would govern without the necessity for such reference. See proposed rule 1.1.

122.5. Duties of depositories.

When property paid into court is deposited with any depository, the entry of such deposit in the books of the depository shall contain a short reference to the title of the cause or matter in relation to which the deposit is made and shall specify the time from which any interest or accumulation on the deposit, if any, is to commence. On or before the first day of February in each year, such depository shall transmit to the appellate division of the supreme court in the department in which the depository is situated a statement describing the property in its custody, including interest or accumulation, if any, to the credit of each cause or matter on the last preceding first day of January.

Notes

This rule is derived from rule 34 of the rules of civil practice. The word "moneys" has been changed to "property" to include property deposited in a warehouse. The phrase "by order of the court" has been omitted in order to cover situations in which money is paid into court without an order (see proposed rule 31.10), and situations in which the treasurer deposits money in his own discretion in the absence of any court order. See N.Y. State Finance Law §182.

The words "where it does not commence from the date of such deposit" are omitted as unnecessary. The phrase "property deposited with it" in the proposed rule has replaced the phrase "funds in its custody" in order to avoid any possible confusion between the custodian of the property and the depository thereof.

122.6. Obtaining order for payment out of court.

An order for the payment of property out of court shall be made only as follows:

1. on motion with such notice as the court may direct; or

2. by special proceeding; the petition shall be accompanied by a copy of the judgment, order or other paper under which the property was paid into court, together with a certificate of the county treasurer or other depository of the property, showing the present condition and amount thereof, and stating separately, in the case of money, the amount of principal and interest.

Notes

This rule embodies rule 31 and all except the last four sentences of rule 32 of the rules of civil practice. Subdivision (1) is a restatement and condensation of the first sentence of the second paragraph of present rule 32. The specific instructions in the present rule as to who must get notice and under what circum-

stances no notice is needed have been omitted, and the court is given discretion to direct such notice as it deems proper.

Subdivision (2) embodies the first paragraph of present rule 32 with such changes in language as were necessary for consistency. The words "or other paper" were added to take into account situations such as tender and offer, in which payment may be made into court without an order. See proposed rule 31.10. In that instance, a pleading alleging a tender and payment into court must be presented.

It is recommended that proposed rule 31.10(a) be amended by the addition of the following sentence:

> A copy of the proposed answer containing the allegations of tender and payment into court shall be filed at the time of payment.

This addition would incorporate present rule 29(1) into proposed rule 31.10.

Present rule 31 has been omitted as unnecessary. If payment is to be made on the basis of consent, the consent may be proved when the motion is made or in a special proceeding.

122.7. Payment of property paid into court.

No property paid into court, or income from such property, shall be paid out except upon order of the court directing payment to a specified person. When the whole of an original payment of money into court, or the whole of a distributive share thereof, or any security or other property, is directed to be paid out of court, the order must direct the payment of all accrued income belonging to the party to whom such money, distributive share, security or other property is paid. A certified copy of the order directing payment shall be delivered to the county treasurer or other custodian of the property. The custodian, in the case of money, shall draw a draft payable to the order of the party entitled thereto specifying the title of the cause or matter on account of which the draft is made and the date of the order authorizing the draft. A certified copy of the order, accompanied by a draft in the case of money, shall be delivered to the depository of the property before it shall pay out any property. If an order directs that periodic payments be made, the filing of one copy of the order shall be sufficient to authorize the payment of subsequent drafts in pursuance thereof.

Notes

This rule is derived from the last sentence of section 136 and the first sentence of section 137 of the civil practice act, and the last four sentences of rule 32, and rule 33 of the rules of civil practice. The first sentence of the proposed rule embraces the first sentence of section 137, and through the inclusion of the words "or income from such property," that portion of the fourth sentence of present rule 32 dealing with interest and accumulation on money. The term "property" in the proposed rule includes all the items enumerated in section 137. The words "paid out" have been substituted for "surrender" for the sake of clarity and consistency.

There has been some question raised as to how much the inability of the county treasurer to "surrender" property without an order limits his right to sell mortgages and other securities. See 5 Carmody-Wait, Cyclopedia of New York Practice 361–62 (1953); 2 Bender, New York Practice 314 (Warren ed. 1954). The use of the phrase "pay out" throughout this title to mean removal from the supervision of the court, should clarify the situation and indicate that this rule is not intended to hamper the treasurer in the exercise of his discretion in the management of property paid into court. See N.Y. State Finance Law §182. The purpose of the proposed rule is to prevent the removal of such property from the custody of the court upon claims unlawfully made. *County of Tompkins* v. *Ingersoll*, 81 App. Div. 344, 81 N.Y. Supp. 242 (3d Dep't 1903), *aff'd*, 177 N.Y. 543, 69 N.E. 1132 (1904).

The words "directing such disposition" appearing at the end of the first sentence of section 137 have been omitted as unnecessary, since the fourth sentence of present rule 32 has been embodied in the proposed rule by the phrase "directing payment to a specified person."

The second sentence of the proposed rule is the last sentence of present section 136 with no substantial changes.

The third, fourth, and fifth sentences of the proposed rule are a restatement of the fifth and sixth sentences of present rule 32. The word "property" has been substituted for "money" and is meant to include property held in storage. The third sentence of the proposed rule also embodies present rule 33 with no change

in substance. Where the custodian—*e.g.*, the County Treasurer—and the depository—*e.g.*, a bank—are different persons two certified copies of the order will be required. If, as in the case of property placed in storage, the custodian and depository are the same person, only one certified copy of the order will be required.

The last sentence of the proposed rule corresponds to the last sentence of present rule 32 and makes only minor changes in language.

122.8. Liability of custodian.

No liability shall attach to a custodian of property paid into court because of a payment made by him in good faith in accordance with the direction of an order of the court.

Notes

This rule is derived from the last sentence of section 137 of the civil practice act. The words "in any event" have been omitted as unnecessary, and the phrase "county treasurer" has been changed to "custodian of property paid into court" to include any custodian appointed by the court.

TITLE 123. UNDERTAKINGS GENERALLY

INTRODUCTION

Proposed title 123 is a consolidation and reorganization of sections 148 through 162 of the civil practice act, rules 25 through 27 of the rules of civil practice, and all other sections and rules generally applicable to bonds, undertakings, bail and recognizances. The rules in this title are intended to govern all situations involving these security devices where they are not excluded by more particular controlling provisions. Aside from elimination of present requirements that security be worth twice the amount of the undertaking there have been no major substantive changes. Adequate provisions to insure financial responsibility of sureties have been provided.

The term "undertaking" is used in the proposed rules to include any instrument including a bond, which evidences an agreement by any person to be bound in a stated amount upon the failure of the condition of the instrument as well as a deposit given in legal tender or in acceptable investment certificates, to be forfeited upon failure of the condition. Strictly defined, a bond is a three party instrument (principal, surety, obligee) given primarily to insure the faithful and efficient performance of duties, while an undertaking is a two party instrument (surety and obligee only) given primarily to insure financial responsibility at some future date. See 11 C.J.S. *Bonds* §4 (1955). New York law, however, does not follow this distinction. Most security provisions in article 17 of the civil practice act and title 4 of the rules of civil practice use the expression "bond or undertaking" when referring to a security device, and nowhere is it indicated that a difference between the two exists. Rule 25, in fact, states in subparagraph 1 that the principal need not join with the sureties in the execution of a bond or undertaking. Section 14 of the New York General Construction Law provides that "[a] provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect." The fact that the instrument is in the form of an undertaking instead of a bond is not significant. *Burns* v. *Watertown*, 126 Misc. 140, 213 N.Y. Supp. 90 (Sup. Ct. 1925). This is the rule even where the statute expressly requires a bond. *Tully* v. *Lewitz*, 50 Misc. 350, 98 N.Y. Supp. 829 (Sup. Ct. App. T. 1906).

Present section 150 has been omitted as unnecessary since its substance is covered by proposed rule 32.1(f), relating to defects in form of papers.

Article 81 of the civil practice act, relating to proceedings for the appointment of a committee of an incompetent, including those incompetent by reason of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age, loss of memory and understanding, has not yet been revised. Section 1375, providing in detail for security to be given by the committee of such incompetent, will be considered in the course of revision. The provisions

for additional security found in section 1375(3) and proposed rule 123.8 adequately provide for the situation where security is required to protect the interests of the infant, lunatic, idiot, or habitual drunkard *in the course of judicial proceedings* as provided by the first sentence of present section 154.

Section 155 of the civil practice act, relating to security for costs in an action brought by the people for the benefit of a person having an interest in the question, is covered by proposed rule 110.2 in the general provisions for actions by the state. See also section 1495 of the civil practice act, providing for recovery of costs in an action brought by the people on relation of a private person.

The last sentence of proposed rule 80.8 and the first and last sentences of proposed rule 80.9(c) are rendered unnecessary by proposed rules 123.1 on definition of undertakings, 123.2(b) on two or more undertakings, and 123.5 on filing of undertakings generally, and these sentences should be omitted from subsequent drafts. The notes to proposed rule 80.9(c) should be deleted and the following substituted: "This subdivision is taken from present section 599. See 11 N.Y. Jud. Council Rep. 289–290 (1945)." See N.Y. Temp. Comm'n on the Courts Rep. II 330, 337, Leg. Doc. 13 (1958).

The substance of the second sentence of present section 161 should be transferred to title 80 of the proposed rules, by adding to proposed rule 80.9(d) the sentence:

> Where an appeal is taken from such an order, the stay shall continue until the final determination of that appeal.

The notes to 80.9(d) should be changed to indicate that they refer to the first sentence of the subdivision and the following notes should be added:

"The second sentence of this subdivision is derived from the last sentence of section 161, which precludes an action on an undertaking on an appeal to an intermediate court, while another undertaking is in effect to cover a subsequent appeal to the Court of Appeals. The provision has been generalized to cover subsequent appeals to the Appellate Division from an appellate term or to the United States Supreme Court from the Court of Appeals. Since enforcement of the judgment is stayed by the second undertaking, and a suit on the first undertaking is also stayed under the present provision, both parties are protected. The proposed subdivision accomplishes the objective more directly, however, by providing that the same undertaking will stay enforcement during both appeals. It thus avoids the problem which arises under present law where different sureties are used, each of whom demands collateral.

"The first sentence of section 161 of the civil practice act provides a ten-day waiting period after service of notice of entry of the judgment or order of affirmance before an action may be brought upon a first appeal undertaking. It apparently is intended to provide time for the judgment to be satisfied, before an action is brought against the surety. The provision has been omitted from this draft, subject to reconsideration with other present sections

relating to actions against sureties. *Cf.* proposed rule 23.11. In any case, the second sentence of present section 161 is covered by the provisions of proposed title 32 on form, filing, and service of papers, and is therefore unnecessary."

TABLE OF RULES IN TITLE 123

RULES—TITLE 123. UNDERTAKINGS GENERALLY

123.1. Undertaking; definition.

Undertaking includes

1. any obligation, whether or not the principal is a party thereto, which contains a covenant by a surety to pay the

required amount, as specified therein, if the required condition, as specified therein, is not fulfilled; and

2. any deposit, made subject to the required condition, of the required amount in legal tender of the United States or in face value of unregistered bonds of the United States.

Notes

This provision embodies the substance of section 157, the first two sentences of section 564 and the first sentence of section 891 of the civil practice act, and rule 25(1) of the rules of civil practice. The alternative of giving a cash deposit rather than a bond or undertaking is made generally applicable. *Cf.* N.Y. Civ. Prac. Act §891. The words "required amount" and "required condition" refer to the requirements of the statute, rule or order which direct the giving of security.

123.2. Surety; form of affidavit; two or more undertakings; condition; acknowledgment.

(a) Surety; form of affidavit. Unless the court orders otherwise, surety shall be

1. an insurance company authorized to execute the undertaking within the state, or

2. a natural person, except an attorney, who shall execute with the undertaking his affidavit setting forth his full name and address and that he is domiciled within the state and worth at least the amount specified in the undertaking exclusive of liabilities and of property exempt from application to the satisfaction of a judgment.

Notes

This provision replaces the first clause of sections 156 and 698, the second sentence of section 565, the second paragraph of section 1264, and section 853 of the civil practice act and subdivisions 2 and 4 of rule 25, and rule 27 of the rules of civil practice.

The proposed rule permitting one surety embodies the substance of subdivision 2 of rule 25 of the rules of civil practice. Where more than one surety is required by a specific rule or statute or where the court requires more than one surety, such specific requirement would govern. Much of the risk attributed to the use of individual sureties has been eliminated by other provisions of the proposed rules. See proposed rule 123.3, covering undertakings larger than one thousand dollars.

The requirement in rule 25(4) that the surety be worth twice the sum specified in the undertaking has been omitted. The surety's liability lies only in contract and not in tort, and he may be held only for the sum specified in his undertaking. *Matter of Ayvazian's Estate,* 157 Misc. 306, 308, 283 N.Y. Supp. 555, 558 (Surr. Ct. 1935). No case has been found where twice the amount of actual damages has been awarded to one secured by an undertaking. "Though the bond or obligation is generally in double the sum which is owing, . . . yet the courts of Equity will not permit a man to take more than in conscience he ought; namely, his principal, interest, and expenses." Clark, Alphabetical Epitome of the Common Law of England 56 (1778). The provision for additional security in the event that the surety later becomes insufficient is sufficient protection against a shrinkage in the surety's assets. See proposed rule 123.8.

Section 152 of the civil practice act, which provides for justification of several sureties in a smaller sum in the court's discretion where "the penalty of the bond, or twice the sum specified in the undertaking, is five thousand dollars" or more, has been omitted as unnecessary. Under the proposed rules, all undertakings in an amount of more than one thousand dollars on which individuals are surety must be secured by a lien on real property. See proposed rule 123.3(a). The use of the plural "persons" in proposed rule 123.3(a) indicates that more than one surety may be offered; more than one tract of real property may also be offered so long as the total amount is equal to the amount specified in the undertaking. *Cf.* proposed rule 123.12. The court has discretion under subdivision (a) of proposed rule 123.2 to require or permit more than one surety. Thus, the problem at which section 152 of the civil practice act was directed—hardship in a case where one individual surety might be required to justify in an amount so high as to be oppressive—is obviated. The problem does not arise with respect to surety companies. Elimination of section 152 is warranted on the further ground that the provision for justification in twice the sum specified in the undertaking, probably the prime cause of the hardship which section 152 was intended to alleviate, is omitted from the proposed rules.

The provision of present rule 25(4) that the surety be a householder or freeholder within the state is replaced by a requirement that domicile be the only connection with the state which a surety need demonstrate. This requirement when read with proposed rule 25.3 (personal service on domiciliaries outside the state)

furnishes sufficient guaranty of ability to obtain service upon sureties if an action against them becomes necessary. The term domicile rather than residence is used because the courts have adopted no settled definition of the word "resident"; its meaning "may depend upon the nature of the subject-matter of the statute as well as the context in which the words are used." *Rawstorne* v. *McGuire,* 265 N.Y. 204, 208, 192 N.E. 294, 295 (1934).

The fixed requirement in present rule 25(4) that the surety be a householder or freeholder has been eliminated. It would disqualify few who qualify as a domiciliary. A householder for the purpose of bail need not be the head of a family or the owner of real property. It has been held, for example, that he may be an unmarried resident, without immediate relatives, who boards, and who leases the mill in which he operates his business. *Delamater* v. *Byrne,* 59 How. Pr. 71, 72 (N.Y. Sup. Ct. 1879); see also *Somerset & Worcester Savings Bank* v. *Huyck,* 33 How. Pr. 323 (N.Y. Sup. Ct. 1867). If the undertaking is for more than one thousand dollars, the individual surety will always be a freeholder since his real property will be required as security under proposed rule 123.3.

(b) Two or more undertakings. Where two or more undertakings are authorized or required to be given, they may be contained in the same instrument.

Notes

This subdivision is derived from the first sentence of section 565 and the last sentence of section 891 of the civil practice act. There is no reason why this rule, heretofore applicable only to appeal and injunction undertakings, should not be applied to undertakings generally.

(c) Condition. Where no condition is specified, the condition shall be that the principal shall faithfully and fairly discharge the duties and fulfill the obligations imposed by law, rules, or court order. Where the condition specifies that the undertaking is to be void upon payment of an amount or performance of an act, the undertaking shall be deemed to contain a convenant to pay the amount or to perform the act specified.

Notes

This subdivision replaces the first sentences of section 148 and 160 of the civil practice act, with no change in substance.

(d) Acknowledgement. The undertaking shall be acknowledged in the form required to entitle a deed to be recorded.

Notes

This subdivision replaces rule 25(5) of the rules of civil practice, with no change.

123.3. Undertaking of more than one thousand dollars; real property; lien.

(a) Creation of lien. Unless the court orders otherwise, an undertaking in an amount of more than one thousand dollars upon which natural persons are surety shall be secured by real property located in the state which shall be worth the amount specified in the undertaking exclusive of all encumbrances. Such undertaking shall create a lien on the real property when recorded in the individual surety bond liens docket in the office of the clerk or register of the county where the real property is located.

(b) Affidavit of surety. The affidavit of the surety shall contain, in addition to the information required by subdivision (a) of rule 123.2,

1. a statement that the surety or sureties is or are the sole owner or owners of the real property offered as security;

2. a description of the property, sufficiently identified to establish the lien of the undertaking;

3. a statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and

4. a statement of the assessed value of each property offered, its market value, and the value of the equity over and above all encumbrances, liens and unpaid taxes.

(c) Filing of affidavit; recording. A duplicate original of the affidavit required by this rule shall be filed in the office of the clerk or register of the county where the real property is located. The following information shall be entered on the individual surety bond liens docket in the office of the clerk or register of the county where the real property is located:

1. The names of the sureties listed in alphabetical order.

2. The amount of the undertaking.

3. A description of the real property or properties offered as security thereunder, sufficiently identified to clearly establish the lien of the undertaking.

4. The date of such recording.

5. The title of the action, proceeding or estate.

6. The court in which the papers are filed.

(d) Release of lien. The clerk or register of the county where the property is located shall make an entry, which shall constitute a release of the lien for all purposes and as to all persons, upon

1. the filing of a consent acknowledged by the person for whose benefit the undertaking was given in the form required to entitle a deed to be recorded; or

2. the order of the court, discharging the surety, made upon motion with such notice to other persons as the court may direct.

Notes

Proposed rule 123.3 is derived from section 150-a of the civil practice act, which was adopted in 1942. Practitioners in the corporate surety area testify to the salutary effect of this section and attribute the dearth of cases to its effectiveness.

Sections 111, 113 and 117 of the Model Probate Code, prepared by the Section of Real Property, Probate and Trust Law of the American Bar Association, and published in 1946 in Simes and Basye, *Problems in Probate Law,* embody the substance of present section 150-a. In the comment following section 113, it is stated:

> The effect of this section . . . is to require each personal surety, on bonds fixed in an amount in excess of $1,000, to give a lien on one or more tracts of his own real estate within the state as security for the performance of the obligation of the bond. The advantages of such a statute are obvious. If the title of the prospective bondsman to real estate is investigated, and if the bond becomes a lien on such real estate when it is approved by the court, the danger of loss from financial irresponsibility of the bondsman is largely eliminated. Certainly in large metropolitan areas where "straw" bondsmen are common, strong arguments can be made for the adoption of such legislation. On the other hand, the probable result of such a statute is that corporate bondsmen would be secured in most cases, and the personal bondsman who acts as such without charging a fee would be relatively uncommon.

The efficacy of present section 150-a is attributed not to its language, but rather to the interpretation of those who daily rely on it. Although permissive in language, it is interpreted as requiring that, in all cases where individuals are surety on undertakings in an amount greater than one thousand dollars, real property *must* be offered as security. Proposed rule 123.3 expressly adopts this interpretation of section 150-a. It should be noted that cash may be put up as security under proposed rule 123.1(2), and that the court may by order permit individual sureties to do so, since subdivision (a) of the proposed rule begins "Unless the court orders otherwise."

For the purposes of security, a real property lien provides unmistakeable advantages to an obligee on an undertaking. When the

lien is perfected, the most effective notice possible is given to all the world that a charge against the property exists. In addition, any valid pre-existing claims to the real property are matters of public record, real property generally changes in value relatively slowly, and it is available when it is needed.

Provisions in the first sentences of subdivisions 2 and 3 of section 150-a dealing with approval of undertakings have been omitted since the necessity for approval has generally been eliminated. See proposed rule 123.6(b). Since the terms of the proposed rule are mandatory, and since the obligee may except to the sufficiency of sureties in the event that the provisions of the rule are not strictly complied with to create the lien, judicial approval is unnecessary.

Subdivision (b) of proposed rule 123.3 incorporates the provisions of subdivision 2(c) of present section 150-a, and though the language has been modified, no change in meaning is intended.

The requirement of subdivision 2(f) of present section 150-a that the equity of the real property be equal to twice the penalty of the undertaking is eliminated. This provision is intended to protect the obligee against downward fluctuations in the value of the real property, or to provide for a margin of excess security in case of an increase in the value of property secured by the undertaking. In cases where greater security than the amount originally thought to be sufficient becomes necessary, proposed rule 123.8 may be utilized to secure a new or additional undertaking.

The first clause in the second sentence of subdivision 3 of section 150-a, pertaining to filing, is covered by proposed rule 123.5, relating to filing of undertakings generally.

The substance of present section 150-a(5), relating to fees, should be relocated in the provisions for fees, which are not yet revised.

It should be noted that the recording required under proposed subdivision (a) to secure the lien is separate from the filing of the undertaking required by proposed rule 123.5.

123.4. Waiver of undertaking; removal and change of parties.

(a) Waiver of undertaking. Unless the court orders otherwise, an undertaking may be waived by the written consent of all parties.

Notes

This subdivision contains the substance of section 569 of the civil practice act, covering appeals. It makes the waiver provisions applicable generally to all undertakings. The opening clause permits the court to deny a party power to waive where infants or others require special protection.

(b) Removal and change of parties. The liability on an undertaking shall remain in effect in favor of the party for whose benefit it was given, notwithstanding a removal of the action or a change of parties.

Notes

This subdivision is derived from section 95 and the second sentence of section 148 of the civil practice act. The sole purpose of the second sentence of section 148 is "to preserve unimpaired the liability on a bond or undertaking in favor of the party for whose benefit it was given, regardless of any subsequent changes in the parties to the action." *First Commercial Bank of Pontiac* v. *Valentine*, 155 App. Div. 91, 96, 139 N.Y. Supp. 1037, 1040 (1st Dep't 1913), *aff'd*, 209 N.Y. 145, 102 N.E. 544. Despite a change in parties, liability of the sureties extends only to the original parties to the action. *Hochman* v. *Hauptman*, 76 App. Div. 72, 78 N.Y. Supp. 659 (1st Dep't 1902); *Goldstein* v. *Shapiro*, 85 App. Div. 83, 82 N.Y. Supp. 1038 (2d Dep't 1903). The language of present section 148 has been modified to more clearly express this result.

123.5. Filing of undertaking; service upon adverse party.

An undertaking together with any affidavit required by this title shall be filed with the clerk of the court in which the action is pending, or, upon an appeal, in the office where the judgment or order of the court of original instance is entered, and a copy shall be served upon the adverse party.

Notes

This rule replaces part of the second sentence of subdivision 3 of section 150-a, the last sentence of section 565, section 567, part of the first sentence of section 864, the first sentence and part of the second sentence of section 955, and part of section 1524 of the civil practice act and rule 26 of the rules of civil practice. It describes the usual procedure for filing and giving notice of undertakings implicit throughout the civil practice act.

The provision in present section 567 that upon an appeal to the court of appeals, the undertaking must be filed with the clerk of the court where the original judgment or order was entered is made generally applicable to undertakings on appeal. This will conform with proposed rule 80.9(b), which generally empowers the court of original instance to act in granting, limiting, vacating or modifying a stay where an appeal is taken. The first clause of section 567 is therefore omitted since no distinction in the place of filing on the basis of whether the appeal is taken to the Court of Appeals or to some other court seems warranted.

The provision of the last sentence of section 565, that the notice must show where the undertaking is filed, is omitted since the proposed rule makes it clear where that place is. The provision therein that a copy of the undertaking must be served on the attorney for the adverse party is made unnecessary by the general provision of proposed rule 32.3(b) that papers required to be served upon a party shall be served upon his attorney.

The undertaking will serve its purpose—as, for example, to stay enforcement—when it is served, unless otherwise provided by the order pursuant to which it is given.

Rule 26 of the rules of civil practice is omitted. There is no reason to expressly impose upon the attorney the duty of filing the undertaking. The second sentence of present rule 26 is unnecessary, since the court always has discretion to vacate the proceedings if the undertaking has not been properly filed. To the extent that present rule 26 implies that the discretion of the court upon failure to properly file the undertaking is limited to vacatur, it is misleading. The court should have discretion to take any necessary action, which may include permitting the party in default to cure an improper filing where no one has been prejudiced.

In addition to the filing required by this rule, undertakings where real property is offered as security should be filed in the office of the clerk or register of the county where the real property is located. See proposed rule 123.3(c). Where security is required to protect a sheriff, the particular provisions providing for such security will require that a copy be served on the sheriff. *Cf.* proposed rule 123.6(a).

123.6. Exception to surety; allowance where no exception taken.

(a) Exception to surety. A party may except to the sufficiency of a surety by written notice of exception served upon the adverse party within ten days after receipt of a copy of the undertaking. Where the undertaking has been served upon a party by the sheriff, the notice of exception shall be served on the sheriff and on the adverse party or his surety. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs.

Notes

This subdivision, permitting an exception to sureties to be taken by serving a notice of exception, is derived from the first and last sentences of section 151, part of the second sentence of section 955, part of the first sentence of section 1104, and the first sentence of section 1526 of the civil practice act.

Should a party wish to move directly to set aside an undertaking or except to sureties he may move under proposed rule 123.8. If there is a danger that action seriously to his detriment will be taken on the basis of the undertaking before a motion can be heard, he may bring on his motion by an order to show cause containing a stay of the relief which the undertaking was intended to secure.

The provisions in sections 955 and 1104 for a three-day period in which to except to sureties on attachment and replevin undertakings is increased to ten days for uniformity and because ten days may often be necessary to acquire facts sufficient to make proper exceptions. If time is of the essence to the person against whom the attachment or replevy is directed, he may except in as little as one day, but he should have more time if he so desires. Section 955, dealing with exceptions in attachment, requires service only on the sheriff. The adverse party or his surety should also have notice.

(b) Allowance where no exception taken. Where no exception to sureties is taken within ten days or where exceptions taken are set aside, the undertaking is allowed.

Notes

This subdivision makes generally applicable the rule for appeals stated in section 566 of the civil practice act, permitting exceptions to sureties but providing that approval is not required. The subdivision also encompasses the last sentence of section 955 and the first sentence of section 1104, providing for waiver of objections if none are made. It also covers that part of section 1527 of the civil practice act deeming the sureties allowed where there is no objection. It makes unnecessary the judicial approval of an undertaking now required by rule 25(6) of civil practice. If the obligee is satisfied that the undertaking sufficiently secures his interests, there is normally no reason for the court to object. The court may, if it wishes to guard an infant's or an incompetent's estate, condition its order on approval of sureties. See proposed rule 91.2(c); *cf.* also proposed rules 123.2(a), 123.4(a). Similarly, a specific provision for court approval would govern. See, *e.g.*, proposed rule 71.5.

123.7. Justification of surety.

(a) Motion to justify. Within ten days after service of notice of exception, the surety excepted to or the person upon

whose behalf the undertaking was given shall move to justify, upon notice to the adverse party and to the sheriff if he was served with the undertaking. The surety shall be present upon the hearing of such motion to be examined under oath. A certificate of qualification issued pursuant to subdivision two of section three hundred twenty-seven of the insurance law shall be accepted in lieu of a justification.

Notes

This subdivision is derived from section 852, part of the first sentence of section 156, the first sentence of section 854, all but the last sentence of section 1106, the second sentence of section 1526, the third sentence of section 955, the fifth sentence of section 1104, and the second, third and sixth sentences of section 151 of the civil practice act. The special venue provisions found in sections 852, 1106, and 1526 of the civil practice act, pertaining to undertakings on arrest in replevin and for security for costs, are superseded by proposed rules 33.3 and 33.4.

The provision for a reference in present section 151 is replaced by proposed rule 43.2, prescribing when a reference to determine may be used. The provision of present section 151 that the court may direct either party to pay the expenses of the reference is covered by proposed rule 43.4, relating to fees and expenses of referees.

The third sentence of the proposed subdivision replaces that part of the first sentence of present section 156 which provides for justification by fidelity and surety companies. Since a certificate of qualification issued under section 327(2) of the Insurance Law is evidence of the company's sound financial position, no reason to require further proof of stability exists. The last sentence of present section 156 is omitted since its provisions are adequately covered by section 327(1) of the Insurance Law.

The provision of present section 852 that the place of residence and occupation of each of the sureties be specified in the notice of justification is not made applicable to undertakings generally. The surety's place of residence is noted on the affidavit to accompany the undertaking. See proposed rule 123.2(a). Inquiry into such facts as the surety's occupation may be made at the time of justification.

(b) Failure to justify. If a motion to justify is not made within ten days after the notice of exception is served, the

undertaking shall then be without effect, except as provided in this subdivision. Unless otherwise provided by order of court, a surety on an undertaking excepted to and not justified shall remain liable until a new undertaking is given and allowed, but the original undertaking shall be otherwise without effect.

Notes

This subdivision is derived in part from section 863 of the civil practice act and replaces the seventh sentence of present section 151. Section 160 of the New York city Municipal Court Code provides in part that "[i]f the sureties fail or refuse to justify after service of the notice of exception, the respondent may proceed as if no undertaking had been executed." This is interpreted to mean that the failure of the sureties to justify has no effect on the undertaking itself, but it does vacate the stay which the undertaking creates, and permits the adverse party to proceed. The undertaking is left in full force and effect—only the stay is vacated. Thus, sureties may not use their own failure to justify as a defense to liability on the undertaking, where the exception is not withdrawn. *Fried* v. *Rivkin*, 96 Misc. 697, 161 N.Y. Supp. 94 (Sup. Ct. 1916).

It has been objected that "'[t]he respondent cannot have the dual right to enforce the judgment pending the appeal as if no undertaking had been given, and at the same time, treat it as valid security for the payment of the judgment.' . . . [But] from an equitable standpoint, the execution and filing of the undertaking procures some stay. Before an execution can issue, the stay created by the filing of the undertaking must be annulled by a notice of exception and the failure of the sureties to justify. This may be but a few days, but it may be of real importance to the judgment creditor and may also enable the judgment debtor to avoid payment. This is sufficient . . . consideration for the undertaking and makes it entirely equitable to enforce the undertaking against the sureties." *Id.* 96 Misc. at 702–03, 161 N.Y. Supp. at 96–97. Since the principal may never give a new undertaking, it might be unjust to hold the sureties liable indefinitely upon the original undertaking. The proposed rule permits the court to release the sureties from liability on the original undertaking when justice and fairness dictate the necessity of such action.

123.8. Motion for new or additional undertaking.

Upon motion of any interested person, upon notice to the parties and surety, and to the sheriff, where he was required to

be served with the undertaking, the court may order a new or additional undertaking, a justification or rejustification of sureties, or new or additional sureties. Unless otherwise provided by order of court, a surety on the original undertaking shall remain liable until such order is complied with, but the original undertaking shall be otherwise without effect.

Notes

This rule replaces section 149, section 1528, the last sentence of the first paragraph of section 124(2), the first three sentences of section 900, part of section 948, part of the last sentence of section 907, part of subdivision 3 of section 1375, and the first sentence of the second paragraph of section 1394 of the civil practice act.

Venue for the motion is provided in proposed rules 33.3 and 33.4. On appeals, the motion may be made in the court from or to which the appeal is taken. See proposed rule 80.9(b); *cf.* N.Y. Civ. Prac. Act §149. Where an undertaking was not given in the course of a judicial proceeding, the court which had power to order it in the first instance will have power to modify or require proof, through justification, that its order is being complied with. *Cf.* N.Y. Civ. Prac. Act §149.

Section 1528, setting forth specific examples of insufficiency of an undertaking or sureties is included in the more general language of the proposed rule. The court may grant one or more forms of the relief provided for in this rule.

123.9. Control of assets by agreement with surety.

Any person of whom an undertaking is required may agree with his surety for the deposit of any assets for which his surety may be held responsible with a bank, or safe deposit or trust company, authorized to do business in the state, if such deposit is otherwise proper and in such manner as to prevent withdrawal without the written consent of the surety or an order of court, made on notice to the surety. The agreement shall not affect the liability of the principal or surety as established by the terms of the undertaking.

Notes

This rule is derived from section 153 of the civil practice act. Minor language changes have been made to conform with the proposed rules. The proposal is in accord with various drafts of a model statute on joint control of property. See Model Joint Control Statute proposed by a subcommittee of the Committee on Fidelity and Surety Insurance Law of the Insurance Section of the American Bar Association (September 15, 1957); Model Probate Code §108 (prepared by the Real Property, Probate and Trust Law Section of the American Bar Association); *cf.* Kissam, *Joint Control by Sureties* 28 (read at the Annual Convention of the American Bar Association in Kansas City, Missouri, September 28, 1937). The model statute or substantially similar adaptations has been adopted in 32 states.

The purpose of this rule is to abrogate a common law rule, and to insure that joint control or countersigner agreements between principal and surety to conserve the assets of the fiduciary estate will not be branded as contrary to public policy. The major purposes of joint control are (1) to minimize the opportunity for mismanagement and embezzlement; (2) to compel the fiduciary to deposit the trust estate, properly identified, in a qualified depository; (3) to have for accounting purposes an accurate record kept by the surety of receipts, deposits, sales, withdrawals and substitutions of funds and assets of the estate; and (4) to avoid the necessity for the fiduciary to deposit collateral security with the surety or to procure an indemnity agreement of responsible persons other than the surety. A major effect of present section 153 has been to aid in the proper administration of trust funds.

123.10. Discharge of surety on the undertaking of a fiduciary.

(a) Motion; new undertaking; accounting. Surety on the undertaking of any fiduciary may move with notice to the person upon whose behalf the undertaking was given, to be discharged from liability for any act or omission of such fiduciary subsequent to the order of the court or the time when a new undertaking satisfactory to the court is filed. The court may restrain such fiduciary from acting pending the order discharging such surety from liability. Upon the hearing, the court shall order the fiduciary ***to give*** *a new undertaking and*

to account, within such time as the court orders but not exceeding twenty days, for all his acts. If a new undertaking is filed the fiduciary shall account for his acts up to and including the date of such filing. Where the fiduciary does not comply with the order to account, the surety may make and file such account with the same effect as though filed by the fiduciary, and may utilize any disclosure device in obtaining information necessary for such an accounting. The court shall make such provisions with respect to commissions, allowances, disbursements and costs as it deems just.

Notes

This provision is derived from subdivisions 1, 2, 3 and 4 of section 158 of the civil practice act. The provision limiting discharge as of right to sureties on fiduciary undertakings has been retained, since to allow sureties on appeal, injunction, attachment, replevin, and other undertakings given as part of judicial proceedings to be discharged by the court as of right would defeat the object of these undertakings. The term "fiduciary" as used here is intended to denote all those persons intended to be covered by the first sentence of present section 158(1), excluding all undertakings used to secure a stay or any other judicial remedy.

The general motion procedure prescribed by proposed title 33 applies. Notice of motion is served as provided by rule 32.3. Under subdivision (b) of that rule the court may direct service in ways other than those specified, so that present law is unchanged.

The court is not limited in its power to order the undertaking filed within the five day period found in present section 158(3) and thus may react more flexibly to particular situations. Since the sureties on the original undertaking are not discharged from liability until a new undertaking is given or until the estate is protected in some other manner by the court, no undue harm to the estate would result where the court gives the principal an extension of time in which to file his new undertaking.

Where it becomes necessary for the surety to make and file the account the proposed rule provides disclosure devices to aid in the discovery of the facts. Subdivision 4 of section 158 has been criticized for not doing so, in 2 Bender, New York Practice 290 (Warren ed. 1954):

> This provision of the statute is one that looks good on paper and frequently is of very little value in actual practice. Ordinarily, the surety has not the faintest idea what the actual proceedings of the principal have been. This is particularly true if the principal has disappeared and there is no way of compelling him to furnish the facts with regard to his acts.

Section 158 closely parallels section 109 of the Surrogate's Court Act, providing for release of surety, and it has been held that the sections are identical in meaning. *In re Schacne's Estate,* 172 Misc. 443, 15 N.Y.S. 2d 501 (Surr. Ct. 1939). Such a provision is necessary in the rules of civil practice to govern those fiduciaries not falling within the jurisdiction of the Surrogate's Court.

The provision of present law permitting the surety to be discharged as of right has been held to preclude the court from requiring the surety to bear the costs and expenses of the discharge proceedings. *Matter of Middlebrook,* 280 N.Y. 380, 21 N.E.2d 360 (1939). The Court of Appeals has indicated doubt about the wisdom of this rule, but has felt itself bound by the precise language of the statute. *Id.* at 384, 21 N.E.2d at 362; see also *In re Calcagnini's Estate,* 178 Misc. 215, 33 N.Y.S.2d 599 (Surr. Ct. 1942). If the surety has an absolute and unconditional right to the relief provided by this rule, an estate might be compelled unjustly to pay for several accountings a year. It would seem that where all the necessary steps have been unreasonably forced by the surety's application for a discharge, the surety should pay the expenses thus incurred in its behalf. Recognizing, however, that the equitable solution to this problem usually lies in the facts of the individual case, the last sentence of subdivision (a) of the proposed rule provides that the burden of costs and expenses shall fall where the court deems just.

(b) Settlement of account. When such account has been filed, the court, upon sufficient notice, shall order all persons interested in the proceedings to attend a settlement of the account at a time and place specified, and such settlement shall be made and the rights and liabilities of all parties to the proceeding shall be determined and enforced. After settlement of the account, the court shall make an order relieving the surety from any act or omission of the fiduciary subsequent to the date of such order or the time when a new undertaking satisfactory to the court was filed, whichever is earlier. Upon written demand

by the fiduciary, the surety shall return any compensation paid for the unexpired portion of such suretyship.

Notes

This subdivision is derived from subdivision 5 of section 158 of the civil practice act. The proposed rule omits as unnecessary the requirement that the accounting be in "like manner and to the same extent as in actions for an accounting in the supreme court."

123.11. Liability of surety.

Where two or more persons are surety on an undertaking, they shall be jointly and severally liable. The amount recoverable from a surety shall not exceed the amount specified in the undertaking except that interest in addition to this amount shall be awarded from the time of default by the surety.

Notes

This provision replaces the second sentence of section 160 of the civil practice act and rule 25(3) of the rules of civil practice. The first sentence of the proposed rule incorporates present rule 25(3) as an implied condition of the undertaking, and not as a description of what the undertaking should contain, thus insuring that the sureties will be jointly and severally liable whether or not such a provision is included in the undertaking.

Present section 160 provides that damages recoverable from the surety for the breach of his contract cannot exceed the penal amount stated except where the condition is for the payment of money, when interest can be added; interest is computed from the time "defendant made default in the performance of the condition" rather than from the time the surety refused to pay.

The proposed rule provides that interest should always be recoverable after breach by the surety of his undertaking, whether or not the recovery would then exceed the stated penal amount, and whether or not the condition of the undertaking is for the payment of a sum of money. So far as interest is payable by the terms of the contract, and until default by the surety, recovery may not exceed the penal amount; after breach by the surety, however, recovery is not on the ground of contract, but as damages for breach thereof. *Brainard* v. *Jones,* 18 N.Y. 35 (1858). The time of breach by the surety is the earliest time at which he could have safely paid the obligee, provided he then unjustly withholds payment. *Tuzzeo* v. *American Bonding Co.,* 226 N.Y. 171, 178, 123 N.E. 142, 144 (1919).

123.12. Undertaking by the state, municipal corporation or public officer.

Any provision of statute or rule authorizing or requiring an undertaking to be given by a party shall be construed as excluding the state, a domestic municipal corporation or a public officer in behalf of the state or of such a corporation. Such party shall, however, be liable for damages as provided in such provision of statute or rule in an amount not exceeding an amount which shall be fixed by the court.

Notes

This rule is derived from section 162, 570, 820 and the first sentence of section 571 of the civil practice act. Section 162 exempts the specified plaintiffs from giving an undertaking required by statute or rule, while section 820 provides that such plaintiff shall be liable for damages sustained by the opposing party by reason of an order of arrest or injunction or a warrant of attachment to the same extent as sureties to an undertaking would have been if an undertaking had been given. It has generally been held that section 820 is not self-executing. *City of White Plains* v. *Griffen,* 169 Misc. 706, 708, 8 N.Y.S.2d 32, 34 (Sup. Ct. 1938). Thus, if the amount of the responsibility of the municipal corporation, public officer, or people for damages is not specified in the injunction, attachment, or arrest order, there is no liability in the event that it is later determined that such plaintiff was not entitled to the relief granted. *Ibid.* See also, *City of Utica* v. *Hanna,* 249 N.Y. 26, 162 N.E. 573 (1928). This result has been reached because "[s]ureties would be liable to an extent not greater than the sum specified by the court or judge. They would not be liable generally . . . . If the liability of a municipal corporation is to be a liability of the same extent as that of sureties on an undertaking, the judge who grants the injunction must fix the extent in the one case as in the other . . . . In any case, [the plaintiff] counts the cost, and assumes a liability whose maximum is a determinate amount. . . . A plaintiff [should have] the opportunity, if he thinks the security excessive, to abandon his injunction . . . . [T]he right to resort to the courts shall be kept free from the menace of unknown and unknowable penalties which intimidate the suitor and clog his liberty of action." *City of Yonkers* v. *Federal Sugar Refining Co.,* 221 N.Y. 206, 211, 212, 116 N.E. 998, 999, 1000 (1917) (*per* Cardozo, J.)

The provisions of sections 162 and 820 are consolidated since each provision necessarily qualifies the other. The limitation of the

application of section 820 to orders of arrest, injunction, and warrants of attachment is not retained. Instead, the proposed rule applies to all cases where an undertaking is required by statute or rule to secure the adverse party from damages it might sustain as a result of the granting of the relief requested to the party invoking the statute or rule. This is intended to include, in addition to injunction, attachment and arrest, undertakings under sections 586, 698, 927 and 1105 of the civil practice act, and any provisional relief where the danger that the adverse party may be wrongfully deprived of liberty and property exists.

123.13. Action on undertaking to the state or public officer.

A person for whose benefit an undertaking has been given to the state or a public officer may move, on notice to persons interested in the disposition of the proceeds, for leave to bring an action in his own name for breach of a condition.

Notes

This provision is derived from section 159 of the civil practice act. No change in meaning is intended.

TITLE 150. SECURITY FOR COSTS

INTRODUCTION

In addition to simplifying language and incorporating some of the case law, the proposed title makes a number of substantive changes.

Mandatory security for costs has been restricted to those who are non-residents and to foreign corporations not licensed to do business in the state. This enumeration—carried over from present statutes and case law—gives protection against plaintiffs whose property is likely not to be readily available to satisfy a judgment for costs. Other instances in the civil practice act where costs are mandatory have been made discretionary or abolished. The overwhelming majority of the mandatory provisions in other states require security only from non-residents and foreign corporations and do not include the representatives enumerated in section 1522. See *Security for Costs Provisions in Other States* at pp. 817–824 *infra*. One of the basic assumptions of our system of administering justice is that the effective right to bring suit ought not to be hobbled—the clear result of security for costs provisions—without some strong reason for doing so. The present mandatory provisions and their proposed disposition are discussed in the notes to proposed rule 150.1(a).

Section 1530 of the civil practice act, making an attorney liable for costs up to one hundred dollars in any case "where a defendant is entitled to security for costs" under subdivisions 1 through 4 of present section 1522, is omitted. Despite a suggestion that this provision be abolished, the Judicial Council, in 1944, recommended the retention of this provision for the following reasons: "First, the provision is a salutary one. In many cases, the defendant may be unaware of the fact that the plaintiff is a non-resident, bankrupt, or person imprisoned for a crime, and that, as such, he may be required to furnish security for costs. In such a case it would be palpably unfair to leave such defendant without a remedy for costs which may be awarded to him. In this case, it would be justifiable to impose the liability for costs upon the attorney for such plaintiff who is in a position to know whether such plaintiff is a non-resident, a bankrupt or a person imprisoned for a crime. The attorney may avoid any monetary loss easily. He may . . . procure and file an undertaking on behalf of his client, as if he had been required to do so by the defendant. . . ." 10 N.Y. Jud. Council Rep. 304 (1944).

The committee has concluded that the reasons for retention are outweighed by the disadvantage of making an attorney liable for costs without any fault or misrepresentation on his part. In the first place, the policy underlying section 1530 is inconsistent with that of the other sections in this article. Security for costs is available to the defendant only when he has moved the court to order it to be given. However, under section 1530, the plaintiff's attorney may become liable for costs upon the court's own initiative, even where the defendant has refrained from making a motion after

having information sufficient to make one. Although an attorney will usually know the residence of his client, it may be that that fact will not become known to him until the action is well under way, when he cannot conveniently withdraw. Canons of Professional Ethics, Canon 44. There is also some question in the Committee's mind as to whether the present provision is inconsistent with canon 44 restricting the attorney's freedom to advance the expenses of litigation in view of the fact that there may be no fault on his part and his client, by hypothesis, will not pay the costs. In practice, since laches generally is no bar to the defendant's motion, which may be made at any stage of the action, the defendant has all the protection he is entitled to receive without this provision. See *Snyder* v. *Griswold*, 140 Misc. 82, 250 N.Y. Supp. 26 (Sup. Ct. 1931).

Many state statutes require all non-resident plaintiffs to give security for costs without conditioning this requirement upon a motion by the defendant. See *Security for Costs Provisions in Other States* at pp. 817–824 *infra*. If the non-resident plaintiff has the unconditional duty to give security for costs before being permitted to bring the action, unconditional liability upon the plaintiff's attorney for costs where the plaintiff does not or cannot pay them has a rational basis since, in that case, a clearly defined statutory duty is imposed upon both the plaintiff and his attorney from the moment of the commencement of the suit. New York, however, has traditionally left the prerogative in the hands of the defendant. Since the requirement of security is conditioned upon a motion by the defendant, logically no penalty for a failure to give security should arise until such motion is made. New York's position is clearly out of line with that in other states. Of the eleven states which provide for attorney's liability where the plaintiff has not given the security for costs required by the statute, only Wisconsin and New York provide security for costs on motion by the defendant rather than as a predicate for bringing the suit. The Wisconsin statute follows all the New York security for costs provisions very closely and obviously was copied from it. Of the twenty states which condition the requirement of mandatory security for costs on a motion by the defendant, only New York and Wisconsin provide for attorney's liability. See *Security for Costs Provisions in Other States* at pp. 817–824 *infra*.

Provisions in the Consolidated Laws requiring security for costs have not been amended. See *Security for Costs Provisions in the Consolidated Laws* at pp. 813–15 *infra*.

TABLE OF RULES IN TITLE 150

RULES—TITLE 150. SECURITY FOR COSTS

150.1. Security for costs.

(a) As of right. Except where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made.

Notes

This subdivision is based on subparagraphs A, B and C of section 1522 and the first clause of section 1524 of the civil practice act. The phrase "at any time," currently found in section 1524, is omitted as unnecessary since it is implied from the fact that no limitation is embodied in the proposal.

The proposed subsection provides the exemption for poor persons implicit in sections 198, 198-a, 199 and part of section 196 of the civil practice act. *Cf.* proposed rule 94.2(d).

We have found only one case in which the problem of security for costs as a condition for bringing a habeas corpus proceeding was raised. Untroubled by the mandatory language of the statute, the court denied a motion for security for costs, noting that, "if security for costs may be exacted for the privilage of prosecuting the writ, not only would a restriction on its allowance be imposed without warrant, but its benefit be denied to the friendless and unfortunate—the class most in need of its protecting energies." *People ex rel. James* v. *The Society for the Prevention of Cruelty to Children*, 19 Misc. 677, 678, 44 N.Y. Supp. 1100, 1101 (Sup. Ct. 1897); see also *State* v. *Lyon*, 1 N.J.L. 403, 405 (1789). In cases of habeas corpus for release from imprisonment or to obtain custody of a child, the state is not a disinterested party to an adversary proceeding and no security for costs should be required.

Subdivisions 1 and 2 of present section 1522 have been incorporated in the proposed rule in somewhat modified form. The decisions have not been uniform on the meaning of the terms "residence" and "foreign corporation" used in this section.

A wife "temporarily" in another state with her serviceman husband has been held not to be "residing without the state"

since she lived in New York and intended to return there in *Morrison* v. *Reese,* 186 Misc. 133, 58 N.Y.S.2d 99 (Sup. Ct. 1945); on almost identical facts, the opposite result was reached in *Grindle* v. *Westbury Food Market,* 135 N.Y.S.2d. 21 (Sup. Ct. 1954). The later case relied upon *Morek* v. *Smolak,* 245 App. Div. 355, 356, 282 N.Y. Supp. 418, 419, 420 (4th Dep't 1935) which concluded that "the purpose of the statute is best subserved by holding the words 'residing without the state' to relate to actual dwelling rather than to a technical legal domicile." In the *Morek* case security was refused where the plaintiff, an alien illegally within the country but living with his family in the state, was "assumed" to be ineligible to acquire any domicile within the country. Although the *Morrison* case relies strongly on a "domicile" theory while the *Morek* case disregards domicile and considers only residence, both results seem sound in view of the purpose of this security provision to require security only from that class of plaintiffs which is not likely to be present in the state.

Without statutory warrant, courts have reached the sound result that a foreign corporation licensed to do business in New York under the laws of this state becomes a domestic corporation for the purposes of section 1522 and is not required to give security for costs. *Standard Marine Ins. Co.* v. *Verity,* 243 App. Div. 639, 640, 276 N.Y. Supp. 801, 802 (2d Dep't 1935) (insurance corporation); *Household Finance Corp.* v. *Worden,* 206 Misc. 614, 615, 134 N.Y.S.2d 608, 609 (Sup. Ct. 1954) (banking corporation). *Contra, Colgate Palmolive Peet Co.* v. *Planet Service Corp.,* 173 Misc. 494, 15 N.Y.S.2d 558 (Sup. Ct. 1939) (general corporation). This result has been explicitly incorporated in the proposed rule.

The requirement that persons imprisoned under execution for a crime and their assignees must give security for costs, found in subdivisions 3 and 4 of present section 1522, has been omitted. A prisoner in a state prison for a term less than for life may not bring an action in the courts. N.Y. Penal Law §510; *Glena* v. *State of New York,* 207 Misc. 776, 138 N.Y.S.2d 857 (Ct. Cl. 1955.) The provision in present law is, therefore, meaningful only as applied to prisoners in federal prisons, county jails and penitentiaries. *Cf. Bowles* v. *Habermann,* 95 N.Y. 246, 251 (1884); *In re O'Connor,* 173 Misc. 419, 17 N.Y.S.2d 758 (Sup. Ct. 1940). However, a prisoner is not immune from process and suit by virtue of his imprisonment when he is a cost debtor. *Cf.* N.Y. Civ. Prac. Act §165; *Bowles* v. *Habermann, supra* at 248; *Matter of Weber,* 165 Misc. 815, 816, 1 N.Y.S.2d 809, 810 (Surr. Ct. 1938). Since the purpose of requiring security for costs is to obviate the danger of the property being placed beyond reach of a court's process by a plaintiff, who has been ordered to pay the costs of litigation, there seems to be no reason why an imprisoned person should be required, solely on the ground of his imprisonment, to give security for costs.

The provision of subdivision 4 of section 1522 requiring the assignee or trustee for the benefit of creditors of a debtor or a debtor in possession or a receiver or trustee in bankruptcy to give

security for costs has been made discretionary and is covered in proposed rule 150.1(b). The qualification that security may be required only when the cause of action arose before the appointment of the trustee or assignee has been omitted. The justification for requiring such persons to give security for costs in all cases does not lie in the fact that they take their title from a person judicially declared to be insolvent, or that matured causes of action transferred to them are indelibly stained by the insolvency of the transferor. Regardless of the past history of the ownership of the cause of action, actions brought by the trustee or assignee do not involve the debtor, except possibly as a witness, and all recovery accrues to the estate for the benefit of creditors, and not to the debtor. The trustee or assignee is a fiduciary who, subject to the authority of the court, takes title to all property, real and personal, of the debtor. N.Y. Debt. & Cred. Law, §§3, 14, 15. Nor can the present provision be justified on the ground that the circumstances of their appointment demonstrate that there is little property from which costs may later be collected, because this reason would apply to both causes of action arising before and those arising after the assignment. In this connection it is significant that an application to require the plaintiff to give security for costs under section 1523 will be denied if a plaintiff seems to have a good cause of action which he is urging in good faith, on behalf of an estate with little or no assets. *McNeil* v. *Merriam,* 57 App. Div. 164, 68 N.Y. Supp. 165 (2d Dep't 1901); *Davidson* v. *Bose,* 57 App. Div. 212, 68 N.Y. Supp. 316 (2d Dep't 1901); see also 23 Carmody-Wait, Cyclopedia of New York Practice 326–27 (1956). It may be argued that a successful defendant in an action brought in one court may be forced to proceed in another court where the insolvency proceeding is pending to collect from the estate costs already awarded to him and that for reasons of convenience and ease of collection it should be required that the trustee or assignee give security for costs. The court can consider this argument in exercising discretion under proposed rule 150.1(b).

Subdivision 5 of present section 1522 providing for a case where the plaintiff becomes a non-resident after commencement of the action, is omitted as unnecessary. The motion must, under the proposed rule, be granted if the plaintiff is in an enumerated class when it is made.

Also omitted is subdivision 6 of present section 1522 providing for mandatory security from one adjudicated a bankrupt, or discharged from his debts or exonerated or discharged from imprisonment *after* the action is commenced. The present law recognizes that it would be unjust to penalize a plaintiff, by means of this statute, for past insolvency, and to deny him the fresh start offered by the Bankruptcy Act. The same reasoning applies to cases where he was discharged after suit was commenced. In addition, it is not the policy of this rule that a plaintiff's access to the courts should be restricted merely because he has little or no assets.

The portion of subdivision 6 dealing with discharge from imprisonment is particularly harsh and unreasonable. It was included in the statute as early as 1836, 2 N.Y. Rev. Stat. 620 (1836). The

defendant could require security for costs to be given in actions commenced "for or in the name of any person being insolvent, who shall have been discharged from his debts, or whose person shall have been exonerated from prison, pursuant to any law, for the collection of any debt contracted before the assignment of his estate. . . ." The Stillwell Act (N.Y. Laws 1831, c. 300) provided generally that the non-fraudulent debtor should be exonerated from imprisonment if he demonstrated his good faith by making a general assignment to an assignee appointed by the court for the benefit of creditors. In such a case, the statute also provided for a discharge of the imprisoned debtor from his debts. These provisions are now found in section 132 of the Debtor & Creditor Law, with the exception that, under section 133, the assignment does not discharge the debtor from his debts, but only from imprisonment. With imprisonment for debt currently all but abolished, the provision operates today only in cases of discharge from imprisonment for contempt or for a crime, where no assignment is required and hence no presumption of insolvency attaches. And, as previously noted, even a presumption of insolvency is not sufficient reason to require security for costs.

The provision in subdivision 7 of present section 1522 that a prisoner sentenced to a state prison for a term less than for life after the commencement of the action may be required to give security for costs is omitted from the proposed rule. Section 510 of the Penal Law exempts from suspension of civil rights prisoners who are on parole or on whom execution of judgment is suspended. The civil practice act never has been amended to reflect these merciful dispensations. Even if the provision of section 1522 were restricted to those actually in prison, it would be nugatory, since section 510 deprives such a prisoner of all his civil rights, including the right to sue. *Glena* v. *State of New York, supra.* Where a plaintiff is so sentenced after commencement of his action, however, the courts will not usually dismiss the action but instead will order the appointment of a committee or a trustee under section 320 or 350 of the Correction Law to continue the litigation. *Shapiro* v. *Equitable Life Assurance Society of the United States,* 294 N.Y. 743, 61 N.E.2d 745 (1945). The disability to sue imposed by section 510 of the Penal Law is personal to the convict and does not attach to his representative or assignee. *Kugel* v. *Kalik,* 176 Misc. 49, 25 N.Y.S.2d 327 (Sup. Ct.), *aff'd,* 262 App. Div. 823, 28 N.Y.S.2d 734 (1st Dep't 1941). See also N.Y. Correc. Law, §323. Under present law, the trustee or committee of the newly incarcerated convict is not required to give security for costs; it is proposed, however, that the court be given discretion to order security for costs in actions by or against such trustee or committee. See proposed rule 150.1(b) and notes thereto.

(b) In court's discretion. Upon motion by the defendant with notice, or upon its own initiative, the court may order the plaintiff to give security for costs in an action by or against an assignee or trustee for the benefit of creditors, a trustee, receiver or debtor in possession in bankruptcy, an official trustee or committee of a person imprisoned in this state, an executor or administrator, the committee of a person judicially declared to be incompetent, a guardian ad litem, or a receiver.

Notes

This rule is derived from sections 1522 and 1523 of the civil practice act and rules 176 and part of 177 of the rules of civil practice. Section 1523 is silent on the procedure for obtaining the exercise of the court's discretion, but notice of motion has been required. *Wood* v. *Blodgett,* 49 Hun 64, 66, 2 N.Y. Supp. 304 (Sup. Ct. 5th Dep't 1888); *McNeil* v. *Merriam,* 57 App. Div. 164, 165, 68 N.Y. Supp. 165, 166 (2d Dep't 1901). A provision that the motion may be made at any time is omitted, since it is implied from the lack of any explicit restriction. The time at which the motion is made should be one of the factors considered by the court in exercising its discretion under this rule.

Both present section 1523 and proposed rule 150.1(b) are more complex than the statutes of other states permiting security for costs to be given in the court's discretion. Many statutes give the judiciary a broad discretionary power. See *Security for Costs Provisions in Other States* at pp. 817–824 *infra.* In only two states is the discretion of the court to give security for costs limited to actions by representatives. *Ibid.* In no state may discretionary security for costs be ordered in actions *against* as well as *by* the representative.

While the matter is not free from doubt, the Committee has concluded that the estates represented should receive judicial protection from dissipation, vexatious suits, and the possible irresponsibility of their representatives who, since they may have no personal interest in the estate or its assets, may not act as prudently to preserve the estate as if it were their own. Hence, the proposed rule retains the provision that security may be required in actions *against* these representatives. However, this protection is incomplete unless the court may order security to be given upon its own initiative, since the rule is intended to safeguard the interests of persons and estates not parties to the action. The provision, therefore, that the court may make the order on its own initiative is included in the proposed rule, which is broadened to include actions against all, and not merely some of the representatives specified. In deciding whether security is to be required the

court will consider the fact that the representatives enumerated are subject to the authority of a court—although not necessarily the one in which the action is pending—in the performance of their duties.

Those representatives enumerated in section 1522 of the civil practice act who have not been omitted from the proposed rules are included in the discretionary rather than the mandatory security for costs provisions since no distinction in treatment between types of representatives is warranted. See notes to proposed rule 150.1(a).

The courts have not been clear on the meaning, if any, of the language in present section 1523, "a person expressly authorized by statute to sue or be sued." A person permitted by law to sue in the name of another person, to the extent of employing the latter's name, is not in this class. *Montgomery* v. *Odell,* 73 Hun 424, 427, 26 N.Y. Supp. 930, 931 (Gen. T. 4th Dep't 1893), *aff'd,* 142 N.Y. 665, 37 N.E. 570 (1894); *Board of Excise* v. *McGrath,* 27 Hun 425 (Sup. Ct. 1882). Nor does the phrase include a guardian ad litem. *Tropeano* v. *Grimaldi,* 173 App. Div. 534, 536, 159 N.Y. Supp. 1025, 1027 (2d Dep't 1916). In the light of these decisions, this language is omitted from the proposed rule.

An early provision that guardians ad litem could be required to give security for costs was deleted from the Code of Civil Procedure in 1904. N.Y. Laws 1904, c. 524. Section 205 of the civil practice act and proposed rule 91.5 exempt infants and guardians ad litem from liability for costs unless the court otherwise orders. It is difficult to see how such a representative can be distinguished from the representative of a person judicially declared to be incompetent, included in present section 1523. Under proposed rule 91.5 they are treated in the same way. The inclusion of the guardian or committee allows the court in which the action is being brought to act to preserve the estate of the infant or incompetent where protection from an irresponsible representative seems necessary. It will undoubtedly be a discretion seldom utilized.

The inclusion of a receiver in this subdivision is derived from rule 176 and part of rule 177 of the rules of civil practice. Rule 176 permits the court to order the receiver to give security for costs if he does not have sufficient property in his actual possession to secure the costs of the defendant. However, the policy of that rule does not harmonize with that of the traditional policy of section 1523 that an application for security for costs under that section may be denied without abusing discretion even though the representative has no assets except the cause of action in suit, if he seems to have a good cause of action which he is urging in good faith. *McNeil* v. *Merriam,* 57 App. Div. 164, 165, 166, 68 N.Y. Supp. 165, 166, 167 (2d Dep't 1901); *Davidson* v. *Bose,* 57 App. Div. 212, 213, 68 N.Y. Supp. 316, 317 (2d Dep't 1901); see also 23 Carmody-Wait, Cyclopedia of New York Practice 326–27 (1954). Rule 177 requires a receiver in a supplementary proceeding to give security for costs unless he files a written request to bring the action by the creditor on whose behalf he was appointed. It is proposed that all receivers be treated no differently from the representatives enumerated in this rule.

150.2. Stay and dismissal on failure to give security.

Until security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed. If the plaintiff shall not have given security for costs at the expiration of thirty days from the date of the order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor.

Notes

This provision is derived from section 1529 and part of section 1524 of the civil practice act. The proposed rule specifies the time when the stay of the plaintiff's proceedings provided in section 1524 ends and when the dismissal of the complaint should occur. Similar provisions are in force in other states. Cal. Code Civ. Proc. §1030; Fla. Stat. Ann. §58.01 (1943); Idaho Code Ann. §12-116 (1949).

150.3. Undertaking.

Security for costs shall be given by an undertaking in an amount of two hundred and fifty dollars or such greater amount as shall be fixed by the court that the plaintiff shall pay all legal costs awarded to the defendant.

Notes

This rule is derived from section 1525 and part of section 1524 of the civil practice act. Details of giving undertakings in present section 1525 are covered in proposed rule 123.1. Sections 1526 and 1527 are covered by proposed rules 123.6 and 123.7; section 1528 is covered by proposed rule 123.8.

RULE-MAKING POWER

INTRODUCTION

The advisory committee has proceeded on the theory that details of procedure should be governed by judicially-made rules while basic policies and procedures having a direct effect on substantive rights ought to be controlled by statute. In addition to the discussions listed at pp. 891–92 *infra*, see with particular reference to New York, Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 Fordham L. Rev. 338 (1955); Flynn, *Regulating Procedure by Rules of Court*, 26 Cornell L.Q. 653 (1941); IX New York State Constitutional Convention Committee, Problems Relating to Judicial Administration and Organization 733 (1938); 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 170 (1915). Implicit in its drafts has been the committee's assumption that the Legislature, wherever it has heretofore exercised the power, might adopt a statute governing a detail of practice which would supersede any inconsistent rule. See N.Y. Const. art. VI, §20. *But cf. Riglander* v. *Star Co.*, 98 App. Div. 101, 90 N.Y. Supp. 772 (1st Dep't 1904), *aff'd without opinion*, 181 N.Y. 531, 73 N.E. 1131 (1905). At the time the committee's work commenced, it was contemplated that the Temporary Commission on the Courts would recommend the body which would exercise rule-making power. The Commission, however, in its drafts of a new judiciary article of the constitution, simply provided the Legislature with power to delegate rule-making authority to a court or to the Judicial Conference. The proposal of the Commission was to add a replacement for section 20 of article VI, a new section 26 to read as follows:

> The legislature may, on such terms as it shall provide, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the judicial conference, any power heretofore possessed by the legislature to regulate practice and procedure in the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or otherwise. [Sen. Int. 2174, Pr. 2283; Ass. Int. 2710, Pr. 2784 (1958).]

The bill of the Republican legislative leaders adopted the same scheme but differed slightly in language. It would have added, as a replacement for section 20, a new section 28, providing:

> The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the judicial conference, any power possessed by the legislature to regulate practice and procedure in the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules. [Sen. Int. 3705, Pr. 4399 (1958).]

As a practical matter, the only bodies capable of exercising the rule-making power are the Court of Appeals, the Appellate Division and the Judicial Conference. With respect to each of them, two questions should be raised. First, what are the advantages and disadvantages of lodging the rule-making authority in that body? Second, can it exercise the power without a constitutional amendment? The conclusion of the advisory committee is that the Judicial Conference is probably best qualified to exercise the rule-making power. It sets out below the factors considered in arriving at this decision.

THE COURT OF APPEALS

The Court of Appeals has great attraction as the rule-making body: as our highest appellate court, it possesses the most prestige of any court in the state; its judges normally represent all geographic areas; it is small enough to operate well in conference, yet large enough to supply a divergence of interests and views; it meets regularly throughout the year for extended periods under circumstances that give its members ample time to discuss matters thoroughly and return to their localities to hear the views of local lawyers; and, while it has a heavy calendar, it is not overburdened by work. Moreover, the court can be assisted by an advisory committee and by a secretariat which could be integrated with the Judicial Conference staff. Considerations such as these undoubtedly explain why almost every jurisdiction in which rule-making power is widely exercised has granted the power to its highest appellate court.

There are, however, disadvantages in giving the Court of Appeals this function. There is a theoretical objection to vesting power to formulate rules in the same body that enforces some of them. A more practical consideration is that the Court of Appeals, operating in the rarified atmosphere imparted by abstract questions of law, may not be in tune with the problems of trial practice. See Mr. Justice Frankfurter's memorandum explaining his refusal to approve the Federal Rules of Criminal Procedure, 323 U.S. 821 (1944).

Commentators are divided on whether the Court of Appeals may be given power by statute to make rules without amending the Constitution. *Compare* Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 Fordham L. Rev. 338, 351 (1955) (statute not sufficient), *with Memorandum on Proposal to Empower the Court of Appeals to Make Rules of Procedure for the Courts of New York*, 2 The Record 12 (1947) (statute sufficient), *and* Flynn, *Regulating Procedure by Rules of Court*, 26 Cornell L.Q. 653, 664 (1941) (subject to doubt). See also IX New York State Constitutional Convention Committee, Problems Relating to Judicial Administrations and Organizations 733 *et seq.* (1938) (the summary of arguments for and against rule-making power assumes that the power would be exercised by the Appellate Division).

The arguments against a statutory grant to the Court of Appeals may be summarized as follows: A consitutional basis, express or implied, is requisite for a court to exercise a supervisory rule-making function. *Cf.* Williams, *The Source of Authority for Rules of Court Affecting Procedure,* 22 Wash. U.L.Q. 459, 474 (1937). But the Constitution makes no such express grant to the Court of Appeals and the rigid limitations on the court's jurisdiction negates any implied grant. *Cf.* Cohen & Karger, Powers of the New York Court of Appeals 8 (rev. ed. 1952). On the other hand, the Supreme Court has long exercised power to make rules for itself and other trial courts (see *Hanna* v. *Mitchell,* 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dep't 1922), *aff'd without opinion,* 235 N.Y. 534, 139 N.E. 724 (1923)), and two courts cannot have plenary power to control procedure in the same court.

The argument in favor is more conceptual. It is: Assuming that a constitutional basis is necessary, it may be implied from the constitutional scheme as well as from specific language. A hierarchy of courts is such a scheme and the Court of Appeals, by virue of its position, has a "potential" rule-making power which may be implemented by the Legislature. The supervisory control that the Court presently exercises over the state bar (N.Y. Judiciary Law §53) helps support this view for it is exercised without specific constitutional grant. Decisions of other states implying power in the highest appellate court are not helpful in support of this view, since most states either explicitly or implicitly vest judicial power in the highest court. The Court of Appeals, unlike the courts of other states, is expressly "limited" to review of certain questions. N.Y. Const. art. VI, §7. In this state, it is the Supreme Court, a much older tribunal, which has "general jurisdiction in law and equity." *Id.,* §1.

THE APPELLATE DIVISION

Since the Appellate Division's present rule-making authority would have to be expanded only slightly were it to promulgate rules of the scope suggested by the advisory committee, there appears to be little doubt that a constitutional amendment would not be required. See N.Y. Judiciary Law §83. *Compare* Amram & Williams, *Is a New Constitutional Provision on Procedural Desirable in Pennsylvania?,* 30 Pa. B. Ass'n Q. 260 (1959), *with* Levin & Amsterdam, *Legislative Control over Judicial Rule Making: A Problem in Constitutional Revision,* 107 U. Pa. L. Rev. 1 (1958). While the judges of this court would bring prestige and a broad day-to-day experience in trial and appellate problems to their work, there are disadvantages to giving them this power. They have been summarized by Shaw, *supra* at 346–47, as follows:

> It seems obvious that the Appellate Division is not by any means an ideal repository for this power. The twenty-six Justices live and work in widely separated areas of a large state. They seldom, if ever, assemble in one place. They are divided into four completely separate courts and have no unified organization and no responsible single head. The First and Second Departments, which embrace only the New York City metropolitan area have between them fourteen of the Justices, while the Third and Fourth Departments covering the entire upstate areas have only twelve Justices between them, so that theoretically at least the metropolitan viewpoint on procedural problems could always prevail. Perhaps most important of all, these Justices are heavily engaged in appeals on specific points of law and do not have any staff of their own to review the body of procedural provisions as a whole, initiate desirable reforms and do the necessary preliminary research and drafting. The result is that proposed amendments to the Rules must be circulated amongst the four departments and separately considered by each without expert technical assistance. Presiding Justice Foster, of the Appellate Division, Third Department, has recently described this system as:
>
> > ". . . a very cumbersome one. The Appellate Divisions adopt [proposed amendments] separately and you have to circulate them around. . . . I do not think all four Departments have given the thorough study that they should receive. In fact, I know they don't."

There would be the further problem of coordinating rules for appeals to the Appellate Division and the Court of Appeals which should insofar as possible, be integrated. While one state, Connecticut, formerly granted supervisory rule-making power to an intermediate court (Conn. Gen. Stat. §3130d (Supp. 1955)), the statute granting such power has recently been repealed (see Conn. Stat. §55-1 (1958)) and the power has been granted to the highest court in the state. *Id.* §§55-14.

THE JUDICIAL CONFERENCE

The Judicial Conference as the rule-making body has some of the advantages and disadvantages of both the Court of Appeals and Appellate Division. Shaw, a proponent of the Judicial Conference, summarized its advantages:

> [I]t is small in number and therefore functional, geographically representative, and it is representative of the trial courts where most procedural provisions are actually applied, yet has the benefit of the more detached and experienced views, as well as the prestige, of the chiefs of the top appellate courts of the state.
>
> Of prime importance is the fact that the Conference will have its own staff, headed by the State Administrator for the Courts. This staff will have among its tasks that of collecting and evaluating data on the work of the courts, which will be of immense assistance in evolving procedural rules to best suit changing needs. The staff, like the staff of the former Judicial Council, will undoubtedly include experts on procedure and drafting who could assist the Conference in carrying out the rule-making power.

Also of prime importance is the fact that the Conference has a built-in pipeline to the trial bench and the practicing bar in the form of departmental committees and conferences. The departmental committees, headed by the respective Presiding Justices and composed of representatives from the trial bench and bar of each judicial district within the department will annually convene a departmental conference of interested judges, attorneys, legislators and others to consider criticisms and suggestions concerning the conduct of the courts and judicial business, including procedures. Based on this annual conference, and its own studies, each departmental committee will be required to submit an annual report to the State Judicial Conference

> ". . . on the effectiveness of the procedures and practices of the courts within its department and its recommendations and those of the departmental conference within the department with respect to general improvements in the conduct of the business of the courts therein."

The Judicial Conference must meet at least twice a year, so that there will be a periodic forum before which judges and lawyers most concerned with procedure may have their views considered. [Shaw, *supra* at 347–48.]

Arguments against the Conference as a rule-making body are that it does not meet often enough or long enough to become a really effective legislative body; its staff and "pipeline" to the bar can and should be put at the disposal of any rule-making body (*cf.* Pub. L. No. 513, 85th Cong., 2d Sess. (July 11, 1958), 27 U.S.L. Week 3 (July 22, 1958)); and its trial judges represent only the Supreme Court bench, who may not have the interest or objectivity to solve problems of other courts.

Shaw takes the position that the Judicial Conference has basically the same organization as the 1921 Judicial Convention whose adoption of our present rules was approved in *Hanna* v. *Mitchell*, 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dep't 1922), *aff'd without opinion*, 235 N.Y. 534, 139 N.E. 724 (1923), and *General Investment Co.* v. *Interborough Rapid Transit Co.*, 235 N.Y. 133, 139 N.E. 216 (1923). Thus, he argues, the Conference could be granted rule-making power by statute alone—subject to the Court of Appeals' power to ignore rules affecting its own practice. Shaw, *supra* at 350–53. It should be noted, however, that the position of the Chief Judge of the Court of Appeals as chairman of the Conference—its other voting members being the Presiding Justices of each of the four Departments of the Appellate Division and one Supreme Court Trial justice from each of the four departments elected by the Supreme Court trial justices of the respective Departments—and its permanent character with many administrative duties, make it a far different body than the 1921 conference. The 1921 rules were adopted by vote of justices of the Supreme Court elected to adopt the rules by the Appellate Division in each Department and trial justices in each judicial district. N.Y. Laws 1920, c. 902; N.Y. Laws 1921, c. 370. As the court noted in

Hanna v. *Mitchell*, *supra* at 512, 196 N.Y. Supp. at 51, "the rules were to be adopted by the justices of the Supreme Court." The argument that no constitutional amendment is required to vest rule-making power in the Conference is at least as weak as the argument that vesting in the Court of Appeals needs no constitutional authority. It is significant that California, the only state granting rule-making power to such a body, has done so by constitutional provision. Cal. Const. art. 6, §1a(5).

In view of the important political problems involved in vesting rule-making power, the advisory committee had drafted alternative constitutional and statutory provisions granting the power to each of the three possible bodies.

CONSTITUTIONAL PROVISIONS GRANTING RULE-MAKING POWER

New York Constitution, Article VI, Section 20

Alternative A (Gives Legislature power to delegate rule-making power)

The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the judicial conference, power to regulate procedure in the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general procedure as provided by statute or general rules.

Alternative B (Gives rule-making power to Court of Appeals)

The court of appeals may make rules of procedure for all courts of the state except the court for the trial of impeachments. The appellate division in each department may make rules of procedure not inconsistent with the rules of the court of appeals for all courts within the department except the court for the trial of impeachments. All courts of record

may make their own rules of procedure not inconsistent with the rules of the court of appeals or the appellate division within the department. No rule shall be inconsistent with statute and the legislature shall have the same power to regulate the jurisdiction and procedure of all courts that it has heretofore exercised.

Alternative C (Gives rule-making power to Judicial Conference)

The judicial conference may make rules of procedure for all courts of the state except the court for the trial of impeachments. The appellate division in each department may make rules of procedure not inconsistent with the rules of the judicial conference for all courts within the department except the court for the trial of impeachments. All courts of record may make their own rules of procedure not inconsistent with the rules of the judicial conference or the appellate division within the department. No rule shall be inconsistent with statute and the legislature shall have the same power to regulate the jurisdiction and procedure of all courts that it has heretofore exercised.

Notes

Alternative A is the draft submitted to the Legislature by the Rules Committee of the Senate after consultation with the staff of the Temporary Commission on the Courts. Sen. Int. 3705, Pr. 4399 (1958). It was adopted by the Senate but defeated in the Assembly as part of a revision of the court system.

The proposed section would replace present section 20 of article VI of the present Constitution. Omitted from the proposed section as unnecessary is the present clause "The testimony in equity cases shall be taken in like manner as in cases at law. . . ." The phrase "practice and procedure" used in the draft adopted by the Senate has been shortened to "procedure" since it encompasses "practice." Both criminal and civil procedure are included. The phrase "any power possessed by the legislature to regulate procedure" has been shortened to "power to regulate procedure."

The former draft might have prevented the legislature from centralizing rule-making authority in one body. *Cf. Riglander* v. *Star Co.*, 98 App. Div. 101, 90 N.Y. Supp. 772 (1st Dep't 1904), *aff'd without opinion*, 181 N.Y. 531, 73 N.E. 1131 (1905).

Alternative B grants rule-making power to the Court of Appeals. The Court for the Trial of Impeachments is specifically excepted from control by the Court of Appeals since it is not a part of our hierarchy of courts. It is a replacement for present section 20 of article 6. Special mention of the Appellate Division is required to permit control of such matters as calendar practice which might not be treated on a state-wide level. Only courts of record are permitted to make their own rules. This accords with present law. N.Y. Civ. Prac. Act §63(3); N.Y. R. Civ. P. 2. The legislature's power to permit many courts not of record to make local rules would remain unimpaired. See, *e.g.*, N.Y. Laws 1931, c. 415 (Ithaca City Court); N.Y. Laws 1938, c. 194 (Peekskill City Court); N.Y. Laws 1918, c. 495 (Rochester City Court).

Alternative C is drawn exactly parallel to alternative B except that it grants rule-making power to the Judicial Conference.

STATUTORY PROVISIONS GRANTING RULE-MAKING POWER

Alternative A. Court of Appeals

Paragraph 1: Judiciary Law §51 is amended to read:

The court of appeals shall make rules of procedure for all courts except the court for the trial of impeachments. The appellate division in each department may make rules of procedure not inconsistent with the rules of the court of appeals for any court, except the court for the trial of impeachments, or for a district or county within the department. A court of record may make rules of procedure, not inconsistent with the rules of the court of appeals or the appellate division within the department. A rule shall not be inconsistent with the constitution or statutes of the state, and it shall neither abridge nor enlarge the substantive rights of any party.

Paragraph 2: The following sentence is added to Judiciary Law §52:

The court of appeals may devise such further means as it deems proper to insure their effective publication.

Paragraph 3: The following sentence is added to the first paragraph of Judiciary Law §232:

Any person may make suggestions to the conference regarding changes in court procedure.

Paragraph 4: Judiciary Law §233(9) is amended to read:

9. To act as an advisory committee on procedure to the court of appeals and shall carry on a continuous study of the operation and effect of the rules of procedure prescribed by the court of appeals and all other courts. Such changes in and additions to rules as the judicial conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the conference to the appropriate rule-making body for its consideration.

Paragraph 5: Judiciary Law §83 is amended to read:

A majority of the justices of the appellate division in each department, by order of such majority, shall have power to adopt any rule for such department or for a district or county within it, but not for the court for the trial of impeachments, not inconsistent with any statute or rule of procedure adopted by the court of appeals.

Alternative B. Judicial Conference

Paragraph 1: Judiciary Law §233 [New]:

The judicial conference shall make rules of procedure for all courts except the court for the trial of impeachments to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay. The appellate division in each department may make rules of procedure not inconsistent with the rules of the judicial conference for any court, except the court for the trial of impeachments, or for a district or county within the department. A court of record may make rules of procedure not inconsistent with the rules of the court of appeals or the appellate division within the department. A rule shall not be inconsistent with the constitution or statutes of the state and it shall neither abridge nor enlarge the substantive rights of any party.

Paragraph 2: Judiciary Law §234 [New]:

Rules made by the judicial conference shall not become effective until published in the state bulletin pursuant to section eighty-two of the executive law. The conference may devise such further means as it deems proper to insure their effective publication.

Paragraph 3: The following sentence is added to the first paragraph of Judiciary Law §232:

Any person may make suggestions to the conference regarding changes in court procedure.

Paragraph 4: [Not required.]

Paragraph 5: Judiciary Law §83 is amended to read:

A majority of the justices of the appellate division in each department, by order of such majority, shall have power to

adopt any rule for such department or for a district or county within it, but not for the court for the trial of impeachments, not inconsistent with any statute or rule of procedure adopted by the judicial conference.

Judiciary Law §§233–239 become §§235–241 respectively.

Alternative C. Appellate Division

Paragraph 1: Judiciary Law §83 is amended to read:

The appellate division of the supreme court shall make rules of procedure for all courts except the court of appeals and the court for the trial of impeachments. The appellate division in each department may make rules of procedure not inconsistent with the rules of the appellate division for all courts, except the court for the trial of impeachments, or for a district or county within the department. A court of record may make rules of procedure not inconsistent with the rules of the court of appeals or the appellate division within the department. A rule shall not be inconsistent with the constitution or statutes of the state, and it shall neither abridge nor enlarge the substantive rights of any party.

Paragraph 2: Judiciary Law §84 is amended to read:

Rules shall not become effective until published in the state bulletin pursuant to section eighty-two of the executive law. The appellate division and the court of appeals may devise such further means as each deems proper to insure the effective publication of rules it promulgates.

Paragraph 3: The following sentence is added to the first paragraph of Judiciary Law §232:

Any person may make suggestions to the conference regarding changes in court procedure.

Paragraph 4: Judiciary Law §233(9) is amended to read:

9. To act as an advisory committee on procedure to the court of appeals and appellate division and shall carry on a continuous study of the operation and effect of the rules of procedure prescribed by the court of appeals, the appellate division and all other courts. Such changes in and additions to rules as the judicial conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the conference to the appropriate rule-making body for its consideration.

Paragraph 5: [Not required.]

Notes

Paragraph 1 for each alternative vests rule-making power in the particular body but rules are limited to procedural matters. The Court for the Trial of Impeachments is left free of control by the rules under all the proposed alternatives. The Legislature also retains the power to supersede any rule by statute under each.

Paragraph 2 utilizes the present mechanics for the promulgation and publication of rules, but also permits additional publication as required by the rule-making body.

Paragraph 3 incorporates a provision used increasingly in recent enactments. *Cf.* N.Y. Judiciary Law §238.

The provision for the Court of Appeals and Appellate Division in paragraph 4 utilizes the Judicial Conference as the main advisory group. The provision is essentially similar to the recent amendment of 28 U.S.C. §331. See Pub. L. No. 513, 85th Cong., 2d Sess. (July 11, 1958), 27 U.S.L. Week 3 (July 22, 1958). The objectives that are to guide the Judicial Conference in suggesting rules should serve a similar function for the body empowered to make rules by paragraph 1. There would be no limitation on the rule-making body's utilization of *ad hoc* or standing advisory committees.

Paragraph 5 is required in the alternatives for the Court of Appeals and Judicial Conference, since these bodies take the place of the Appellate Division as the rule-making authority.

There is sufficient language in subdivision 11 of present section 233 of the Judiciary Law to provide the Judicial Conference with the assistance it will need for the rule-making process. Utilization of the present subdivision has required some rearrangement of provisions with the result that the criteria for rules now appear in the paragraph vesting the rule-making power itself—proposed section 233.

Continued unchanged in the Judiciary Law are section 85, giving the Appellate Division within each Department power to control calendar practice in each county in the Department, section 86, giving the Appellate Division within each Department power to fix trial and special terms, section 592 and subdivisions 9 and 10 of section 749-aa, giving the Appellate Division in the First and Second Departments power to adopt rules to regulate juries in New York city, section 78, permitting the Appellate Division in the First Department to control libraries within the Department, section 107, giving the Appellate Division in the First Department power to control certain personnel, and section 152 granting Supreme Court Justices in the Eighth Judicial District power to regulate calendars in Erie county.

Section 51 of the Judiciary Law, giving the Court of Appeals rule-making power over its own practice, should not be changed if either the Appellate Division or the Judicial Conference is granted rule-making power. Similarly, the power of the Court of Appeals to control admission of attorneys, under section 53 of the Judiciary Law, should not be changed under any of the alternatives.

The civil practice act contains both specific and general rule-making grants. The general rule-making power is contained in section 63, which states:

> A court of record has power:
>
> . . . .
>
> 3. To devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.

This section, taken in combination with rule 2 of the rules of civil practice, provides the basis for local rule-making. Rule 2 provides:

> The appellate division in each department and any other court of record may make such other, or further, rule for the conduct of business before it as it may deem necessary and which is not inconsistent with the following rules.

There is no need for these provisions in view of the general local rule-making provision in the proposed amendments to the Judiciary Law. See proposed section 51 of the Judiciary Law (Alternative A, Court of Appeals); proposed section 83 of the Judiciary Law (Alternative C, Appellate Division); proposed section 233 of the Judiciary Law (Alternative B, Judicial Conference).

Various local court acts provide specific rule-making power. See, *e.g.*, N.Y. Laws 1930, c. 368, §214 (Dunkirk City Court). Some make the rules of civil practice and the civil practice act applicable. See, *e.g.*, N.Y. Laws 1948, c. 569, §23 (Newburgh City Court). Some provide explicitly only that the civil practice act or its predecessors apply, making no reference to the rules of civil practice. See, *e.g.*, N.Y. Laws 1921, c. 679, §211 (Rome City Court). Some appear to have no reference to rule-making power. See, *e.g.*, N.Y. Laws 1897, c. 360 (Geneva City Court). At least one city court act permits the court to adopt rules inconsistent with general rules of practice. N.Y. Laws 1930, c. 805, §19 (Mechanicville City Court). Such provisions should be amended to adopt the provisions in sections 23 and 39 of the Uniform City Court Act. 7 N.Y. Jud. Council Rep. 211, 228, 242 (1941). These provisions read as follows:

> §23. Civil practice, general provisions. The provisions of the civil practice act and the rules of civil practice, notwithstanding express reference by name or classification therein to any other court, shall apply to the city court as far as the same can be made applicable and are not in conflict with the provisions of this act.
>
> Where the word "state" is used in applicable provisions of the civil practice act or rules of civil practice it shall be construed to mean "county" as applied to the city court if the context of the particular section or rule permits of such construction.
>
> The court, within the limits of its jurisdiction, is vested with all the powers possessed by the county court in like causes.
>
> §39. Rules. The court may adopt, amend and rescind rules not inconsistent with this act, the civil practice act or the rules of civil practice. Such rules shall become effective upon being approved by the justices of the appellate division for the department in which the court is located. The rules shall be entered upon the minutes of the city court and shall be published as the chief judge may direct.

See also the possible ambiguity in section 9(9) of the Court of Claims Act and section 36 of the New York City Court Act.

Applicability of the proposed rules of civil practice is provided in the proposed amendment to the Judiciary Law. See proposed section 51 of the Judiciary Law (Alternative A, Court of Appeals); proposed section 83 of the Judiciary Law (Alternative C, Appellate Division); proposed section 233 of the Judiciary Law (Alternative B, Judicial Conference).

Specific references to rule-making power in the civil practice act will be omitted from the proposed Civil Practice Law as unnecessary. See N.Y. Civ. Prac. Act §114 (persons to be notified in actions commenced by order); *id.* §140 (preferences in the trial of civil causes); *id.* §247 (bills of particulars); *id.* §311 (proceedings on failure to obey subpoena); *id.* §473 (declaratory judgments); *id.* §575 (making case on appeal); *id.* §616 (records on appeal); *id.* §842 (time within which bail may be reduced).

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PARALLEL TABLES*

* The following tables are cumulative and contain counterparts and references to those parts of the proposed act and rules which were published in the 1957 and 1958 reports as well as those in this volume. The Outline of Working Draft on pages 9–36 *supra* indicates the page and report in which each section and rule of the tentative draft appears. In the following tables, those sections and rules first appearing in the 1957 report for which amendments appear in the 1958 report are designated by an asterisk; those sections and rules appearing in either report for which amendments appear in this volume are designated by a dagger.

TABLE I

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
ARTICLE 1		
1.1	1, 62 (first sentence and part of second sentence)	
1.2(a)	8	
1.2(b) (first sentence)	4 (in part), 5	
1.2(b) (last sentence) (new)		
1.2(c) (new)	*cf.* 8	
1.3 (new)	*cf.* 4, 5, 6	
1.4	473	212
ARTICLE 3		
3.1 (new)	*cf.* 229-b, 483, 520	
3.2 (new)	*cf.* 229-b	
3.3 (new in part)	227-a (part of first paragraph, second paragraph)	
3.4 (first sentence)	218 (first sentence)	
3.4 (second sentence) (new)	*cf.* 119, 1286 (part of first sentence)	
3.4 (last sentence) (new in part)	218 (part of last sentence)	
ARTICLE 4		
4.1	186	
4.2 (new)		
4.3 (new)		
4.4(a)	182 (first, third and last sentences)	
4.4(b) (new in part)	182 (second sentence)	
4.4(c) (new)		
4.4(d) (new)		
4.4(e)	184-a (first paragraph)	
4.5	182-a, 182-b (in part)	
4.6(a) (new)		
4.6(b)	182-b (in part)	
*4.7(a)	184(2), 1287 (first sentence)	
4.7(b)	1287 (third sentence)	
4.7(c)	1287 (last sentence)	
4.8	183	
4.9 (new in part)	184(3) (in part)	
4.10(a)	187	
4.10(b) (second sentence new)		146
4.10(c)		145
4.10(d)	188	147 (first sentence)
4.10(e) (new)		
4.11	185	

* As amended in 1958 report.

TABLE I—Continued

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
ARTICLE 5		
5.1	10(1), 54, 55 (in part), 99(1) (in part); *cf.* 1202	
5.2	13 (first sentence)	
5.3(a)	11 (in part)	
5.3(b) (subparagraphs 2 and 3 new in part)	16, 17, 18, 218 (first sentence), 825, 905 (in part)	
5.3(c)	16 (in part)	
5.3(d) (first two sentences) (new in part)	11 (part of first paragraph), 61; *cf.* 34 (second paragraph)	
5.3(d) (last sentence)	26	
5.3(e) (new)		
5.4(a)	24	
5.4(b)	25	
5.5	23	
5.6(a)	15	
5.6(b) (subparagraph 2 new)	14	
5.6(c) (new in part)	48(5) (last sentence)	
5.6(d)	11 (last paragraph)	
5.6(e)	56	
5.7 (subparagraph 3 new)	19	
5.8	43, 60; *cf.* 28, 29	
5.9(a)	13 (last sentence)	
5.9(b)	27	
5.9(c)	28-a	
5.10(a)	20	
5.10(b)	12, 21 (first sentence)	
5.10(c)	57	
†5.11(a)	47-b	
†5.11(b)	44, 45	
5.12(a)	34 (first paragraph)	
5.12(b)	33	
5.12(c)	46	
†5.12(d)	44, 45	
5.13(1)	53	
5.13(2)	48(1)	
5.13(3)	47(1)	
5.13(4)	47-a(1)	
5.13(5) (first sentence)	1226	
5.13(5) (last sentence) (new)		
5.13(6) (new in part)	48(5) (first sentence)	
5.13(7)	48(6)	
5.13(8) (first sentence)	48(8)	
5.13(8) (last sentence) (new)		
5.14(1)	49(1)	
5.14(2)	48(2), 49(3), 50(2)	
5.14(3)	49(4)	
5.14(4)	48(8) (in part), 49(7)	
5.14(5)	48(4)	

† As amended in 1959 report.

TABLE I—Continued

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
5.14(6)	49(7)	
5.14(7)	49(6), 50(1)	
5.14(8)	49(8)	
5.14(9)	49(9)	
5.15(1)	49(2), 51(1)	
5.15(2)	51(2)	
5.15(3)	50(1) (in part), 51(3)	
5.15(4)	52	
5.15(5) (new)		
5.16(a)	51-a	
5.16(b)	51-b	
5.17	1286	
5.18 (new)		
ARTICLE 7		
7.1 (first sentence)	1282	
7.1 (last sentence) (new)	*cf.* 1247, 1266, 1268	
7.2(a)	1230, 1232 (in part), 1241	
7.2(b)	1232 (in part)	
7.2(c)	1232 (in part), 1234 (in part)	
7.3(a) (new in part)	1231, 1235 (in part), 1252 (in part), 1253 (in part)	
7.3(b) (new)	*cf.* 1234 (part of last paragraph)	
7.4(a)	1236(2)	
7.4(b) (new in part)	1236(3)	
7.4(c)	1239(2), 1239(3)	
7.4(d)	1239(1), 1239(4)	
7.4(e)	1243(2), 1243(3), 1243(4); *cf.* 1242	
7.5 (new in part)	1242	
7.6(a)	1240, 1244(1), 1244(3) (in part), 1246 (in part)	
7.6(b)	1248, 1250	
7.6(c)	1249	
7.7	1271, 1272, 1273	
7.8(a)	1244(3) (in part)	
7.8(b)	1245 (in part)	
7.9(a)	1258 (in part)	
7.9(b)	1259 (in part)	
7.9(c) (first sentence)	1251 (in part), 1259 (in part)	
7.9(c) (last sentence) (new)		
7.9(d) (new)	*cf.* 1260	
7.9(e)	1257	
7.10(a)	1251 (in part), 1253 (in part), 1255 (in part), 1256 (in part), 1262 (in part), 1267 (in part)	
7.10(b)	1255 (in part), 1264 (in part), 1265 (in part), 1276 (in part), 1277, 1278, 1279, 1280	
7.10(c)	1252 (in part), 1256 (in part), 1262 (in part)	
7.11	1258 (in part), 1274, 1275; *cf.* 1276	
7.12	1269 (in part)	

TABLE I—Continued

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
ARTICLE 11		
11.1	355	
11.2(a)	349 (first and second sentences)	
11.2(b)	349 (third sentence)	
11.3(a)	353, 354 (part of first, fifth and sixth sentences)	
11.3(b)	354 (third and fourth sentences)	
11.4(a)	352 (in part), 354 (part of first, fifth and sixth sentences)	
11.4(b)	352 (in part)	
11.4(c)	354 (second sentence)	
11.5	351, 354 (part of first, fifth and sixth sentences)	
11.6	345-a	
ARTICLE 12		
12.1(a) (new in part)	480 (part of last sentence)	
12.1(b) (new)		
12.1(c) (first and second sentences) (new)		
12.1(c) (last sentence) (new)	*cf.* 480 (part of first sentence)	
12.2	480 (part of first sentence)	
12.3	481 (first sentence)	
12.4 (new)		
ARTICLE 13		
13.1(a) (1) (new)	*cf.* 504(1), 505(2), 642, 644 (last two sentences), 649, 658 (first sentence), 778 (last sentence)	
13.1(a) (2)	7(5); *cf.* 534, 539, 650 (in part), 654 (in part)	
13.1(a) (3) (new)	*cf.* 222-a (last sentence), 778, 1199, 1200 (second sentence)	
13.1(a) (4) (new)	*cf.* 687-a(1) (second and last sentences), 917(2) (part of first paragraph)	
13.1(a) (5)	509 (in part), 510(1) (in part), 512 (in part); *cf.* 708	
13.1(b)	687 (part of second sentence), 687-a(1) (first sentence); *cf.* 679(2), 687-a(8)(a) (in part), 792(a) (in part), 914, 915, 916(1), 916(2), 916(3), 916(4), 917(2) (part of first paragraph)	
13.1(c) (first sentence) (new)	*cf.* 687-a(8)(a) (in part), 792(a) (in part), 913, 914, 915, 916(5), 916(6)	

TABLE I—Continued

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
13.1(c) (last sentence)	222-a (last sentence), 778 (first sentence), 1199 (last two sentences); *cf.* 658 (first sentence), 1200 (second sentence)	
13.1(d) (1)	687 (first and second sentences) (in part), 687-a(1) (first, second and last sentences) (in part); *cf.* 917(2) (part of first paragraph)	
13.1(d) (2) (new)	*cf.* 687-a(1) (last sentence) (in part), 917(2) (part of first paragraph)	
13.1(d) (3) (new)	*cf.* 687-a(1) (part of last sentence), 915-a, 916(7), 917(2) (part of first paragraph)	
13.1(d) (4)	687 (first and second sentences) (in part); *cf.* 799-a, 917(2) (in part)	
13.2(a) (1) (new)	*cf.* 679(1), 680, 682, 683, 687-a(2), 794(3), 807, 808	
13.2(a) (2) (new)	*cf.* 679(1), 680, 682, 683, 687-a(2), 794(3), 807, 808	
13.2(a) (3) (new)	*cf.* 679(1), 680, 682, 683, 687-a(2), 794(3), 807, 808	
13.2(a) (4) (new)	*cf.* 679(1), 680, 682, 683, 687-a(2), 794(3), 807, 808	
13.2(a) (5) (new)	*cf.* 478 (second sentence)	
13.2(a) (6) (new)		
13.3(a) (1)	510(1) (first sentence), 512 (last sentence); *cf.* 509	
13.3(a) (2)	514	
13.3(a) (3) (new)	*cf.* 478 (second sentence)	
13.3(a) (4)	478 (second sentence)	
13.3(a) (5)	510(1) (part of first sentence)	
13.3(b) (first sentence)	515 (first sentence)	
13.3(b) (last sentence) (new)		
13.4	516, 689 (first sentence)	
13.5(a)	665, 665-a	
13.5(b)	666	
13.5(c)	668	
13.5(d)	687-a(8)(b), 792(b), 1196 (part of second sentence)	
13.5(e) (1)	793 (part of first sentence); *cf.* 684(1) (part of first sentence)	
13.5(e) (2)	687-a(8)(c), 792(c), 793 (part of first sentence); *cf.* 684(1) (part of first sentence)	
13.5(e) (3)	687-a(8)(d), 792(d), 793 (last sentence)	
13.5(f)	667	
13.6(a)	671, 673	
13.6(b)	672, 673	

TABLE I—Continued

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
ARTICLE 13 — *Concluded*		
13.6(c)	674	
13.6(d)	675	
13.6(e)	676	
13.6(f)	677	
13.6(g)	670	
13.6(h)	678	
13.7	659, 811 (part of first sentence)	
13.8 (first sentence)	655 (last paragraph), 656(1) (in part), 656(2), 656(3) (in part), 657	
13.8 (second sentence)	656(4) (in part)	
13.8 (last sentence)	656(3) (in part), 656(4) (in part)	
13.9	684(2) (in part), 687-a(2) (fourth sentence), 794(3)	
13.10	801 (last sentence)	
13.11	789	
ARTICLE 14		
14.1 (first sentence) (new in part)	80, 464 (first sentence), 465 (first and second sentences), 466, 467, 785 (first sentence)	
14.1 (second sentence) (new in part)	80 (part of last sentence), 469 (in part)	
14.1 (last sentence) (new in part)	80 (part of last sentence), 785 (second sentence)	
ARTICLE 15		
15.1 (first sentence) (new)	*cf.* 814	
15.1 (second sentence)	823 (part of first sentence)	
15.1 (last sentence)	125, 824 (in part)	
15.2	827 (first sentence); *cf.* 877 (first sentence)	
15.3	902	
15.3(1)	903(1)	
15.3(2) (new)	*cf.* 903(1), 903(2), 903(7)	
15.3(3)	903(2)	
15.3(4)	903(3)	
15.3(5)	903(4), 903(5); *cf.* 826(2), 826(3), 826(5), 826(7)	
15.3(6)	903(6); *cf.* 826(9)	
15.3(7) (new)	*cf.* 826(1)	
15.3(8) (new)	*cf.* 826(4)	
15.3(9)	904; *cf.* 826(8)	
15.4 (first sentence)	912 (first paragraph)	
15.4 (last sentence) (new)		
15.5	917(2) (last sentence of third paragraph) (in part)	
15.6	*cf.* 680, 681, 682, 960	

TABLE I—Continued

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
15.7 (first sentence)	877 (first sentence), 878(1)	
15.7 (last sentence)	882 (second sentence)	
15.8 (first sentence)	120 (part of first sentence)	
15.8 (second sentence)	121 (first sentence)	
15.8 (last sentence)	121 (second sentence)	
ARTICLE 16		
16.1(a)	588(1) (b)	
16.1(b) (1)	588(1) (a)	
16.1(b) (2)	588(4)	
16.1(c)	588(3) (in part)	
16.1(d) (new in part)	588(2), 590 (in part)	
16.2(a) (1)	589(3)	
16.2(a) (2)	589(2); *cf.* 589(1) (a)	
16.2(b) (1)	589(1) (a)	
16.2(b) (2) (i)	589(1) (b)	
16.2(b) (2) (ii)	590 (in part)	
16.2(b) (2) (iii) (new)		
16.3(a) (1)	608 (in part), 611, 622(1) (in part), 631(1) (in part), 631(2) (in part), 631(3) (in part)	
16.3(a) (2) (i)	609(1) (in part); *cf.* 622(1), 631	
16.3(a) (2) (ii) (new)	*cf.* 609(3), 609(4), 622(1), 631	
16.3(a) (2) (iii)	609(2) (in part); *cf.* 622(1), 631	
16.3(a) (2) (iv) (new)	*cf.* 609(3), 609(4), 622(1), 631	
16.3(a) (2) (v)	457-a(3) (last paragraph)	
16.3(a) (2) (vi)	609(5); *cf.* 622(1), 631	
16.3(a) (2) (vii) (new)	*cf.* 609(3), 609(4), 631	
16.3(a) (2) (viii) (new)	*cf.* 609(3), 609(4), 631	
†16.3(a) (2) (ix) (new)		
16.3(a) (3) (new)	*cf.* 609(3), 609(4), 631	
16.3(b) (new)		
16.4 (new)	*cf.* 622(2), 631(2) (last sentence)	
16.5(a)	623(1)	
16.5(b)	623(2)	
16.6(a) (1)	580 (part of first sentence), 581 (in part)	
16.6(a) (2)	580 (second sentence), 581 (in part)	
16.6(a) (3)	106 (in part), 583(2)	
16.6(a) (4)	582	
16.6(a) (5) (new in part)	584-a (in part)	
16.6(b)	590 (in part), 605	
16.6(c) (new in part)	590 (in part), 608 (in part), 626 (in part)	
16.6(d)	626 (in part)	
ARTICLE 17		
17.1	1448 (first, second and last paragraphs, subparagraph 2 of third paragraph), 1449, 1450 (first sentence)	

† Added in 1959 report.

TABLE I—Concluded

Sections of Proposed Act Compared with Present Provisions

Proposed Act Sections	Civil Practice Act Sections	Rules of Civil Practice
ARTICLE 17 — *Concluded*		
17.2	1450 (fourth sentence of first paragraph), 1459 (part of first paragraph)	
17.3(a)	1450 (second, third and last sentences of first paragraph, second and last paragraphs), 1451	
17.3(b)	1458(2) (in part)	
17.4	1452	
17.5 (new in part)	358 (first sentence), 1456 (first sentence)	
17.6(a)	1455 (in part)	
17.6(b)	1454(2) (in part), 1454(3)	
17.6(c) (new)		
17.6(d)	1454(1)	
17.6(e)	1454(2) (in part), 1456 (last sentence)	
17.6(f)	1454(2) (in part), 1455 (in part)	
17.7 (second and third sentences new)	1460	
17.8	1460-a	
17.9 (new)		
17.10	1458(1), 1458(2) (in part), 1461, 1463 (part of first sentence)	
17.11(a)	1463 (part of first sentence)	
17.11(b) (new in part)	1462 (first paragraph)	
17.11(c)	1462-a (in part)	
17.11(d)	1462 (second paragraph)	
17.11(e) (new)		
17.12	1468 (third and last sentences)	
17.13	1457	
17.14(a)	1464 (first sentence), 1465 (last paragraph), 1466, 1467	
17.14(b)	1465 (first paragraph)	

TABLE II

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 1		
1.1 (new)	*cf.* 1	
TITLE 23		
23.1(a)	193(1) (first sentence), 194; *cf.* 191, 193-c (first sentence), 1204	
23.1(b) (last sentence new)	193(1) (last sentence), 193(2) (first, third and fourth sentences)	
23.2(a)	212(1) (first sentence)	
23.2(b)	212(2) (first sentence)	
23.2(c)	212(3)	
23.3 (second and last sentences new)	192, 193(2) (second and last sentences)	
*23.4 (new in part)	210 (in part)	
23.5(a) (last sentence new)	195	
23.5(b) (new)		
23.5(c) (new)		*cf.* 8
23.5(d) (new)		*cf.* 301
23.6(a)	285(1), 285(2)	
23.6(b)	285(3) (first sentence)	
23.6(c)	285(4)	
23.6(d)	285(5)	
23.6(e)	285(6)	
23.6(f)	285(7)	
23.6(g)	285(8)	
23.6(h)	285(9)	
23.6(i)	285(10)	
23.7	193-a(1)	54 (part of first sentence)
23.8	193-a(2)	
23.9	193-a(3)	
23.10 (opening clause new)	193-a(4)	
23.11	193-a(6)	
23.12	193-b(1)	
23.13	193-b(2); *cf.* 988 (part of first sentence)	
23.14 (last sentence new)	193-b(3)	
23.15(a)	84 (part of first three sentences), 86	
23.15(b) (last sentence new)	82, 83 (in part), 85 (first sentence)	
23.16 (new)		
23.17 (new)	*cf.* 977-b(19) (part of fourth sentence)	
23.18	83 (in part)	
23.19	90 (in part), 90-a; *cf.* 213	
*23.20	84 (part of first three sentences), 578, 579; *cf.* 557(2), 557(3)	
*23.21 (new in part)	99(2)	
23.22	213	
23.23	215 (except third sentence)	
23.24 (new in part)	222-a (first sentence)	

* As amended in 1958 report.

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 24		
24.1	258 (in part); *cf.* 1204	
24.2(a)	96 (in part), 96-a; *cf.* 1205	
24.2(b)	97	
24.3	258 (part of first sentence), 443(2) (in part), 443(3); *cf.* 85, 702	
TITLE 25		
25.1(a)	219	
25.1(b) (new in part)	105 (in part), 109 (subparagraphs 2 and 3 and last paragraph)	
25.1(c)		53(7), 53(8), 53(1) (in part), 53(3) (in part), 53(6) (in part)
25.2(a)	221	
25.2(b) (1)	225(3)	
25.2(b) (2) (new in part)	230 (part of first paragraph); *cf.* 231 (part of first clause)	
25.2(b) (3)	227	
25.2(c)	225(1) (first sentence)	
25.2(d)	225(2)	
25.2(e)	222-a (second sentence)	
25.2(f) (1)	228(1) (in part)	
25.2(f) (2)	228(2)	
25.2(f) (3)	228(3) (in part)	
25.2(f) (4)	228(4)	
25.2(f) (5)	228(5)	
25.2(f) (6)	228(6)	
25.2(f) (7)	228(7)	
25.2(f) (8)	228(8), 228(9) (first sentence), 229(1), 229(2) (first sentence), 229(3)	
25.2(g)	1289 (fourth and last sentences)	
25.3 (new in part)	233 (first and second sentences) (in part), 235 (part of first sentence)	
25.4 (new)	*cf.* 232	
25.5(a) (new in part)	232 (in part)	
25.5(b) (new in part)		50 (part of first sentence)
25.5(c) (new in part)		51 (in part)
25.6 (first sentence new in part)	217 (first and last sentences) (in part)	
TITLE 26		
26.1	254, 260, 261(2), 272 (first sentence), 274; *cf.* 193-a, 264	
26.2 (first sentence)	257	
26.2 (second and third sentences)	193-a(2) (in part), 264 (part of first sentence), 271 (second sentence), 285(3) (first sentence)	
26.2 (fourth sentence)	193-a(2) (in part), 263 (all except last sentence), 271 (last sentence), 273, 285(3) (last sentence)	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
*26.2 (last sentence)	227-a (part of last paragraph), 228(9) (last sentence), 229(2) (last sentence), 233 (last sentence), 235 (last sentence) 264 (in part)	
‡26.3		
26.4 (fourth and last sentences new)	241, 255(2), 258 (in part), 262 (part of first sentence), 272 (last sentence), 338	90
26.5 (new)	*cf.* 241, 246	*cf.* 98
26.6(a)		92
26.6(b)		93(1)
26.6(c)		95
26.6(d) (new)		
†26.6(e)	1186, 1201	
26.7(a)		116
26.7(b) (new in part)		94
26.7(c) (new)		96
26.7(d)		
26.7(e) (new)		
†26.8(a)	111 (part of first sentence), 255(3), 479 (last sentence); *cf.* 193-a, 264	
†26.8(b)		211
26.9(a)	243, 261(1) 272 (second sentence); *cf.* 255-a, 269 (first sentence)	
26.9(b)	30 (in part), 242, 339	
26.10(a)	266, 268	
26.10(b) (first sentence new)	264 (part of first sentence)	
26.10(c)	267(1)	
26.10(d)	267(2)	
26.10(e)	267(3)	
26.10(f)	271 (second and third sentences), 424	
26.11 (new in part)	248, 249, 250, 251, 252, 253	
26.12(a)		102(1)
26.12(b)		103
26.12(c)	283 (part of first sentence)	105 (first sentence)
26.13(a)	244 (first sentence)	
26.13(b)	105 (in part), 245, 245-a, 245-b	
26.13(c)	434	166(1) (second and last sentences)
26.13(d) (new in part)		101
26.14 (second and last sentences new)	275	
26.15	218-a	118

* As amended in 1958 report.
†As amended in 1959 report.
‡ Replaced by proposed rule 32.1(c)

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 27		
27.1 (first sentence) (new)	*cf.* 191 (first sentence)	
27.1 (last sentence)	192 (second sentence)	
27.2(a) (new)		*cf.* 60
27.2(b) (new)		21 (in part)
27.2(c)	1289 (third sentence), 1309 (part of second sentence), 1421(a), 1469-d	
27.2(d)		60
27.3 (new)		*cf.* 61
27.4	85 (part of last sentence), 96 (part of last sentence); *cf.* 258 (part of first sentence), 262 (part of first sentence), 443(2), 443(3), 474(2) (in part), 475 (third sentence), 702	
27.5 (new)		
27.6	308	
27.7(a) (first two sentences)		*cf.* 65 (first sentence)
27.7(a) (third sentence) (new)		
27.7(a) (last sentence)	101 (in part)	
27.7(b) (new)		
27.8 (new)		
27.9 (new)		
TITLE 31		
31.1(a) (1) (new)		
*31.1(a) (2)	237-a (part of first sentece)	106(1), 107(1), 109(1), 110(1)
31.1(a) (3)		106(2), 107(2), 109(2), 110(2)
31.1(a) (4)		106(3), 107(3), 109(3), 110(3)
31.1(a) (5)	30 (in part)	107(4), 107(5), 107(6), 107(7), 107(8), 110(5), 110(6), 110(7), 110(8), 110(9)
31.1(a) (6)		109(4), 110(4)
31.1(b) (first sentence new)		108 (part of first sentence); *cf.* 107, 110
31.1(c) (new in part)		108 (part of first sentence)
31.1(d)	279 (in part); *cf.* 278	
31.1(e)	283 (part of first sentence)	
*31.2(a) (new in part)	*cf.* 30, 460, 476, 1143, 1150	113 (in part); *cf.* 104
31.2(b)		113 (in part)
31.2(c) (new)		
31.2(d) (new)	*cf.* 476	114
31.2(e) (new)		
31.3 (new)		

* As amended in 1958 report.

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
31.4 (new)		
31.5 (new)		
31.6(a)	485, 486 (in part), 487 (in part), 489, 493(1), 494-a (in part); *cf.* 433 (second sentence)	
31.6(b)	490, 479 (first sentence)	191 (last sentence)
31.6(c)		302(1)
31.6(d)		191 (all except last sentence)
31.6(e)	486 (in part), 487 (in part), 493(2), 494-a (in part)	189, 192(1), 192(2), 192(4)
†31.6(f)		190
31.6(g) (new in part)	494	
31.6(h) (new)		
31.7	181, 482 (part of first sentence); *cf.* 482	
31.8		301
31.9(a)	540, 541	
31.9(b)	543(1), 544	
31.9(c)	545	
31.9(d)	542	
†31.10(a)	174-a (in part)	
31.10(b)	174-b	
31.10(c)	174-c	
31.10(d)	174-a (in part)	
31.11	177, 178	
31.12	175, 176	
31.13(a) (first sentence), (new in part)		546 (in part)
31.13(a) (second sentence)		546 (in part)
31.13(a) (last sentence)		547 (second sentence)
31.13(b) (first sentence)		547 (last sentence)
31.13(b) (1)		548 (first sentence)
31.13(b) (2)		548 (part of third sentence)
31.13(b) (3) (new in part)		548 (fourth sentence)
31.13(b) (4) (new)		
31.13(b) (5)		548 (part of last sentence)
TITLE 32		
32.1(a) (last sentence new)		10 (part of first sentence)
32.1(b) (last sentence new)		10 (part of first sentence, second sentence)
32.1(c) (last sentence new)	255(1)	11 (last sentence); *cf.* 13 (in part)
32.1(d)		10 (part of first sentence)
32.1(e) (first sentence)		

† As amended in 1959 report.

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 32 — *Concluded*		
32.1(e) (second sentence)		14
32.1(f) (first sentence)	105 (in part)	
32.1(f) (second sentence)		12 (first sentence)
32.2	101 (in part)	15 (first three sentences)
32.3(a) (new)	*cf.* 1243	
32.3(b)	163 (first sentence)	
32.3(b) (1)		20 (opening paragraph)
32.3(b) (2)	163-a (part of first paragraph), 164 (in part)	20(1) (in part)
32.3(b) (3)		20(2), 20(3) (in part)
32.3(b) (4)		20(3) (in part)
32.3(c)	163-a (part of first paragraph), 164 (in part)	20(1) (in part), 20(5) (in part)
32.3(d)		20(4), 20(5) (in part)
32.3(e)	163 (part of second sentence)	
TITLE 33		
33.1	113	
†33.2 (new in part)	115, 116, 128, 129; *cf.* 65 (last sentence)	
†33.3(a)		63
†33.3(b)	130(2) (in part)	
†33.3(c) (new in part)	77 (in part), 130(2) (in part)	
†33.4(a)	130(1)	
†33.4(b) (new in part)	130(1)	
†33.5(a) (first sentence) (new)	*cf.* 280	*cf.* 62
†33.5(a) (last sentence)	117 (part of first sentence)	
†33.5(b) (first sentence)	117 (part of first sentence)	60 (first sentence)
†33.5(b) (second sentence)	117 (part of first sentence)	
†33.5(b) (third sentence)		64
†33.5(b) (last sentence) (new)		
†33.5(c) (first sentence) (new)		
†33.5 (c) (second sentence) (new)	*cf.* 975 (second sentence)	
†33.5(d) (last sentence new in part)		64 (in part), 65
†33.5(e)		60 (second sentence)
†33.6	117 (second sentence)	
†33.7		66
33.8 (first sentence)	118	
33.8 (second sentence) (new)		
33.8 (last sentence)		61
33.9 (new)	*cf.* 237-a(3)	*cf.* 108
33.10(a) (first sentence)	127	
33.10(a) (last sentence)		70 (first paragraph)
33.10(b)		70 (second paragraph)

† As amended in 1959 report.

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
33.11(a) (first sentence)	101 (in part)	71 (part of first sentence), 72
33.11(a) (second sentence)		73
33.11(a) (last sentence)		71 (part of first sentence), 73 (part of last sentence)
33.11(b) (new)		
33.12 (new in part)	131 (in part)	
33.13	*cf.* 773 (second sentence)	74
TITLE 34		
34.1(a)	288 (in part), 292-a (in part), 1094-a (in part), 1195, 1221-c	
34.1(b) (new)		
34.1(c) (new)		
34.1(d) (new)		
34.2(a) (new in part)	302 (first sentence); *cf.* 345	
34.2(b)	298, 290 (in part)	
*34.2(c)	295, 308 (in part), 313 (in part), 315 (in part), 316, 317, 318 (in part), 319 (in part), 320 (in part), 321, 1459 (in part)	122 (in part), 123
34.2(d)	293	
34.2(e)	310, 311, 312	136
34.3(a)	291 (first sentence), 294 (first sentence); *cf.* 296-a	124 (second sentence)
34.3(b)	291 (second sentence)	
34.3(c)		133
34.4(a) (new)	*cf.* 296-a	*cf.* 120, 142
34.4(b) (new)		*cf.* 125
34.4(c) (new)		
34.4(d) (new)		
34.4(e) (new)		
34.5	292 (last sentence), 303 (last phrase)	
34.6(a)	288 (in part), 289, 292 (first sentence), 292-a (in part), 299 (in part), 308, 328	121-a (in part)
34.6(b)	296-a (in part), 299 (in part), 307, 1094-a (in part)	120 (in part)
34.6(c)	297	
34.7(a)	290 (in part), 294 (in part), 302 (in part), 1094-a (in part)	121-a (in part), 122 (in part)
34.7(b) (new)		
34.8	290 (in part), 302 (in part)	121-a (in part), 126, 128
34.9	300	
34.10	290 (in part), 296, 314	122 (in part)
34.11 (new)		
34.12(a)	294 (in part), 301, 309, 318 (in part), 357 (in part), 358 (first sentence), 359 (in part)	

* As amended in 1958 report.

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 34 — *Concluded*		
34.12(b)	302 (in part), 319 (in part), 320 (in part)	127, 129 (in part)
34.12(c)		129 (in part), 129-a
34.13	309-a	
34.14	305 (in part), 315 (in part)	129 (in part)
34.15(a)	302 (in part), 319 (in part), 320 (in part)	130 (in part)
34.15(b)	312, 319 (in part), 320 (in part)	130 (in part), 131, 132
34.15(c)	320 (in part); *cf.* 374	130 (in part)
34.15(d) (new)		
34.15(e) (new)		
34.16(a)	303 (in part), 304, 305 (in part), 313, 343-a	129 (in part)
34.16(b) (new)		
34.16(c)	303 (in part)	
34.16(d) (new)		
34.17 (new)	*cf.* 318	*cf.* 115, 116
34.18 (new)		*cf.* 115
34.19 (new)		*cf.* 115, 117
34.20	324, 327, 982, 983, 984	140, 141, 142 (in part)
34.21	306, 306-a	
34.22 (new)		
34.23	322	
34.24	299 (in part), 318 (in part), 325 (in part)	
34.25	299 (in part), 325 (in part)	137; *cf.* 115(c)
TITLE 35		
35.1 (new)		
35.2 (new)		
35.3 (new)		
35.4 (new)		
35.5 (new)		
TITLE 36		
36.1 (first sentence)		237 (first paragraph)
36.1 (last sentence) (new)		
36.2(a)	*cf.* 433 (part of first sentence)	150 (first paragraph)
36.2(b)		150 (fourth paragraph)
36.3	*cf.* 139	151
TITLE 38		
38.1	299 (in part), 403 (in part), 411 (in part), 413 (in part)	13
38.2(a)	403 (in part), 406(1) (in part), 411 (in part), 413 (in part)	
38.2(b)	410, 412, 413 (in part), 415, 416, 417, 418, 419, 420	162, 163
38.3	299 (in part), 404, 406(1) (in part)	
38.4	411 (in part), 787 (in part)	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
38.5(a)	403-a	
38.5(b)	411 (in part), 413 (in part), 414	
38.6(a)	299 (in part), 405, 407, 420, 801	
39.6(b)	406(2), 406(3), 406(4), 406(5)	
38.7(a) (first sentence)	357 (in part), 359 (part of first paragraph)	
38.7(a) (second sentence)	358 (first sentence)	
38.7(a) (last sentence)	357 (in part)	
38.7(b)	360, 361, 362, 363, 364; *cf.* 365	
38.7(c)	359 (part of first sentence)	53(6) (second sentence)
TITLE 40		
40.1	443(2) (in part)	
40.2		160
40.3	437	159
40.4	436	
40.5 (last sentence new)		157 (first and second sentences)
40.6		161 (first and third sentences)
40.7	445, 446	
40.8	435	
40.9 (new)		
TITLE 41		
41.1	425; *cf.* 424	
41.2(a)	426(5) (first four sentences), 426-a (part of first sentence and second and third sentences)	
41.2(b)	429 (first sentence)	
41.2(c)	426(1), 426(2), 426(3), 426-a (part of first sentence); *cf.* 424	
41.2(d) (new)	*cf.* 426, 426-a	
41.2(e)	426(5) (last sentence), 426-a (last sentence)	
41.3 (new)		
41.4 (new)		
41.5	448	
41.6	449-a	
41.7 (new)		
41.8	450	
41.9	451	
41.10(a)	452, 454 (in part)	
41.10(b)	455	
41.11(a)	458, 459 (first sentence)	
41.11(b) (new)		
41.11(c)	459 (second and last sentences)	
41.12	459 (third sentence)	165
41.13(a)	463-a (part of first sentence)	
41.13(b)	463 (first paragraph)	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 42		
42.1	427, 428	
42.2 (new in part)	430 (first sentence), 466 (last sentence), 467; *cf.* 80, 1174	157 (part of first sentence)
42.3(a)	439 (first sentence)	
42.3(b)	440 (second sentence)	
42.3(c)	442 (first sentence)	
TITLE 43		
43.1(a) (new)		
43.1(b) (1) (first and last sentences)	468 (first paragraph)	
43.1(b) (1) (second sentence)		172 (fourth sentence)
43.1(b) (2) (first sentence)		172 (first sentence)
43.1(b) (2) (last sentence)	1174 (second sentence)	
43.1(b) (3)		172 (third and fifth sentences)
43.1(c) (new)		
43.1(d)	81 (last sentence), 464 (last sentence), 465 (last sentence)	
43.1(e)	126 (in part)	171 (first sentence and part of second sentence)
43.2(a)	464 (first three sentences), 465 (first and second sentences)	
43.2(b)	466 (part of first sentence), 490 (in part)	
43.2(c)	469 (part of first sentence)	
43.2(d)	470	
43.3(a)	469 (part of first sentence)	
43.3(b) (first sentence)	470(3) (part of first sentence)	
43.3(b) (last sentence)		170 (first sentence)
43.4 (second sentence new)	1545 (in part)	
TITLE 44		
44.1	344-a, 380 (first sentence), 380-a, 381	
44.2	346	
44.3	350	
44.4	343-a	
44.5 (new)		
44.6 (new)		
44.7	334	
44.8 (new in part)	348	
44.9	373, 374-a; *cf.* 374	
44.10	*cf.* 347	
44.11	367	
44.12	366, 398-c	
44.13	389, 389-a	
44.14	385	
44.15	393	
44.16	383-b	
44.17	372	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
44.18	341-a	
44.19	375	
44.20	375-b	
44.21	401	
44.22	371	
44.23	370	
44.24	375-a	
44.25	344, 374-b (last sentence), 398-a(1) (second paragraph), 398-d; *cf.* 387(2), 387(3), 394(3), 394(4)	
44.26	332	
44.27	331	
44.28 (first sentence)	384(1), 386, 392 (first sentence)	
44.28 (last sentence)	392 (last sentence)	
44.29	374-b	
44.30	329, 330, 336(1), 336(2), 336(4), 382, 383, 384(2), 388, 390, 391, 398-b, 399, 400, 402	
44.31(a)	387(1)	
44.31(b)	394(1), 394(2)	
44.32(a)	398-a	
44.32(b)	395	
44.32(c)	398	
44.32(d)	396	
TITLE 45		
45.1	457-a(1), 457-a(2), 476 (in part); *cf.* 482 (in part)	166(2)
45.2 (new)		
45.3	447 (in part), 553 (first sentence, part of last sentence), 556	170 (last sentence), 221 (second paragraph), 222 (part of first and second sentences)
45.4(a)	457-a(3) (first three paragraphs), 549 (part of first paragraph), 552 (part of first and second sentences) ;*cf.* 554 (part of first sentence)	
45.4(b)	549 (part of first paragraph, second paragraph), 552 (part of first and second sentences); *cf.* 554 (part of first sentence)	
45.4(c) (new)		
45.4(d) (last sentence new)	447 (in part)	60-a
45.4(e) (new)		
TITLE 50		
50.1 (first sentence)	472; *cf.* 474(1) (part of second sentence)	
50.1 (last sentence)		185 (second and third sentences)

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 50 — *Concluded*		
50.2	474(2), 476	114
50.3	482	
50.4	484; *cf.* 510, 511, 515	
50.5(a) (new in part)	108, 521, 522, 523, 524, 525, 526, 527, 528	
50.5(b)	529	
50.6(a)		201 (first sentence)
50.6(b)	495	
50.6(c) (new)		*cf.* 188, 194, 195, 196, 197, 198, 199
50.6(d)	478 (first sentence and last two sentences)	*cf.* 186
50.6(e)		187 (first sentence)
50.7(a) (first sentence)		202(1)
50.7(a) (last sentence)		202(8)
50.7(b) (first sentence)		202(2)
50.7(b) (second sentence)		202(3)
50.7(b) (third sentence)		202(4)
50.7(b) (fourth sentence)	607 (first sentence)	202(5)
50.7(b) (fifth sentence)	548 (part of third sentence)	
50.7(b) (last sentence)	544 (part of first sentence)	
50.8(a) (first sentence) (new in part)	498(1) (second sentence), 501 (part of first paragraph); *cf.* 501(3)	
50.8(a) (second and third sentences)	498(1) (second sentence), 502 (second sentence)	
50.8(a) (fourth and last sentences) (new)		
50.8(b)	502-a	
50.8(c)	501 (in part)	
50.9(a)	109, 511 (first sentence)	
50.9(b) (first sentence)	498(1) (part of first sentence); *cf.* 517	
50.9(b) (last sentence)	511 (part of first sentence); *cf.* 498(1) (last sentence)	*cf.* 203
50.9(c)	498(d)(2) (in part), 511 (part of second sentence), 518	
50.10(a) (first sentence) (new in part)	534 (in part)	
50.10(a) (last sentence)	539	
50.10(b)	530 (in part), 531, 532 (in part)	
50.10(c)	530(1) (in part); *cf.* 530(3)	
50.11(a) (opening paragraph)	530 (first sentence)	
50.11(a)(1)	530 (first sentence); *cf.* 530(2)	
50.11(a)(2) (new)		
50.11(a)(3)	530(4) (in part)	
50.11(a)(4)	531	
50.11(b) (first sentence)	535, 536 (first sentence)	
50.11(b) (second sentence)	536 (part of second sentence)	
50.11(b) (last sentence)	530(6) (part of first sentence), 536 (part of second sentence)	
50.11(c)	530(6) (second sentence), 537	204

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Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 60		
60.1	504(1), 1520 (part of first sentence); 773 (first and second sentences)	
60.2 (first sentence)	504(2), 504(3), 638(3), 638(4)	
60.2 (second sentence)	644 (part of first sentence)	
60.2 (last sentence)	655 (first paragraph)	
60.3(a)	500	
60.3(b)	506 (in part), 507 (in part), 508 (in part)	
60.4	505(1), 505(2), 505(3)	
60.5(1)	505(4)	
60.5(2)	505(5)	
60.6	974(2)	
TITLE 61		
61.1(a)(1)	777 (first and fifth sentences) (in part), 780 (first sentence), 782(3), (first sentence); *cf.* 684(1) (in part), 773 (first sentence)	
61.1(a)(2)	777 (sixth sentence and part of first sentence), 780 (first sentence), 782(3) (first sentence); *cf.* 684(1) (in part), 773 (first sentence)	
61.1(a)(3)	777 (first, second, third and fifth sentences) (in part), 780 (first sentence), 782(3) (first sentence); *cf.* 684(1) (in part), 773 (first sentence)	
61.1(a)(4)	780 (second sentence), 782(3) (last sentence)	
61.1(b)	782(8) (second sentence); *cf.* 684(1) (in part), 773 (first sentence)	
61.2(a)	781 (second sentence of second paragraph), 783(1), 783(2) (in part); *cf.* 687-a(2) (second sentence)	
61.2(b)	781 (first paragraph and last two paragraphs), 799-a (in part); *cf.* 687-a(1) (third sentence), 687-a(2) (second sentence), 687-a(7) (in part), 773 (last sentence), 775(1) (last two sentences), 779(1) last three sentences), 795 (part of second sentence), 799 (first and second sentences)	
61.2(c) (new)	*cf.* 775(1) (second sentence), 779(4)	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 61 — *Continued*		
61.3(a)(1)	774(4) (last sentence and part of second sentence), 775(2) (first and second sentences), 779(2) (in part), 782(2) (in part), 782(6) (in part); *cf.* 687-a(3), 773 (last sentence), 775(1) (first sentence), 779(1) (first sentence), 782(1) (first sentence)	
61.3(a)(2)	774(4) (last sentence and part of second sentence), 782(6) (in part), 784-a (part of first sentence); *cf.* 773 (last sentence), 782(1) (last sentence)	
61.3(a)(3)	774(4) (first and last sentences), 782-a(2) (in part), 782-a(3) (in part), 782-a(4) (in part), 782-a(5) (in part); *cf.* 773 (last sentence)	
61.3(b)	782(7) (first sentence), 782-a(4) (in part), 783(3) (last sentence)	
61.3(c) (new)	*cf.* 687-a(3) (in part), 782(8) (first sentence), 791	
61.3(d)	784, 784-a (second sentence); *cf.* 687-a(3) (in part)	
61.3(e) (new)		
61.3(f)	775(2) (last sentence); *cf.* 775(1) (second sentence), 779(4)	
61.4(a)	796 (in part)	
61.4(b)	796 (in part); *cf.* 687-a(6) (last sentence), 795 (part of last sentence)	
61.4(c)	687-a(6) (second sentence); *cf.* 795 (part of second sentence)	
61.5(a)	793 (first and second sentences); *cf.* 684(1) (in part), 684(7)	
61.5(b)(1) (new)	*cf.* 684(1) (in part), 684(8) (fourth and fifth sentences) (in part)	
61.5(b)(2) (first sentence)	684(4) (part of last sentence), 684(6) (last sentence and part of first sentence)	
61.5(b)(2) (last sentence)	684(8) (second and third sentences)	
61.5(b)(3) (first sentence)	684(2) (in part); *cf.* 684(1) (in part)	
61.5(b)(3) (last sentence)	684(3) (in part); *cf.* 684(1) (in part)	
61.5(b)(4)	684(6) (part of first sentence)	

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Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
61.6 (first sentence)	687-a(6) (first sentence), 794(1) (in part), 794(2) (part of first sentence), 795 (part of first sentence); *cf.* 794(2) (last three sentences) (in part)	
61.6 (second sentence)	687-a(6) (last sentence), 795 (last sentence)	
61.6 (third sentence)	687-a(6) (sixth sentence), 794(1) (in part), 794(2) (part of first sentence), 795 (last sentence)	
61.6 (last sentence)	687-a(6) (sixth sentence)	
61.7(a) (first sentence)	804(1) (first and last sentences) (in part), 804(2) (in part)	175, 177
61.7(a) (second sentence)	804(1) (second and third sentences) (in part), 805 (in part)	
61.7(a) (third sentence)	804(2) (in part)	
61.7(a) (fourth sentence)		180
61.7(a) (fifth sentence) (new in part)	804-a (first sentence)	
61.7(a) (sixth sentence)	796 (in part), 797(2) (in part)	
61.7(a) (last sentence) (new)		
61.7(b)	806 (second sentence)	179 (last sentence)
61.8 (new)		
61.9(a) (first sentence)	640 (first sentence)	
61.9(a) (second sentence)	641	
61.9(a) (third sentence)	222-a (last sentence), 642 (in part), 658 (last sentence), 1199 (first sentence)	
61.9(a) (fourth sentence)	645(1) (in part)	
61.9(a) (last sentence)	711	
61.9(b)	635, 648 (last sentence)	
61.9(c)	640 (last two sentences)	
61.9(d)	636-a	
61.10(a)	687-a(1) (second sentence), 687-a(2) (third sentence); *cf.* 679(1) (in part), 687-a(1) (last two sentences)	
61.10(b)	*cf.* 686, 688 (second sentence)	
61.11(a) (first sentence)	660, 663, 686, 706 (first sentence); *cf.* 687-a(2) (last sentence), 687-a(6) (fifth sentence)	
61.11(a) (last sentence)	706 (last sentence); *cf.* 687-a(2) (last sentence), 687-a(6) (fifth sentence), 688 (second sentence)	
61.11(b) (first sentence)	707 (first sentence)	
61.11(b) (last sentence)	662	
61.11(c)	707 (last sentence)	
61.12	512 (first three sentences) (in part), 710	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 61 — *Concluded*		
61.13(a)	660, 663, 712(2) (second sentence), 715 (first sentence)	
61.13(b)	710	
61.13(c)	662, 712(1), 712(2) (first and last sentences), 713	
61.13(d)	748 (second sentence); *cf.* 717 (first sentence), 748 (first sentence)	
61.14 (first sentence)	680 (in part), 687 (third sentence); *cf.* 682, 685 (in part), 687-a(6) (fourth sentence), 795 (third sentence), 798 (in part)	
61.14 (second sentence)	681; *cf.* 682	
61.14 (last sentence) (new)	*cf.* 687-a(4) (first sentence), 687-a(6) (fourth sentence), 795 (third sentence), 798	
61.15 (first sentence)	756	
61.15 (last sentence)	757 (in part)	
61.16	687-a(4), 798; *cf.* 685, 687-a(6) (fourth sentence), 795 (third sentence)	
61.17 (new)	*cf.* 687-a(4) (part of first sentence), 687-a(5) (in part), 687-a(6) (in part), 696, 697, 698, 795 (in part)	
61.18 (new)	*cf.* 649, 684(4) (first sentence), 687-a(4), 687-a(7), 775(1) (last sentence), 779(1) (last sentence), 781 (last two paragraphs), 784-a (first sentence), 785, 787, 793 (third sentence), 799 (last two sentences), 800, 802(1), 802(3)	
61.19 (first and second sentences)	774(3), 775(3) (first sentence)	
61.19 (third sentence)	783(4)	
61.19 (last sentence)	776 (first sentence)	
61.20	661, 781 (first sentence of second paragraph), 782-a(7), 788, 793 (fourth sentence), 801 (first sentence)	
TITLE 71		
71.1 (first sentence)	815 (in part), 818, 827 (last sentence)	
71.1 (second sentence)	838 (first sentence), 839 (in part)	82 (in part)
71.1 (last sentence)	840 (in part)	82 (in part)
71.2(a) (first sentence)	816, 827, (first sentence), 833	
71.2(a) (last sentence)		81
71.2(b)	819 (in part), 835 (in part), 836, 856 (in part); *cf.* 847, 848, 857	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
71.3(a) (first and second sentences)	839 (first sentence); *cf.* 818	
71.3(a) (third and last sentences) (new)		
71.3(b) (new)		
71.4 (first sentence)	841 (in part)	
71.4 (last sentence)	830	
71.5 (first sentence)	847, 849 (in part), 850 (in part)	
71.5 (second sentence)	850 (in part), 851, 856, 857 (in part)	
71.5 (third sentence)	852	
71.5 (last sentence)	855 (last sentence)	
71.6(a)	865 (in part), 866 (in part), 867 (in part), 868 (in part), 875(3)	
71.6(b)	875(1)	
71.6(c)	874	
71.6(d)	875 (last paragraph)	
71.7	861, 861(1)	
71.8 (first and second sentences)	822 (in part), 844, 845; *cf.* 842, 843, 900 (first three sentences)	83 (in part)
71.8 (last sentence)	846 (in part)	
TITLE 72		
72.1 (first sentence)	815 (in part), 817 (in part), 818	
72.1 (second sentence)	910 (part of first paragraph)	84 (in part)
72.1 (last sentence)	910 (part of first paragraph)	
72.2(a)	816 (in part), 903 (first paragraph)	
72.2(b)	819 (in part), 907, 908	
72.2(c) (first sentence)	906 (first sentence)	
72.2(c) (last sentence)	906 (part of second paragraph)	84
72.2(d)	906 (third and fourth paragraphs)	
72.3	905	
72.4	917(1)	
72.5(a)	917(2) (first paragraph)	
72.5(b) (first sentence)	910 (part of second paragraph), 917(2) (second paragraph)	
72.5(b) (second sentence)	917(2) (first sentence of third paragraph)	
72.5(b) (last sentence)	917(2) (part of fourth paragraph), 922(1) (third paragraph)	
72.5(c)	912 (second sentence of second paragraph)	
72.5(d) (new)	*cf.* 922(1) (in part), 924(2), 943 (in part), 944 (in part), 944-a, 945 (in part), 946 (in part), 965 (in part)	
72.5(e)	816 (in part), 922(2); *cf.* 952, 953, 957, 959, 970, 971, 972	
72.6 (first sentence)	917(3)	

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 72 — *Concluded*		
72.6 (last sentence)	912 (first sentence of second paragraph)	
72.7	920	
72.8(a) (first sentence)	940	
72.8(a) (last sentence)	923	
72.8(b)	921, 973 (first sentence)	
72.9	918	
72.10	919, 922(3) (in part)	
72.11 (first three sentences)	924(1) (first and second paragraphs), 925, 926, 927, 964, 965 (in part); *cf.* 948 (in part), 949 (in part), 950 (in part), 951 (in part)	
72.11 (last sentence)	924(1) (last sentence of fourth paragraph)	
72.12 (first and second sentences)	922(2), 952 (in part), 953 (in part), 954 (in part), 955 (in part), 957 (in part), 958 (in part), 959 (in part); *cf.* 956, 970, 971, 972	
72.12 (last sentence)	906 (fourth paragraph)	
72.13 (first sentence)	822 (in part), 948 (in part), 949 (in part), 950 (in part), 951 (in part)	
72.13 (second sentence)	906 (fourth paragraph)	
72.13 (last sentence)	822 (in part)	
72.14	923, 941, 942, 947, 970, 971, 972, 973 (last sentence)	
72.15	969	
TITLE 73		
73.1 (first sentence)	818, 882 (first sentence)	
73.1 (last sentence)	879	
73.2(a)	816 (in part), 877, 878(1)	
73.2(b)	162, 819, 891, 893	
73.2(b) (1)	884 (in part), 885 (in part), 892	
73.2(b)(2)	889 (in part), 890 (in part), 892	
73.2(b)(3)	886, 892	
73.3(a)	879 (in part), 882	
73.3(b)	883 (in part)	
73.4 (first and second sentences)	897 (in part), 898 (in part)	
73.4 (last sentence)	900 (last sentence)	
TITLE 74		
74.1(a) (first sentence)	974(1), 974(3)	*cf.* 180
74.1(a) (last sentence) (new)		
74.1(b) (first sentence)	977	
74.1(b) (second sentence)		180 (in part)
74.1(b) (last sentence)	*cf.* 977	179 (part of second sentence)
74.1(c) (new)		
74.2 (first sentence)	126 (first sentence)	

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Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
74.2 (last sentence) (new)		
74.3	976 (in part)	
74.4 (first and second sentences)		181 (in part)
74.4 (last sentence)	976 (last two sentences)	
74.5	81 (first sentence)	179 (part of first sentence)
TITLE 75		
75.1(a)	120 (part of first sentence)	
75.1(b) (first sentence)	120 (part of first sentence)	
75.1(b) (second and third sentences)	122 (in part)	
75.1(c)	122 (in part)	
75.2	120 (second paragraph and last sentence of first paragraph)	
75.3	121-a (part of first paragraph)	
75.4(a)	123 (first sentence), 586 (in part)	
75.4(b)	123 (second sentence)	
75.4(c)	123 (second paragraph)	
75.5	124 (in part)	
TITLE 80		
80.1	557, 561 (first sentence); *cf.* 626, 634	
80.2(a)	591; *cf.* 560	
80.2(b)	559	
80.3(a)	592(1), 612, 624(1), 632, 634-a (in part)	
80.3(b)	592(4), 624(2)	
80.3(c)	578-a (first paragraph)	
80.3(d)	592(2) (in part), 592(3) (in part)	
80.4(a)	592(3) (in part), 592(5)	
80.4(b) (new in part)	99(3)	
80.4(c)	99(1) (in part)	
80.5	562 (first paragraph)	
80.6	592(2) (in part), 592(3) (in part)	
80.7(a)	562-a (first sentence)	
80.7(b)	562-b (last sentence of first paragraph)	
80.8 (new in part)	564 (part of first and second sentences), 565 (part of last sentence), 567 (in part), 570 (in part), 571 (in part), 593 (first sentence)	
80.9(a) (1)	570 (in part), 571 (in part)	
80.9(a) (2)	594 (in part), 601 (part of first sentence), 615 (in part)	
80.9(a) (3)	594 (in part), 601 (part of first sentence), 615 (in part)	
80.9(a) (4)	595 (in part), 596 (in part), 601 (part of first sentence), 615 (in part)	

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Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 80 — *Concluded*		
80.9(a) (5)	597, 601 (part of first sentence), 615 (in part)	
80.9(a) (6)	598 (in part), 601 (part of first sentence), 615 (in part)	
80.9(a) (7) (new)		
80.9(b)	598-a, 599-a, 601 (last sentence of first paragraph), 613 (in part), 615 (in part); *cf.* 568, 568-a	
80.9(c)	564 (first and second sentences), 565 (first sentence and part of last sentence), 567 (in part)	
†80.9(d)	161, 573 (part of first sentence)	
80.9(e)	573 (part of first sentence), 601 (last paragraph)	
80.10	107	
80.11	138, 139 (in part); *cf.* 140	
80.12	496, 584(1)	
80.13	587; *cf.* 529	
80.14(a)	621 (in part), 625 (in part)	
80.14(b)	497, 607-a, 621 (in part), 625 (in part), 633 (in part), 634 (in part)	
80.15 (new)		
80.16 (new in part)	607 (first sentence), 607-d (first and second paragraphs), 616 (in part)	234
80.17 (new)		
80.18 (new)	*cf.* 576	*cf.* 235
80.19 (new in part)		232 (in part), 235 (in part)
80.20 (new)	*cf.* 607-d (last paragraph)	*cf.* 230 (in part)
TITLE 81		
81.1	590(b) (in part)	
81.2(a) (new in part)	602 (in part)	
81.2(b) (new in part)	603 (in part)	
81.3 (new in part)	606	
81.4	589(4) (b) (last sentence)	
81.5 (new in part)	604	
TITLE 82		
82.1	617, 618	
82.2(a)	620 (in part)	
82.2(b)	620 (in part)	
82.2(c)	602 (in part)	
82.3	589(4) (a) (in part), 589(4) (b), 603 (in part)	

† As amended in 1959 report.

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Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 91		
91.1 (new in part)	202 (part of first sentence), 208 (in part)	
91.2(a)	202 (part of first sentence), 203 (first sentence), 207 (part of first sentence), 208 (in part)	39
91.2(b)	204	
91.2(c)		40(3), 40(5)
91.3 (new in part)	492	
91.4	207 (part of first sentence, last sentence)	43 (first sentence of first paragraph, second paragraph)
91.5 (new in part)	205	
91.6	980-a	
†91.7(a) (new in part)	1320, 1321, 1322, 1323, 1324	294(9)
91.7(b)		294(4), 294(5), 294(6)
91.7(c)		294(7)
91.7(d)		294(8)
91.7(e)		294(3) (first and second sentences)
91.7(f)		294(1) (first sentence)
91.7(g)		294(2) (first sentence)
91.8	1448(1)	
TITLE 94		
94.1(a)	196 (first sentence), 198, 198-a; *cf.* 199	35 (first paragraph and part of last paragraph), 36 (part of first sentence), 37 (first sentence and part of last sentence)
94.1(b)		35 (part of last paragraph), 37 (part of last sentence)
94.1(c) (new)		
94.2(a)		36 (part of first sentence)
94.2(b)	1493 (part of first paragraph)	
94.2(c)	558	
94.2(d)	196 (last sentence)	36 (part of first sentence)
94.3	1493 (part of first paragraph, second and third paragraphs)	
TITLE 110		
110.1	1202	
110.2 (first sentence)	1203	
110.2 (last sentence)	155	
110.3	1206	

† As amended in 1959 report.

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 111		
111.1	1283 (second sentence), 1285	
111.2(a)	1290 (first sentence)	
111.2(b)	1290 (second sentence)	
111.2(c)	1298	
111.3(1)	1296(1)	
111.3(2)	1296(2), 1296(3)	
111.3(3)	1296(4), 1296(5), 1296(5-a)	
111.4	1296(6), 1296(7)	
111.4(a) (new)		
111.4(b)	1287 (in part)	
111.4(c) (first sentence)	1291 (third sentence of last paragraph)	
111.4(c) (second sentence)	1296 (first sentence of last paragraph)	
111.4(c) (last sentence)	1297	
111.4(d)	1296 (second and third paragraphs)	
111.4(e)	1295	
111.5	1299	
TITLE 121		
121.1(1)	978 (part of first sentence)	
121.1(2)	978 (part of second sentence)	
121.1(3)	979-a (in part)	
121.2 (new in part)	980 (in part)	
121.3	979 (in part)	
TITLE 122		
122.1(a)	133	
122.1(b)	134 (in part), 134-a (in part), 136 (in part), 137 (in part)	
122.1(c)	135 (in part)	
122.1(d)	136 (in part)	
122.2	134-a (in part)	
122.3		30 (part of first sentence)
122.4		30 (last two sentences) (in part)
122.5		34 (in part)
122.6(1)		32 (part of third sentence)
122.6(2)		32 (first and second sentences)
122.7 (first sentence)	137 (part of first sentence)	32 (fourth sentence)
122.7 (second, third and fourth sentences)		32 (fifth and sixth sentences), 33
122.7 (last sentence)		32 (last sentence)
122.8	137 (part of last sentence)	
TITLE 123		
123.1	157, 564 (first and second sentences), 891 (first sentence); *cf.* 887	25(1)

TABLE II—Continued

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
123.2(a)	156 (part of first sentence), 565 (second sentence), 698 (part of first sentence), 853, 1264 (second paragraph)	25(2), 25(4), 27
123.2(b)	565 (first sentence), 891 (last sentence)	
123.2(c) (first sentence)	148 (first sentence); *cf.* 888	
123.2(c) (last sentence)	160 (first sentence)	
123.2		25(5)
123.3(a) (first sentence)	150-a(1)	
123.3(a) (last sentence)	150-a(3) (last sentence)	
123.3(b)	150-a(2)	
123.3(c)	150-a(3) (first three sentences)	
123.3(d)	150-a(4)	
123.4(a)	569	
123.4(b)	95 (part of first sentence), 148 (second sentence)	
123.5	150-a(3) (part of second sentence), 565 (last sentence), 567, 864 (part of first sentence), 955 (first sentence, part of second sentence), 1524 (in part)	
123.6(a) (first sentence)	151 (first sentence), 955 (part of second sentence), 1104 (part of first sentence), 1526 (first sentence), 1527 (second sentence)	
123.6(a) (second sentence)	1104 (part of first sentence)	
123.6(a) (last sentence)	151 (last sentence)	
123.6(b)	566, 955 (last sentence); *cf.* 1104 (part of first sentence), 1527 (second sentence)	25(6)
123.7(a) (first sentence)	151 (second, third, and sixth sentences), 852, 955 (third sentence), 1104 (fifth sentence), 1106 (first and second sentences), 1526 (second sentence)	
123.7(a) (second sentence)	854 (first sentence)	
123.7(a) (last sentence)	156 (part of first sentence)	
123.7(b)	151 (seventh sentence), 863	
123.8 (first sentence)	124(2) (last sentence of first paragraph), 149 (first and second sentences), 900 (first and second sentences), 948 (in part), 976 (second sentence), 1375(3) (in part), 1394 (second paragraph), 1528; *cf.* 842	
123.8 (last sentence)	149 (third sentence), 900 (third sentence)	
123.9	153	
123.10(a) (first sentence)	158(1)	
123.10(a) (second sentence)	158(2) (second sentence)	

TABLE II—Concluded

Proposed Rules Compared with Present Provisions

Proposed Rules	Civil Practice Act Sections	Rules of Civil Practice
TITLE 123 — *Concluded*		
123.10(a) (third sentence)	158(3) (first sentence and part of second sentence)	
123.10(a) (fourth sentence)	158(3) (part of second sentence)	
123.10(a) (fifth sentence)	158(4) (in part)	
123.10(a) (last sentence)	158(5) (in part)	
123.10(b)	158(5) (in part)	
123.11 (first sentence)		25(3)
123.11 (last sentence)	160 (second sentence)	
123.12 (first sentence)	162, 570, 571 (first sentence)	
123.12 (last sentence)	820	
123.13	159	
TITLE 150		
150.1(a) (new in part)	1522 (in part), 1524 (in part); *cf.* 198-a, 199	
150.1(b)	1522 (in part), 1523	176, 177 (in part)
150.2	1524 (in part), 1529	
150.3 (first sentence)	1525	
150.3 (last sentence)	1524 (in part)	
TITLE 160		
160.1(a)	1539, 1541	
160.1(b)	1540	
160.1(c)	1540-a	

TABLE III

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 1		
1	1.1 (in part)	*cf.* 1.1
4 (omitted)	*cf.* 1.3(1)	
5 (omitted)	*cf.* 1.3(1)	
6	1.3(1) (in part)	
7(5)	13.1(a) (2)	
8	1.2(a)	
ARTICLE 2		
10(1)	5.1 (part of first sentence)	
11 (first paragraph)	5.3(a); *cf.* 5.3(d)	
11 (last paragraph)	5.6(d)	
12	5.10(b) (in part)	
13 (first sentence)	5.2	
13 (last sentence)	5.9(a)	
14	5.6(b) (1)	
15	5.6(a)	
16	5.3(b) (1), 5.3(c)	
17	5.3(b) (3) (in part)	
18	5.3(b) (3) (in part)	
19	5.7	
20	5.10(a)	
21 (second sentence omitted)	5.10(b) (in part)	
22 (omitted)		
23	5.5	
24	5.4(a)	
25	5.4(b)	
26	5.3(d) (last sentence)	
27	5.9(b)	
28 (omitted)	*cf.* 5.8	
28-a	5.9(c)	
29 (omitted)	*cf.* 5.8	
30		26.9(b) (part of first sentence), 31.1(a)(5) (in part)
31 (omitted)	*cf.* 5.12(a)	
32 (omitted)	*cf.* 5.12(a)	
33	5.12(b)	
34 (omitted in part)	5.12(a) (in part); *cf.* 5.3(d)	
35		to be transferred to Real Property Law
36		to be transferred to Real Property Law
37		to be transferred to Real Property Law
38		to be transferred to Real Property Law
39		to be transferred to Real Property Law
40		to be transferred to Real Property Law
41		to be transferred to Real Property Law
41-a		to be transferred to Real Property Law

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Propcsed Rules
ARTICLE 2 — *Concluded*		
42		to be transferred to Real Property Law
43	5.8 (in part)	
44 (last sentence not yet considered)	†5.11(b) (in part)	
45	†5.11(b) (in part)	
46	5.12(c)	
47(1)	5.13(3)	
47(2) (omitted)		
47-a(1)	5.13(4)	
47-a(2) (omitted)		
47-b	†5.11(a)	
48(1)	5.13(2)	
48(2)	5.14(2) (in part)	
48(3) (omitted)	*cf.* 5.14(7)	
48(4)	5.14(5)	
48(5) (first sentence)	5.13(6) (in part)	
48(5) (last sentence)	5.6(c) (in part)	
48(6)	5.13(7)	
48(7)	5.12(d)	
48(8)	5.13(8), 5.14(4)	
49(1)	5.14(1)	
49(2)	5.15(1) (in part)	
49(3)	5.14(2) (in part)	
49(4)	5.14(3)	
49(5) (omitted)	*cf.* 5.14(5), 5.14(6), 5.14(7)	
49(6)	5.14(7)	
49(7)	5.14(4) (in part), 5.14(6)	
49(8)	5.14(8)	
49(9)	5.14(9)	
50(1)	5.15(3) (in part), 5.14(7) (in part)	
50(2)	5.14(2) (in part)	
51(1)	5.15(1) (in part)	
51(2)	5.15(2)	
51(3)	5.15(3) (in part)	
51-a	5.16(a)	
51-b	5.16(b)	
52	5.15(4)	
53	5.13(1)	
54 (omitted in part)	5.1 (part of first sentence)	
55	5.1 (part of first sentence)	
56	5.6(e)	
57	5.10(c)	
58 (omitted)		
59		to be transferred to Personal Property Law
60	5.8 (in part)	
61	5.3(d) (1) (in part)	

† As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 3		
62 (part not yet considered)	1.1	†33.2
65 (last sentence)		†33.3(c) (part of first sentence)
77		
80	14.1 (part of first and second sentences)	
81		43.1(d) (in part), 74.5 (in part)
ARTICLE 4		
82		23.15(b) (part of first sentence)
83		23.15(b) (part of first sentence), 23.18
84 (last sentence omitted)		23.15(a) (in part), *23.20 (part of first sentence)
85 (last sentence omitted in part)		23.15(b) (part of first sentence), 27.4; *cf.* 24.3
86		23.15(a) (in part)
87 (omitted)		*cf.* *23.20
88 (omitted)		*cf.* 23.15
89 (first sentence omitted, second sentence not yet considered)		*cf.* 23.15 (b)
90 (omitted in part)		23.19 (first sentence)
90-a		23.19 (second sentence)
91 (omitted)		
95 (part not yet considered)		123.4(b)
ARTICLE 5		
96		24.2(a) (in part), 24.3, 27.4
96-a		24.2(a) (in part)
97		24.2(b)
ARTICLE 6		
99(1) (part not yet considered)	5.1 (last sentence)	80.4(c)
99(2)		*23.21 (in part)
99(3)		80.4(b)
ARTICLE 7		
100 (omitted)		
101		27.7(a) (last sentence), 32.2 (in part), 33.11(a) (first sentence)
ARTICLE 9		
105 (part not yet considered)		25.1(b) (in part), 26.13(b) (in part), 32.1(f) (first sentence)

* As amended in 1958 report.
† As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 9 — *Concluded*		
106 (part not yet considered)	16.6(a)(3) (in part)	
107		80.10
108		50.5(a) (in part)
109		25.1(b) (in part), 50.9(a)
111 (omitted in part)		†26.8(a) (last sentence)
ARTICLE 10		
113		33.1
114 (omitted)		
115 (omitted in part)		†33.2 (in part)
116 (omitted)		*cf.* †33.2
117 (first sentence)		†33.5(a) (second sentence), †33.5(b) (first and second sentences)
117 (last sentence)		†33.6
118		†33.8 (first sentence)
119 (omitted)		
ARTICLE 11		
120 (first sentence)	15.8 (part of first sentence)	75.1(a) (in part), 75.1(b) (part of first sentence)
120 (second paragraph and last sentence of first paragraph)		75.2
121 (first sentence)	15.8 (second sentence)	
121 (second sentence)	15.8 (last sentence)	
121-a (first paragraph)		75.3 (in part)
121-a (last paragraph omitted)		
122		75.1(b) (second and third sentences) (in part), 75.1(c) (in part)
123 (first sentence of first paragraph)		75.4(a) (in part)
123 (second sentence of first first paragraph)		75.4(b)
123 (last two sentences of first paragraph) (omitted)		
123 (second paragraph)		75.4(c)
124		75.5 (in part), 123.8 (first sentence)
125	15.1 (part of last sentence)	
ARTICLE 12		
126		43.1(e) (in part), 74.2 (first sentence)

†As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 13		
127		33.10(a) (first sentence)
128		†33.2
129		†33.2
130(1)		†33.4(a), †33.4(b) (part of first sentence)
130(2) (omitted in part)		†33.3(b), †33.3(c) (part of first sentence)
131 (omitted in part)		33.12
ARTICLE 14		
133		122.1(a)
134 (omitted in part)		122.1(b) (in part)
134-a		122.1(b) (last sentence), 122.2
135 (omitted in part)		122.1(c)
136 (omitted in part)		122.1(b) (last sentence), 122.1(d)
137 (first sentence) (omitted in part)		122.7 (in part)
137 (last sentence) (omitted in part)		122.1(b) (last sentence), 122.8
ARTICLE 15		
138		80.11 (in part)
139		80.11 (in part); *cf.* 36.3(a)(1)
140 (omitted)		*cf.* 80.11
ARTICLE 17		
148		123.2(c) (first sentence), 123.4(b)
149 (last sentence omitted)		123.8; *cf.* 80.9(b)
150 (omitted)		*cf.* 32.1(f)
150-a (part not yet considered)		123.3
151		123.6(a) (first and third sentences), 123.7(a) (part of first sentence), 123.7(b) (in part)
152 (omitted)		*cf.* 123.2(a)
153		123.9
154 (omitted)		
155		110(2) (last sentence)
156 (second sentence omitted)		123.2(a), 123.7(a) (last sentence)
157		123.1
158		123.10
159		123.13
160		123.2(c) (second sentence), 123.11 (second sentence)
161 (omitted)		*cf.* †80.9(d)
162		73.2(b) (in part), 123.12 (first sentence)

†As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 18		
163 (third sentence and part of second sentence omitted)		32.3(b), 32.3 (e)
163-a (last paragraph omitted)		32.3(b)(2) (second sentence)
164 (last clause omitted)		32.3(c) (in part) 32.3(b) (2) (third sentence)
ARTICLE 21		
174-a		†31.10(a), 31.10(d) (in part)
174-b		31.10(b)
174-c		31.10(c) (in part)
175		31.12 (in part)
176		31.12 (in part)
177		31.11 (in part)
178		31.11 (in part)
179 (omitted)		
ARTICLE 22		
180 (omitted)		
181		31.7 (in part)
ARTICLE 23		
182 (first, third and last sentences)	4.4(a)	
182 (second sentence)	4.4(b) (in part)	
182-a	4.5 (in part)	
182-b	4.6(b), 4.5 (in part)	
183	4.8	
184(1) (omitted)		
184(2)	*4.7(a)	
184(3) (omitted in part)	4.9	
184-a (second paragraph omitted)	4.4(e)	
185	4.11	
186	4.1	
187	4.10(a)	
188	4.10(d) (in part)	24.2(b)
ARTICLE 24		
191 (omitted)		*cf.* 23.1(a), 27.1 (first sentence)
192		23.3 (third and fourth sentences), 27.1 (second sentence)
193(1)		23.1(a) (part of first sentence), 23.1(b) (second and third sentences) (in part)
193(2)		23.1(b) (first and second sentences) (in part), 23.3 (first sentence)

*As amended in 1958 report.
†As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
193(3) (omitted)		
193-a(1)		23.7; *cf.* 26.1, †26.8(a)
193-a(2) (part of first sentence omitted)		23.8, 26.2 (second, third and fourth sentences) (in part)
193-a(3)		23.9; *cf.* †26.8(a)
193-a(4)		23.10 (in part)
193-a(5)		41.11(c)
193-a(6)		23.11; *cf.* †26.8(a)
193-b(1) (clause (c) omitted)		23.12
193-b(2)		23.13
193-b(3)		23.14 (first three sentences)
193-c (first sentence omitted, second and last sentences not yet considered)		*cf.* 23.1(a)
194		23.1(a) (in part)
195		23.5(a) (first sentence)
196		94.1(a) (in part), 94.2(d) (in part)
197 (omitted)		
198		94.1(a) (in part)
198-a		94.1(a) (in part)
199 (omitted)		*cf.* 94.1(a)
200 (omitted)		
201 (omitted)		*cf.* 23.4
202 (part of first sentence and second sentence omitted)		91.1 (in part), 91.2(a) (in part)
203 (last sentence omitted)		91.2(a) (in part)
204		91.2(b)
205		91.5 (in part)
206 (omitted)		
207		91.2(a) (in part), 91.4 (in part)
208		91.1 (in part), 91.2(a) (in part)
210 (omitted in part)		*23.4 (in part)
212(1) (last sentence not yet considered)		23.2(a)
212(2) (last sentence not yet considered)		23.2(b)
212(3)		23.2(c)
213		23.22; *cf.* 23.19 (last sentence)
215 (third sentence not yet considered)		23.23
217 (first sentence) (omitted in part)		25.6 (part of first sentence)
217 (second sentence) (not yet considered)		
217 (last sentence)		25.6 (part of second sentence)

*As amended in 1958 report.
†As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 25		
218 (first sentence)	3.4 (first sentence), 5.3(b)(1)	
218 (last sentence)	3.4 (last sentence)	
218-a		26.15 (in part)
219		25.1(a)
220 (second, third and last sentences omitted)		32.3(a)
221		25.2(a)
222-a (first sentence)		23.24 (in part)
222-a (second sentence)		25.2(e)
222-a (third sentence) (not yet considered)		
222-a (last sentence)	13.1(c) (last sentence); *cf.* 13.1(a)(3)	61.9(a)
223 (omitted in part)		23.24 (in part)
224 (omitted)		*cf.* 25.2(b)(2), 25.2(c)
225(1) (second sentence omitted)		25.2(c)
225(2)		25.2(d)
225(3)		25.2(b)(1)
226 (omitted)		
227		25.2(b)(3)
227-a (part of first paragraph, second paragraph)	3.3 (in part)	
227-a (last paragraph) (omitted in part)		*26.2 (part of last sentence)
228(1) (omitted in part)		25.2(f)(1)
228(2)		25.2(f)(2)
228(3) (omitted in part)		25.2(f)(3)
228(4)		25.2(f)(4)
228(5)		25.2(f)(5)
228(6)		25.2(f)(6)
228(7)		25.2(f)(7)
228(8)		25.2(f)(8) (in part)
228(9) (first sentence)		25.2(f)(8) (in part)
228(9) (last sentence)		*26.2 (part of last sentence)
229(1)		25.2(f)(8) (in part)
229(2) (first sentence)		25.2(f)(8) (in part)
229(2) (last sentence)		*26.2 (part of last sentence)
229(3)		25.2(f)(8) (in part)
229-b (omitted in part)	*cf.* 3.1, 3.2(1)	25.2(b) (in part), 25.3 (in part)
230 (omitted)		*cf.* 25.2(b)(2)
231 (first clause) (omitted)		*cf.* 25.2(b) (2)
231 (second and third clauses) (not yet considered)		
232 (omitted in part)		25.5(a) (in part); *cf.* 25.4
232-a (omitted)		*cf.* 25.4, 25.5(a)
232-b (omitted)		*cf.* 25.4, 25.5
233 (first sentence) (omitted in part)		25.3 (in part)

*As amended in 1958 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
233 (second sentence) (omitted in part)		25.3 (in part)
233 (third sentence) (omitted)		
233 (last sentence)		*26.2 (part of last sentence)
234 (omitted)		
235 (first sentence) (omitted in part)		25.3 (in part)
235 (second sentence) (omitted)		
235 (last sentence)		*26.2 (part of last sentence)
ARTICLE 26		
237-a (part of first sentence)		*31.1(a) (2) (in part)
237-a(3)		33.9
ARTICLE 27		
241		26.4 (first sentence); *cf.* 26.5
242		26.9(b) (in part)
243		26.9(a) (last sentence)
244 (last sentence omitted)		26.13(a)
245		26.13(b) (in part)
245-a		26.13(b) (in part)
245-b		26.13(b) (in part)
246 (omitted)		*cf.* 26.5
247 (omitted)		
248		26.11(a) (in part), 26.11(b) (in part)
249		26.11(a) (in part), 26.11(b) (in part)
250		26.11(a) (in part), 26.11(b) (in part)
251		26.11(a) (in part), 26.11(b) (in part)
252		26.11(a) (in part), 26.11(b) (in part)
253		26.11(c)
254		26.1 (part of first sentence)
255(1)		26.3; *cf.* 32.1(c)
255(2)		26.4 (part of fifth and sixth sentences)
255(3)		†26.8(a) (first sentence)
255-a (omitted)		*cf.* 26.4, 26.9(a)
256 (omitted)		
257		26.2 (first sentence)
258		24.1, 24.3 (part of first sentence), 26.4 (part of fourth, fifth and sixth sentences); *cf.* 27.4
260		26.1 (part of first sentence)
261(1)		26.9(a) (in part)

*As amended in 1958 report.
†As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 27 — *Concluded*		
261(2)		26.1 (part of second sentence)
262 (last sentence of first paragraph and second and last paragraphs omitted)		24.3 (part of first sentence), 26.4 (part of fifth and sixth sentences); *cf.* 27.4
263 (last sentence not yet considered)		26.2 (part of third and fourth sentences)
264 (last sentence omitted)		26.2 (part of second and third sentences), 26.10(b) (second sentence); *cf.* 26.1, †26.8(a)
266		26.10(a) (in part)
267(1)		26.10(c)
267(2)		26.10(d)
267(3)		26.10(e)
268		26.10(a) (in part)
269 (first sentence omitted, last sentence not yet considered)		*cf.* 26.10(a)
271 (first sentence omitted)		26.2 (part of second, third and fourth sentences), 26.10(f) (second sentence)
272		26.1 (part of fourth sentence), 26.4 (part of fifth and sixth sentences), 26.9(a) (part of first and second sentences)
273		26.2 (part of fourth sentence)
274		26.1 (last sentence)
275		26.14 (first sentence)
276 (omitted)		*cf.* 26.11
277 (omitted)		*cf.* 31.1(a)
278 (omitted)		*cf.* 31.1(d)
279 (omitted in part)		31.1(d) (part of last sentence)
280 (omitted)		*cf.* 31.1, †33.5(a) (part of first sentence)
281 (omitted)		*cf.* 31.1 (in part)
283 (last sentence omitted)		31.1(e), 26.12(c) (last sentence)
ARTICLE 28		
285(1)		23.6(a) (in part)
285(2)		23.6(a) (in part)
285(3)		23.6(b), 26.2 (part of second, third and fourth sentences)
285(4)		23.6(c)
285(5)		23.6(d)
285(6)		23.6(e)
285(7)		23.6(f)
285(8)		23.6(g)
285(9)		23.6(h)
285(10)		23.6(i)

†As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 29		
288		34.1(a) (in part), 34.6(a) (in part)
289		34.6(a) (in part)
290		34.2(b) (in part), 34.7(a) (in part), 34.8 (in part), 34.10 (in part)
291 (last three sentences omitted)		34.3(a) (part of first sentence), 34.3(b) (first sentence)
292		34.5 (in part), 34.6(a) (in part)
292-a		34.1(a) (in part), 34.6(a) (in part)
293		34.2(d)
294		34.3(a) (in part), 34.7(a) (in part), 34.12(a) (in part)
295		*34.2(c) (in part)
296		34.10 (in part)
296-a (omitted)		*cf.* 34.3(a) 34.4(a), 34.6(b)
297		34.6(b) (in part)
298 (second and last sentences omitted)		34.2(b) (in part)
299		34.6(a) (in part), 34.6(b) (in part), 34.24 (in part), 34.25 (in part), 38.1 (in part), 38.3 (in part), 38.6(a) (in part)
300		34.9
301		34.12(a) (in part)
302		34.2(a) (in part), 34.7(a) (in part), 34.8 (in part), 34.12(b) (in part), 34.15(a) (in part)
303		34.5 (in part), 34.16(a) (in part), 34.16(c) (in part)
304		34.16(a) (in part)
305		34.14 (in part), 34.16(a) (in part)
306		34.21 (in part)
306-a		34.21 (in part)
307		34.6(b) (in part)
308		27.6, *34.2(c) (part of first sentence), 34.6(a) (in part)
309		34.12(a) (in part)
309-a		34.13
ARTICLE 30		
310		34.2(e) (in part)
311		34.2(e) (in part)
312		34.2(e) (in part), 34.15(b) (in part)

*As amended in 1958 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 31		
313		*34.2(c) (in part), 34.16(a) (in part)
314		34.10 (in part)
315		*34.2(c) (in part), 34.14 (in part)
316		*34.2(c) (in part)
317		*34.2(c) (in part)
318		*34.2(c) (in part), 34.12(a) (in part), 34.24 (in part); *cf.* 34.17
319		*34.2(c) (in part), 34.12(b) (in part), 34.15(a) (in part), 34.15(b) (in part)
320		*34.2(c) (in part), 34.12(b) (in part), 34.15(a) (in part), 34.15(b) (in part), 34.15(c) (in part)
321		*34.2(c) (in part)
ARTICLE 32		
322		34.23
324		34.20 (in part)
325		34.24 (in part), 34.25 (in part)
326 (omitted)		
327		34.20 (in part)
328		34.6(a) (in part)
ARTICLE 33		
329		44.30 (in part)
330		44.30 (in part)
331		44.27
332		44.26
333		to be transferred to Negotiable Instruments Law
334 (last phrase omitted)		44.7
335		to be transferred to Real Property Law
336(1)		44.30(in part)
336(2)		44.30(in part)
336(3) (omitted)		
336(4)		44.30 (in part)
337		to be transferred to Civil Rights Law
337-a		to be transferred to Civil Rights Law
338		26.4; *cf.* 26.13(c)
338-a		to be transferred to Civil Rights Law

*As amended in 1958 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
339		26.9(b); *cf.* 26.13(c)
340 (omitted)		
341		to be transferred to Decedent Estate Law
341-a		44.18
342		to be transferred to General Construction Law
343		34.16(d) (last sentence)
343-a		44.4; *cf.* 34.16(a)(1), 34.16(d)
344		44.25
344-a		44.1
345 (omitted)		*cf.* 34.2(a)
345-a	11.6	
346		44.2
347 (omitted)		*cf.* 44.10
348		44.8
348-a		to be transferred to Real Property Law
349	11.2	
350		44.3
351	11.5 (in part)	
352	11.4(a), 11.4(b)	
353	11.3(a)	
354	11.3(b), 11.4(c), 11.5 (in part)	
355 (part of last sentence omitted)	11.1	
356 (first sentence omitted)		to be transferred to Agriculture and Markets Law
357		34.12(a) (in part), 38.7(a) (part of first sentence)
358 (second sentence omitted)	17.5 (in part)	34.12(a) (in part), 38.7(a) (second sentence)
359		32.1(b), 38.7(c), 34.12(a) (in part), 38.7(a) (part of first sentence)
360		38.7(b) (in part)
361		38.7(b) (in part)
362		38.7(b) (in part)
363		38.7(b) (in part)
364		38.7(b) (in part)
365 (omitted in part)		38.7(b) (in part)
366		44.12
367		44.11
368		to be transferred to Negotiable Instruments Law
369		to be transferred to Negotiable Instruments Law
370 (last sentence omitted)		44.23
371		44.22
372		44.17
373		44.9
374		34.15(*c*); *cf.* 44.9

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 33 — *Concluded*		
374-a		44.9
374-b (first three sentences)		44.29
374-b (last sentence)		44.25
375		44.19
375-a		44.24
375-b		44.20
376		to be transferred to Real Property Law
377		to be transferred to General Corporation Law
378		to be transferred to General Construction Law
379		to be transferred to Real Property Law
379-a		to be transferred to Real Property Law
380 (first sentence)		44.1(a), 44.1(b)
380 (second and last sentences)		to be transferred to Public Officers Law
380-a		44.1
381		44.1
382		44.30 (in part)
383		44.30 (in part)
383-b		44.16
384(1)		44.28 (first sentence)
384(2)		44.30 (in part)
384(3)		to be transferred to Real Property Law
384(4)		to be transferred to Real Property Law
385		44.14
386		44.28 (first sentence)
387(1)		44.31(a)
387(2) (omitted)		*cf.* 44.25
387(3) (omitted)		*cf.* 44.9, 44.25
388		44.30 (in part)
389		44.13 (in part)
389-a		44.13 (in part)
390		44.30 (in part)
391		44.30 (in part)
392 (first sentence)		44.28 (first sentence)
392 (last sentence)		44.28 (last sentence)
393		44.15; *cf.* 44.30(a)
394(1)		44.31(b) (in part)
394 (2)		44.31(b) (in part)
394(3) (omitted)		*cf.* 44.25
394(4) (omitted)		*cf.* 44.25
395		44.32(b)
396		44.32(d)
397 (omitted)		
398		44.32(c)
398-a(1) (first paragraph)		44.32(a)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
398-a(1) (second paragraph)		44.25
398-a(2)		44.32(a)
398-a(3)		44.32(a)
398-a(4)		44.32(a)
398-b		44.30 (in part)
398-c		44.12
398-d		44.25
399		44.30 (in part)
400		44.30 (in part)
401		44.21
402		44.30 (in part)
403		38.1 (in part), 38.2(a) (in part)
403-a		38.5(a)
404		38.3 (in part)
405		38.6(a) (in part)
406(1)		38.2(a) (in part), 38.3 (in part)
406(2)		38.6(b) (in part)
406(3)		38.6(b) (in part)
406(4)		38.6(b) (in part)
406(5)		38.6(b) (in part)
406-a (omitted)		
407		38.6(a) (in part)
409 (omitted)		
410		38.2(b) (in part)
411		38.1 (in part), 38.2(a) (in part), 38.4 (in part), 38.5(b) (in part)
412		38.2(b) (in part)
413		38.1 (in part), 38.2(a) (in part), 38.2(b) (in part), 38.5(b) (in part)
414		38.5(b) (in part)
415		38.2(b) (in part)
416		38.2(b) (in part)
417		38.2(b) (in part)
418		38.2(b) (in part)
419		38.2(b) (in part)
420		38.2(b) (in part), 38.6(a) (in part)
ARTICLE 34		
422 (omitted)		
423 (omitted)		
424		26.10(f) (first sentence); *cf.* 41.1, 41.2(c)
425		41.1
426(1)		41.2(c) (part of first sentence)
426(2)		41.2(c) (part of first sentence)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 34 — *Concluded*		
426(3)		41.2(c) (part of first sentence)
426(4) (omitted)		
426(5) (fourth and fifth sentences omitted)		41.2(a) (in part), 41.2(d) (in part)
426-a		41.2(a) (in part), 41.2(c) (in part), 41.2(d) (in part)
427		42.1 (in part)
428		42.1 (in part)
429 (last two sentences omitted)		41.2(b)
430 last sentence omitted)		42.2 (first sentence)
431 (omitted)		*cf.* 40.1
432 (omitted)		
433 (first sentence) (omitted in part)		*cf.* 36.2(a)
433 (last sentence) (omitted)		*cf.* 31.6(a)
434		26.13(c) (ir part)
435		40.8
436		40.4
437		40.3
439 (last sentence omitted)		42.3(b)
440 (first, third and fourth sentences omitted, last sentence not yet considered)		42.3(b)
442 (second and last sentences omitted)		42.3(c)
443(1) (omitted)		
443(2)		24.3 (part of first sentence), 40.1; *cf.* 27.4
443(3)		24.3 (last sentence); *cf.* 27.4
444 (omitted)		
445		40.7 (first sentence)
446		40.7 (last sentence)
447		45.3 (in part), 45.4(d) (in part)
448		41.5
449-a		41.6
450 (last sentence omitted)	*cf.* 16.6(a) (3)	41.8
451		41.9
452		41.10(a) (first sentence)
453		To be transferred to Judiciary Law
454 (part to be transferred to Judiciary Law)		41.10(a) (second sentence)
455		41.10(b)
457-a(1)		45.1 (fourth sentence)
457-a(2)		45.1 (second and third sentences)
457-a(3)	16.3(a) (2) (v)	45.4(a) (in part)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
458		41.11(a) (second and third sentences)
459		41.11(a) (first sentence), 41.11(c), 41.12 (in part)
460 (omitted)		*cf.* *31.2(a)
462 (omitted)		
463 (second paragraph omitted)		41.13(b)
463-a (part of first sentence and second sentence omitted)		41.13(a)
464	14.1 (part of first sentence)	43.1(d) (in part), 43.2(b)
465	14.1 (part of first sentence)	43.1(d) (in part), 43.2(a)
466 (part of first sentence omitted)	14.1 (part of first sentence)	42.2 (first sentence), 43.2(b) (in part)
467	14.1 (part of first sentence)	42.2 in part)
468 (last paragraph omitted		43.1(b)(1) (first and last sentences)
469 (last sentence of first paragraph and second paragraph omitted)	14.1 (in part)	43.2(c), 43.3(a)
470(1)		43.2(d) (first sentence)
470(2)		43.2(d) (first sentence)
470(3)		43.2(d) (last two sentences)
471		42.3(a); *cf.* 43.3(b)
ARTICLE 35		
472		50.1 (first sentence)
473	1.4	
474(1) (first two sentences) (omitted)		*cf.* 50.1 (first sentence)
474(1) (last two sentences) (not yet considered)		
474(2)		50.2; *cf.* 24.3, 27.4
475 (third sentence)		*cf.* 27.4
476 (omitted in part)		45.1 (in part), 50.2; *cf.* *31.2(a), 31.2(d)
478 first sentence and last two sentences)		50.6(d)
478 (second sentence)	13.3(a)(4)	
479		†26.8(a) (part of last sentence), 31.6(b) (last sentence)
480 (first sentence)	12.2; *cf.* 12.1(c) (first sentence)	
480 (last sentence)	12.1(a) (in part)	
480-a		to be transferred to Insurance Law
481 (last sentence omitted)	12.3	
482		31.7 (last sentence), 50.3

* As amended in 1958 report.
† As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 35 — *Continued*		
483 (omitted)	*cf.* 3.1	
484		50.4
485 (second sentence omitted)		31.6(a) (in part)
486		31.6(a) (first and second sentences) (in part), 31.6(e) (in part)
487 (omitted in part)		31.6(a) (in part), 31.6(e) (part of first sentence)
489		31.6(a) (in part)
490		31.6(b) (first two sentences), 31.6(e) (in part), 43.2(c) (in part)
491 (omitted)		*cf.* 31.6(f)(1)
492		91.3; *cf.* 31.6(h)
493(1)		31.6(a) (in part)
493(2)		31.6(e) (part of last sentence)
494		31.6(g) (in part)
494-a		31.6(a) (part of first sentence), 31.6(e) (in part)
495		50.6(b)
496		80.12 (second sentence)
497		80.14(b)
498(1) (first sentence) (omitted in part)		50.9(b) (part of first sentence)
498(1) (second sentence)		50.8(a) (second and third sentences)
498(1) (last sentence) (omitted)		*cf.* 50.9(b) (second sentence)
498(2)		50.9(c)
499 (omitted)		*cf.* 45.4
500		60.3(a)
501 (opening paragraph)		50.8(a) (part of first sentence), 50.8(c) (in part)
501(1)		50.8(c)
501(2)		50.8(c)
501(3)		50.8(c); *cf.* 50.8(a) (part of first sentence)
501(4)		50.8(c)
501(5)		50.8(c)
501(6)		50.8(c)
501(7)		50.8(c)
502 (all except second sentence omitted)		50.8(a) (second and third sentences)
502-a		50.8(b)
504(1)		60.1
504(2)		60.2 (part of first sentence)
504(3)		60.2 (part of first sentence)
505(1)		60.4
505(2)		60.4
505(3)		60.4
505(4)		60.5

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
505(5)		60.5
506 (omitted in part)	*cf.* 14.1 (in part)	60.3(b)
507 (omitted in part)		60.3(b)
508 (omitted in part)		60.3(b)
509 (omitted in part)	13.1(a)(5); *cf.* 13.3(a)(1) (in part)	
510(1) (first sentence)	13.1(a)(5), 13.3(a)(1) (in part), 13.3(a)(5) (in part)	
510(1) (last sentence) (omitted)		
510(2)		50.8(b)
511 (first sentence)		50.9(a), 50.9(b) (part of second sentence); *cf.* 50.4
511 (last sentence)		50.9(c); *cf.* 50.4
512 (first three sentences) (omitted in part)	13.1(a)(5)	61.12 (in part)
512 (last sentence)	13.3(a)(1) (in part)	
513 (omitted)		
514	13.3(a)(2)	
515 (last sentence omitted)	13.3(b) (first sentence)	
516	13.4	
517 (omitted)		*cf.* 50.9(b)
518		50.9(c)
519 (omitted)		
520 (omitted)	*cf.* 3.1	
521		50.5(a) (in part)
522		50.5(a) (in part)
523		50.5(a) (in part)
524		50.5(a) (in part)
525		50.5(a) (in part)
526		50.5(a) (in part)
527		50.5(a) (in part)
528 (omitted in part)		50.5(a) (in part); *cf.* 91.1, 91.3
529		50.5(b); *cf.* 80.13
530 (opening paragraph) (omitted in part)		50.10(b) (in part), 50.11(a) (opening paragraph), 50.11(a)(1)
530(1) (omitted in part)		50.10(c)
530(2) (omitted)		*cf.* 50.11(a)(1)
530(3) (omitted)		*cf.* 50.10(c)
530(4) (omitted in part)		50.11(a)(3)
530(5) (omitted)		
530(6) (first sentence) (omitted in part)		50.11(b) (part of last sentence)
530(6) (second sentence)		50.11(c)
530(6) (last sentence) (omitted)		
531		50.10(b) (in part), 50.11(a)(4)
532 (omitted in part)		50.10(b) (in part)
533		to be transferred to Personal Property Law

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 35 — *Concluded*		
534 (omitted in part)	*cf.* 13.1(a)(2)	50.10(a) (part of first sentence)
535		50.11(b) (part of first sentence)
536 (first sentence)		50.11(b) (part of first sentence)
536 (second sentence)		50.11(b) (second and last sentences)
536 (last sentence) (omitted)		*cf.* 50.11(b) (first sentence)
537		50.11(c)
539	*cf.* 13.1(a)(2)	50.10(a) (last sentence)
540		31.9(a) (in part)
541		31.9(a) (in part)
542		31.9(d)
543(1)		31.9(b) (in part)
544		31.9(b) (in part), 50.7(a) (part of last sentence), 50.7(b) (last sentence)
545		31.9(c)
546 (omitted in part)		31.13(a) (second sentence and part of first sentence)
547 (first sentence)		32.2 (first sentence)
547 (second sentence)		31.13(a) (last sentence)
547 (last sentence)		31.13(b) (first sentence)
548 (first sentence)		31.13(b)(1)
548 (second sentence) (omitted)		
548 (third sentence)		31.13(b)(2), 50.7(b) (fifth sentence)
548 (fourth sentence)		31.13(b)(3) (in part)
548 (last sentence) (omitted in part)		31.13(b)(5)
ARTICLE 36		
549 (first paragraph)		45.4(a) (part of first sentence), 45.4(b) (first sentence)
549 (second paragraph)		45.4(b) (second sentence)
550 (omitted)		
551 (omitted)		
552		45.4(a) (part of first sentence), 45.4(b) (part of first sentence)
553		45.3 (part of first sentence)
554 (first sentence omitted)		*cf.* 45.4(a) (in part), 45.4(b) (in part)
554 (second sentence not yet considered)		
555 (omitted)		
556		45.3 (part of first sentence)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 37		
557(1)		80.1 (in part)
557(2) (omitted in part)		80.1 (in part); *cf.* 23.16, 23.17, 23.18, 23.19, *23.20
557(3) (omitted in part)		80.1 (in part); *cf.* 23.15(a), *23.20
558		94.2(c)
559 (omitted in part)		80.2(b)
560 (omitted)		*cf.* 80.2(a)
561 (last sentence omitted)		80.1 (last sentence)
562 (last paragraph omitted)		80.5
562-a (last paragraph omitted)		80.7
563 (omitted)		*cf.* 32.3
564 (last sentence omitted)		80.8 (in part), 80.9(c) (in part), 123.1 (in part)
565 (second sentence omitted)		80.8 (in part), 80.9(c) (in part), 123.2(b), 123.5 (in part)
566		123.6(b)
567		80.8 (in part), 80.9(c) (in part), 123.5 (in part)
568 (omitted)		*cf.* 80.9(b)
568-a (omitted)		*cf.* 80.9(b)
569		123.4(a)
570		80.8 (in part), 80.9(a)(1) (in part), 123.12 (first sentence)
571		80.8 (in part), 80.9(a)(1) (in part), 123.12 (first sentence)
572 (omitted)		
573 (part of first sentence and last sentence omitted)		†80.9(d), 80.9(e)
575 (omitted)		
576 (omitted)		*cf.* 80.18
578		*23.20 (part of third sentence)
578-a (last paragraph omitted)		80.3(c)
579		*23.20 (part of last sentence)
580 (part of first sentence and last sentence omitted)	16.6(a)(1) (in part), 16.6(a)(2) (in part)	
581	16.6(a)(1) (in part), 16.6(a)(2) (in part)	
582	16.6(a)(4)	
583(1) (omitted)		
583(2)	16.6(a)(3) (in part)	
584(1)		80.12 (in part)

*As amended in 1958 report.
†As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 37 — *Concluded*		
584(2) (omitted)		*cf.* 80.12
584-a	16.6(a)(5) (in part)	
585 (omitted)		*cf.* 80.16
586		75.4(a) (in part)
587		80.13
ARTICLE 38		
588(1)(a)	16.1(b)(1)	
588(1)(b)	16.1(a)	
588(2)	16.1(d) (in part)	
588(3) (last clause omitted)	16.1(c)	*cf.* 81.5
588(4)	16.1(b)(2)	
589(1)(a)	16.2(b)(1); *cf.* 16.2(a)(2)	
589(1)(b)	16.2(b)(2)(i)	
589(2)	16.2(a)(2) (in part)	
589(3)	16.2(a)(1)	
589(4)		81.4, 82.3
590	16.1(d) (in part), 16.2(a)(1)(ii) (in part), 16.2(b)(2)(ii), 16.6(c) (last sentence)	81.1
591		80.2(a)
592(1)		80.3(a) (in part)
592(2)		80.3(d) (in part), 80.6 (in part)
592(3)		80.3(d) (in part), 80.4(a) (in part), 80.6 (in part)
592(4)		80.3(b) (in part)
592(5)		80.4(a) (in part)
593 (last sentence omitted)		80.8 (in part)
594 (omitted in part)		80.9(a)(2) (in part), 80.9(a)(3) (in part)
595 (omitted in part)		80.9(a)(4) (in part)
596 (omitted in part)		80.9(a)(4) (in part)
597 (omitted in part)		80.9(a)(5) (in part)
598 (omitted in part)		80.9(a)(6) (in part)
598-a		80.9(b) (in part)
599		80.9(c) (second sentence)
599-a		80.9(b) (in part)
600 (omitted)		*cf.* 80.9(b)
601		80.9(a)(2)–80.9(a)(6) (in part), 80.9(b) (in part) 80.9(e) (in part)
602		81.2(a) (in part), 82.2(c) (in part)
603		81.2(b) (in part), 82.3 (in part)
604		81.5 (in part)
605	16.6(b) (first sentence)	
606		81.3 (in part)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
607 (last sentence omitted)		50.7(b) (fourth sentence), 80.16 (part of first sentence)
607-a		80.14(b) (part of first sentence)
607-b (omitted)		
607-d (first and second paragraphs)		80.16 (in part)
607-d (last paragraph) (omitted)		*cf.* 80.20
ARTICLE 39		
608	16.3(a)(1) (in part), 16.6(c) (part of first sentence)	
609(1) (omitted in part)	16.3(a)(2)(i) (in part)	
609(2) (omitted in part)	16.3(a)(2)(iii) (in part)	
609(3) (omitted)	*cf.* 16.3(a)(2)(ii), 16.3(a)(2)(iv), 16.3(a)(2)(vii)—16.3(a)(2)(ix)	
609(4) (omitted)	*cf.* 16.3(a)(2)(ii), 16.3(a)(2)(iv), 16.3(a)(2)(vii)—16.3(a)(2)(ix)	
609(5)	16.3(a)(2)(vi) (in part)	
609(6) (omitted)		
610	16.3(a)(2) (in part)	
611	16.3(a)(1) (in part)	
612		80.3(a) (in part)
613		80.9(b) (in part)
614 (omitted)		
615 (omitted in part)		80.9(a)(2)—80.9(a)(6) (in part), 80.9(b) (in part)
616 (last four sentences of first paragraph and last paragraph omitted)		80.16 (in part)
617		82.1 (in part)
618		82.1 (in part)
620		82.2(a), 82.2(b)
621		80.14 (in part)
ARTICLE 40		
622(1)	16.3(a) (in part)	
622(2) (omitted)	*cf.* 16.4	
622(3) (omitted)	*cf.* 16.4	
623(1)	16.5(a)	
623(2)	16.5(b)	
624(1)		80.3(a) (in part)
624(2)		80.3(b) (in part)
625		80.14(a) (in part), 80.14(b) (in part)
626	16.6(c) (in part), 16.6(d)	*cf.* 80.1

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 41		
631(1) (omitted in part)	16.3(a) (in part)	
631(2) (second sentence and part of first sentence omitted)	16.3(a) (in part); *cf.* 16.4	
631(3)	16.3(a) (in part)	
632		80.3(a) (in part)
633 (omitted in part)		80.14(b) (in part)
634 (omitted)		*cf.* 80.1
ARTICLE 42		
635		61.9(b) (in part)
636 (first sentence) (omitted in part)		61.9(b)
636 (last six sentences) (omitted)		
636-a		61.9(d)
637 (omitted)		
638(1) (omitted)		
638(2) (omitted)		
638(3)		60.2 (in part)
638(4)		60.2 (in part)
639 (omitted)		
640 (first sentence)		32.1(c), 61.9(a) (in part)
640 (last two sentences)		61.9(c)
640-a (omitted)		
641		61.9(a) (in part)
642 (second sentence omitted)		61.9(a) (in part)
643 (last two sentences omitted)		61.9(a) (in part)
644 (first sentence)		60.2 (in part)
644 (last two sentences) (omitted)	*cf.* 13.1(a)(1)	*cf.* 60.2
645(1) (omitted in part)		61.9(a) (in part)
645(2) (omitted)		
646 (omitted)		
647 (omitted)		
648 (first three sentences) (omitted)		
648 (fourth sentence) (not yet considered)		
648 (last sentence)		61.9(b) (in part)
649 (omitted)	*cf.* 13.1(a)(1)	*cf.* 61.18 (in part)
650 (omitted)	*cf.* 13.1(a)(2)	
651 (omitted)		
652 (omitted)		
653 (omitted)		
654 (omitted)	*cf.* 13.1(a)(2)	
655 (first sentence)		60.2 (in part)
655 (last sentence)	13.8 (part of first sentence)	
656(1) (omitted in part)	13.8 (part of first sentence)	
656(2)	13.8 (part of first sentence)	

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
656(3) (omitted in part)	13.8 (first and last sentences) (in part)	
656(4)	13.8 (second and last sentences)	
656(5) (omitted)		
656(6) (omitted)		
657 (first paragraph) (omitted)	13.8 (part of first sentence)	
657 (last paragraph)		to be transferred to Surrogate's Court Act
658 (first sentence) (omitted)	*cf.* 13.1(a)(1), 13.1(a)(3), 13.1(c) (second sentence)	
658 (last sentence)		61.9(a) (in part)
659	13.7 (in part)	
660		61.11(a) (part of first sentence), 61.13(a) (in part)
661 (omitted)		*cf.* 61.20 (in part)
662		61.11(b) (in part), 61.13(c) (in part)
663		61.11(a) (part of first sentence), 61.13(a) (in part)
ARTICLE 43		
664 (omitted)		
665	13.5(a)	
665-a	13.5(a)	
666	13.5(b)	
667	13.5(f)	
668	13.5(c)	
669 (omitted)		
670	13.6(g)	
671	13.6(a)	
672	13.6(b)	
673	13.6(a), 13.6(b)	
674	13.6(c)	
675	13.6(d)	
676	13.6(e)	
677	13.6(f)	
678	13.6(h)	
679(1) (omitted)	*cf.* 13.2	
679(2) (omitted)	*cf.* 13.1(b)	
680 (omitted in part)	15.6 (in part); *cf.* 13.2	61.14 (part of first sentence)
681	15.6 (in part)	61.14 (second sentence)
682 (omitted in part)	15.6 (in part); *cf.* 13.2	*cf.* 61.14 (first and second sentences)
683 (omitted)	*cf.* 13.2	
684(1) (first sentence)	*cf.* 13.5(e)(1), 13.5(e)(2)	*cf.* 61.1, 61.5(a), 61.5(b)(1), 61.5(b)(3)
684(1) (last sentence) (omitted)		*cf.* 25.2(f)(7)
684(2)	13.9	61.5(b)(3) (first sentence)
684(3) (omitted in part)		61.5(b)(3) (part of second sentence)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 43 — *Continued*		
684(4) (first sentence)		61.18 (first sentence)
684(4) (last sentence) (omitted in part)		61.5(b)(2) (part of first sentence)
684(6) (first sentence)		61.5(b)(2) (part of first sentence), 61.5(b)(4)
684(6) (last sentence)		61.5(b)(2) (part of first sentence)
684(7) (omitted)		*cf.* 61.5(a) (in part)
684(8) (first sentence and and last three sentences) (omitted)		
684(8) (second and third sentences)		61.5(b)(2) (second sentence)
684(8) (fourth and fifth sentences)		61.5(b)(1) (in part)
685 (omitted)		*cf.* 61.14 (first sentence), 61.16
686		61.11(a) (part of first sentence)
687 (first sentence) (omitted in part)	13.1(d)(1), 13.1(d)(4)	
687 (second sentence) (omitted in part)	13.1(b) (in part), 13.1(d)(1), 13.1(d)(4)	
687 (last sentence)		61.14 (part of first sentence)
687-a(1) (first sentence)	13.1(b), 13.1(d)(1)	
687-a(1) (second sentence)	13.1(d)(1); *cf.* 13.1(a)(4)	61.10(a) (in part)
687-a(1) (third sentence) (omitted)		*cf.* 61.2(b)
687-a(1) (last sentence) (omitted)	*cf.* 13.1(a)(4), 13.1(d)(1), 13.1(d)(2), 13.1(d)(3)	*cf.* 61.10(a)
687-a(2) (first and fifth sentences) (omitted)		
687-a(2) (second sentence) (omitted)		*cf.* 61.2(a), 61.2(b)
687-a(2) (third sentence)		61.10(a) (in part)
687-a(2) (fourth sentence)	13.9	
687-a(2) (last sentence) (omitted)		*cf.* 61.11(a) (in part)
687-a(3) (omitted)		*cf.* 61.3(a)(1), 61.3(c), 61.3(d)
687-a(4) (first sentence)		61.16 (in part); *cf.* 61.14 (last sentence), 61.17
687-a(4) (last sentence)		61.16 (in part)
687-a(5)		23.12, 23.13, 61.17
687-a(6) (first sentence)		61.6 (first sentence)
687-a(6) (second sentence)		61.4(c)
687-a(6) (third sentence) (omitted)		
687-a(6) (fourth sentence) (omitted)		*cf.* 61.14 (first and last sentences), 61.16
687-a(6) (fifth sentence) (omitted)		*cf.* 61.11(a) (in part)
687-a(6) (sixth sentence)		61.6 (last two sentences)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
687-a(6) (last sentence)		61.6 (second sentence); *cf.* 61.4(b) (in part)
687-a(7) (omitted)		*cf.* 61.2(b)
687-a(8)(a) (omitted)	*cf.* 13.1(b) (in part), 13.1(c) (in part)	
687-a(8)(b) (omitted)	*cf.* 13.5(d)	
687-a(8)(c) (omitted)	*cf.* 13.5(e)(2)	
687-a(8)(d) (omitted)	*cf.* 13.5(e)(3)	
687-a(8)(e) (omitted)		
688 (first and last sentences) (omitted)		
688 (second sentence) (omitted)		*cf.* 61.10(b) (in part), 61.11(a) (part of second sentence)
689 (first sentence)	13.4 (in part)	
689 (last sentence) (omitted)		
695 (omitted)		
696 (omitted)		*cf.* 61.17
697 (omitted)		*cf.* 61.17
698 (omitted in part)		123.2(a) (in part); *cf.* 61.17
702 (part not yet considered)		*cf.* 24.3, 27.4
706 (first sentence)		61.11(a) (part of first sentence)
706 (last sentence)		61.11(a) (second sentence)
707 (first sentence)		61.11(b) (first sentence)
707 (last sentence)		61.11(c)
708 (omitted)	*cf.* 13.1(a)(5)	
709 (omitted)		
710		61.13(b)
711		61.9(a) (in part)
712(1)		61.13(c) (in part)
712(2) (first and last sentences)		61.13(c) (in part)
712(2) (second sentence)		61.13(a) (in part)
712(2) (third sentence) (omitted)		
713		61.13(c) (in part)
714 (omitted)		
715 (last three sentences omitted)		61.13(a) (in part)
716 (omitted)		
717 (first sentence) (omitted)		*cf.* 61.13(d)
717 (last three sentences) (omitted)		
718 (omitted)		
719 (omitted)		
720 (omitted)		
721 (omitted)		
722 (omitted)		
723 (omitted)		
724 (omitted)		
725 (omitted)		

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 43 — *Concluded*		
726 (omitted)		
727 (omitted)		
728 (omitted)		
729 (omitted)		
730 (omitted)		
731 (omitted)		
732 (omitted)		
733 (omitted)		
734 (omitted)		
735 (omitted)		
736 (omitted)		
737 (omitted)		
738 (omitted)		
739 (omitted)		
740 (omitted)		
741 (omitted)		
742 (omitted)		
743 (omitted)		
744 (omitted)		
745 (omitted)		
746 (omitted)		
747 (omitted)		
748 (first sentence) (omitted)		*cf.* 61.13(d)
748 (second sentence)		61.13(d) (in part)
748 (last sentence) (omitted)		
749 (omitted)		
750 (omitted)		
751 (omitted)		
752 (omitted)		
753 (omitted)		
754 (omitted)		
755 (omitted)		
756		61.15 (first sentence)
757 (omitted in part)		61.15 (last sentence)
758 (omitted)		
759 (omitted)		
760 (omitted)		
761 (omitted)		
762 (omitted)		
763 (omitted)		
ARTICLE 44		
764 (omitted)		
765 (omitted)		
766 (omitted)		
767 (omitted)		
768 (omitted)		
769 (omitted)		
770 (omitted)		
771 (omitted)		
772 (omitted)		

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 45		
773 (first sentence) (omitted)		*cf.* 33.13, 61.1
773 (second sentence)		60.1 (in part); *cf.* 33.13
773 (last sentence) (omitted)		*cf.* 61.2(b) (in part), 61.3(a) (in part)
774(1) (omitted)		
774(2) (omitted)		
774(3)		61.19 (first and second sentences)
774(4) (first sentence)		61.3(a)(3)
774(4) (second sentence)		61.3(a)(1), 61.3(a)(2)
774(4) (last sentence)		61.3(a) (in part)
775(1) (first sentence) (omitted)		*cf.* 61.3(a)(1)
775(1) (second sentence) (omitted)		*cf.* 61.2(c), 61.3(f)
775(1) (last two sentences) (omitted)		*cf.* 61.2(b)
775(2) (first sentence)		61.3(a)(1)
775(2) (second sentence)		32.1(c), 32.1(d), 61.3(a)(1) (in part)
775(2) (third sentence and form) (not yet considered)		
775(2) (last sentence)		61.3(f)
775(3) (last sentence omitted)		61.19 (first and second sentences)
776 (last sentence omitted)		61.19 (last sentence)
777 (first sentence)		61.1(a)
777 (second and third sentences)		61.1(a)(3)
777 (fourth sentence)		61.1(a)(4)
777 (fifth sentence)		61.1(a)(1), 61.1(a)(3)
777 (sixth sentence)		61.1(a)(2)
777 (last sentence) (omitted)		
778 (first sentence)	13.1(c) (part of second sentence)	
778 (last sentence)	*cf.* 13.1(a)(1)	
779(1) (first sentence) (omitted)		*cf.* 61.3(a)(1)
779(1) (last three sentences) (omitted)		*cf.* 61.2(b)
779(2) (last sentence omitted)		61.3(a)(1)
779(3) (omitted)		
779(4) (omitted)		*cf.* 61.2(c), 61.3(f)
780 (first sentence)		61.1(a)
780 (second sentence)		61.1(a)(4)
781 (first paragraph)		61.2(b)
781 (first sentence of second paragraph)		61.20 (in part)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 45 — *Continued*		
781 (second sentence of second paragraph)		61.2(a) (in part)
781 (last two paragraphs)		61.2(b) (in part)
782(1) (first sentence) (omitted)		*cf.* 61.3(a)(1)
782(1) (last sentence) (omitted)		*cf.* 61.3(a)(2)
782(2) (last sentence omitted)		61.3(a)(1)
782(3) (first sentence)		61.1(a)
782(3) (last sentence)		61.1(a)(4)
782(4) (omitted)		
782(5) (omitted)		
782(6)		61.3(a)(1), 61.3(a)(2)
782(7) (last sentence omitted)		61.3(b) (in part)
782(a) (first sentence) (omitted)		*cf.* 61.3(c)
782(8) (second sentence)		61.1(b)
782(8) (last sentence) (omitted)		
782-a(1) (omitted)		
782-a(2) (omitted in part)		61.3(a)(3) (in part)
782-a(3) (omitted in part)		61.3(a)(3) (in part)
782-a(4) (last three sentences omitted)		61.3(a)(3) (in part), 61.3(b) (in part)
782-a(5) (last sentence omitted)		61.3(a)(3) (in part)
782-a(6) (omitted)		
782-a(7) (omitted in part)		61.20 (in part)
783(1)		38.3, 61.2(a) (in part)
783(2) (omitted in part)		38.3, 61.2(a) (in part)
783(3) (first sentence omitted)		61.3(b) (in part)
783(4)		61.19 (third sentence)
784		61.3(d) (in part)
784-a (first sentence)		61.3(a)(2), 61.18 (in part)
784-a (second sentence)		61.3(d) (in part)
784-a (last sentence) (omitted)		
785 (omitted)	*cf.* 14.1 (in part)	*cf.* 61.18 (in part)
786 (omitted)		*cf.* 33.2
787 (omitted in part)		38.4 (in part); *cf.* 33.12, 61.18 (in part)
788		61.20 (in part)
789	13.11	
791 (omitted)		*cf.* 61.3(c)
792(a)	13.1(b) (in part), 13.1(c) (in part)	
792(b)	13.5(d)	
792(c)	13.5(e)(2)	
792(d)	13.5(e)(3)	

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
793 (first sentence)	13.5(e)(1), 13.5(e)(2)	61.5(a) (in part)
793 (second sentence)		61.5(a) (in part)
793 (third sentence)		61.18 (in part)
793 (fourth sentence)		61.20 (in part)
793 (last sentence)	13.5(e)(3)	
794(1)		61.6 (first sentence), 61.7(a) (in part)
794(2) (first sentence)		61.6 (third sentence), 61.7(a) (in part)
794(2) (last three sentences) (omitted in part)		*cf.* 61.6 (first sentence)
794(3)	13.9	
795 (first sentence)		61.6 (first sentence)
795 (second sentence) (omitted)		*cf.* 61.2(b), 61.4(c)
795 (third sentence) (omitted)		*cf.* 61.14 (first and last sentences) (in part), 61.16 (in part)
795 (last sentence)		61.6 (second and third sentences); *cf.* 61.4(b)
796		61.4(a), 61.4(b), 61.7(a) (in part)
797(1) (omitted)		
797(2) (last sentence omitted)		61.7(a) (in part)
798		61.16 (in part); *cf.* 61.14 (first and last sentences) (in part)
799 (first and second sentences) (omitted)		*cf.* 61.2(b)
799 (last two sentences) (omitted)		*cf.* 61.18
799-a	*cf.* 13.1(d)(4)	61.2(b) (in part)
800 (omitted)		*cf.* 61.18
801 (first sentence)		61.20 (in part)
801 (last sentence)	13.10	*cf.* 38.6(a) (in part)
802(1) (omitted)		
802(2) (omitted)		
802(3) (omitted)		
802(4) (not yet considered)		
804(1) (third sentence omitted)		61.7(a) (in part)
804(2) (first sentence omitted)		61.7(a) (in part)
804(3)		61.7(a) (in part) 74.4
804-a (last sentence omitted)		61.7(a) (part of fourth sentence)
805		61.7(a) (second sentence)
806 (first and last sentences omitted)		61.7(b)
807 (omitted)		
808 (omitted)		
809 (omitted)		

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 45 — *Concluded*		
810 (omitted)		
811 (first sentence) (omitted in part)	13.7 (in part)	
811 (last sentence) (omitted)		
ARTICLE 46		
814 (omitted)	*cf.* 15.1	
815		71.1 (part of first sentence), 72.1 (part of first sentence)
816		71.2(a) (part of first sentence), 72.2(a) (in part), 72.5(e) (in part), 73.2(a) (in part)
817		72.1 (part of first sentence)
818		71.1 (part of first sentence), 72.1 (part of first sentence), 73.1 (part of first sentence); *cf.* 71.3(a) (first and second sentences)
819		71.2(b) (part of first sentence), 72.2(b) (first and second sentences) (in part), 73.2(b) (in part)
820		123.12 (last sentence)
821 (omitted)		
822		71.8 (first and second sentences) (in part), 72.13 (part of first sentence), 72.13 (part of last sentence)
823 (first sentence)	15.1 (part of second sentence)	
823 (second sentence) (omitted)		
824	15.1 (part of last sentence)	
825	5.3(b)(2)	
ARTICLE 47		
826(1) (omitted)	*cf.* 15.7	
826(2) (omitted)	*cf.* 15.3(5) (in part)	
826(3) (omitted)	*cf.* 15.3(5) (in part)	
826(4) (omitted)	*cf.* 15.3(8)	
826(5) (omitted)	*cf.* 15.3(5) (in part)	
826(6) (omitted)		
826(7) (omitted)	*cf.* 15.3(5) (in part)	
826(8) (omitted)	*cf.* 15.3(9)	
826(9) (omitted)	*cf.* 15.3(6)	
827 (first sentence)		71.2(a) (part of first sentence)
827 (last sentence)		71.1 (part of first sentence)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
828 (omitted)		
829 (omitted)		
830		71.4 (last sentence)
831 (omitted)		
832 (omitted)		
ARTICLE 48		
833		71.2(a) (part of first sentence)
834 (omitted)		
835		71.2(b) (part of first sentence)
836		71.2(b) (part of first sentence)
837 (omitted)		
838 (first sentence)		71.1 (part of second sentence)
838 (second and third sentences) (omitted)		
839		71.1 (part of second sentence)
839 (first sentence)		71.3(a) (first and second sentences)
840		71.1 (part of last sentence)
841		71.4 (part of first sentence)
842		*cf.* 71.8 (first and second sentences); 123.8
843 (omitted)		*cf.* 71.8 (second sentence)
844		71.8 (first and second sentences) (in part)
845		71.8 (first and second sentences) (in part)
846		71.8 (part of last sentence)
ARTICLE 49		
847		71.5 (part of first sentence); *cf.* 71.2(b) (part of first sentence)
848 (omitted)		*cf.* 71.2(b) (part of first sentence)
849		71.5 (part of first sentence)
850		71.5 (part of first sentence), 71.5 (part of second sentence)
851		71.5 (part of second sentence)
852		71.5 (third sentence), 123.1 (in part), 123.7(a) (in part)
853 (omitted in part)		123.2(a)
854 (part not yet considered)		123.7(a) (second sentence)
855 (last sentence)		71.5 (last sentence)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 49 — *Concluded*		
856		71.2(b) (part of first sentence), 71.5 (part of second sentence)
857		71.5 (part of second sentence); *cf.* 71.2(b) (part of first sentence)
861		71.7 (in part)
862 (omitted)		
863		123.7(b)
864 (part not yet considered)		123.5 (in part)
ARTICLE 50		
865		71.6(a) (in part)
866		71.6(a) (in part)
867		71.6(a) (in part)
868		71.6(a) (in part)
869 (omitted)		
870 (omitted)		
871 (omitted)		
872 (omitted)		
873 (omitted)		
874		71.6(c)
875(1)		71.6(b) (in part)
875(2) (not yet considered)		
875(3)		71.6(a) (in part)
875 (last paragraph)		71.6(d)
ARTICLE 51		
876 (omitted)		
876-a		to be transferred to Labor Law
877 (second sentence omitted)	15.7 (part of first sentence); *cf.* 15.2	73.2(a) (in part)
878(1)	15.7 (part of first sentence)	73.2(a) (in part)
878(2) (omitted)		
879		73.1 (last sentence), 73.3(a) (in part)
881 (omitted)		
882	15.7 (part of last sentence)	73.1 (part of first sentence), 73.3(a) (in part)
882-a		to be transferred to Labor Law
883		73.3(b) (in part)
ARTICLE 52		
884		73.2(b)(1) (in part)
885		73.2(b)(1) (in part)
886		73.2(b)(3)
887 (omitted)		*cf.* 123.2(a)
888 (omitted)		*cf.* 123.2(c)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
889		73.2(b)(2) (in part)
890		73.2(b)(2) (in part)
891		73.2(b) (in part), 123.1 (in part), 123.2(b)
892		73.2(b)(1) (in part)
893		73.2(b) (in part)
896 (omitted)		*cf.* 123.13
ARTICLE 53		
897		73.4 (first and second sentences) (in part)
898		73.4 (first and second sentences) (in part)
899 (omitted)		
900 (first three sentences)		*cf.* 71.8 (first sentence), 123.8
900 (last sentence)		73.4 (last sentence)
ARTICLE 54		
902	15.3	
903 (first paragraph)		72.2(a) (in part)
903(1)	15.3(1); *cf.* 15.3(2) (in part)	
903(2)	15.3(3); *cf.* 15.3(2) (in part)	
903(3)	15.3(4)	
903(4)	15.3(5) (in part)	
903(5)	15.3(5) (in part)	
903(6)	15.3(6)	
903(7)	*cf.* 15.3(2) (in part)	
904	15.3(9)	
905	5.3(b) (in part)	72.3
906 (first sentence) (first paragraph omitted in part)		72.2(c) (first sentence)
906 (second paragraph)		72.2(c) (part of last sentence)
906 (third paragraph)		72.2(d) (in part)
906 (fourth paragraph)		72.2(d) (in part), 72.12 (third sentence), 72.13 (second sentence)
907		72.2(b) (first and second sentences) (in part)
908		72.2(b) (first and second sentences) (in part)
909 (omitted)		
910 (first paragraph		72.1 (second and third sentences) (in part)
910 (second paragraph)		72.5(b) (part of first sentence)
911 (omitted)		

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 55		
912 (first paragraph)	15.4 (in part)	
912 (second paragraph, first sentence)		72.6 (last sentence)
912 (second paragraph, second sentence)		72.5(c) (in part)
913	15.4 (in part)	
914	15.4 (in part); *cf.* 13.1(b), 13.1(c)	
915	15.4 (in part); *cf.* 13.1(b), 13.1(c)	
915-a	*cf.* 13.1(d)(3)	to be transferred to Partnership Law
916(1)	15.4 (in part); *cf.* 13.1(b)	
916(2)	15.4 (in part); *cf.* 13.1(b)	
916(3)	15.4 (in part); *cf.* 13.1(b)	
916(4)	15.4 (in part); *cf.* 13.1(b)	
916(5)	15.4 (in part); *cf.* 13.1(c)	
916(6)	15.4 (in part); *cf.* 13.1(c)	
916(7)	15.4 (in part); *cf.* 13.1(d)(3)	
917(1)		72.4
917(2) (first paragraph)	*cf.* 13.1(a)(4), 13.1(b), 13.1(d)	72.5(a)
917(2) (second paragraph)	*cf.* 13.1(d)	72.5(b) (part of first sentence)
917(2) (first sentence of third paragraph)	*cf.* 13.1(d)	72.5(b) (second sentence)
917(2) (last sentence of third paragraph)	15.5 (in part); *cf.* 13.1(d)	
917(2) (fourth paragraph)	*cf.* 13.1(d)	72.5(b) (part of last sentence)
917(3)		72.5(c) (in part), 72.6 (first sentence)
918		72.9
919		72.10 (in part)
920		72.7
921		72.8(b) (in part)
922(1) (last paragraph omitted)		72.5(b) (part of last sentence); *cf.* 72.5(d) (in part)
922(2)		72.5(e), 72.12 (in part)
922(3)		72.10 (in part)
923		72.8(a) (last sentence), 72.14 (in part)
924(1) (first and second paragraphs)		72.11 (first three sentences) (in part)
924(1) (third paragraph omitted)		
924(1) (fourth paragraph)		72.11 (part of last sentence)
924(2) (omitted)		*cf.* 72.5(d) (in part)
925		72.11 (first three sentences) (in part)
926		72.11 (first three sentences) (in part)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
927		72.11 (first three sentences) (in part)
928 (omitted)		
929 (omitted)		
930 (omitted)		
931 (omitted)		
932 (omitted)		
933 (omitted)		
934 (omitted)		
935 (omitted)		
936 (omitted)		
937 (omitted)		
938 (omitted)		
939 (omitted)		
940		72.8(a) (first sentence)
941		72.14 (in part)
942		72.14 (in part)
943		*cf.* 72.5(d) (in part)
944		*cf.* 72.5(d) (in part)
944-a		*cf.* 72.5(d)
945		*cf.* 72.5(d) (in part)
946		*cf.* 72.5(d) (in part)
947		72.14 (in part)
ARTICLE 56		
948		72.13 (part of first sentence), 123.8 (first sentence); *cf.* 72.11 (first three sentences)
949		72.13 (part of second sentence); *cf.* 72.11 (first three sentences)
950		72.13 (part of second sentence); *cf.* 72.11 (first three sentences)
951		72.13 (part of second sentence); *cf.* 72.11 (first three sentences)
ARTICLE 57		
952		72.12 (in part); *cf.* 72.5(e) (in part)
953		72.12 (in part); *cf.* 72.5(e) (in part)
954		72.12 (in part)
955		72.12 (in part), 123.5 (in part), 123.6(a) (first sentence), 123.6(b) (in part), 123.7(a) (first sentence)
956		72.12 (in part)
957 (omitted)		*cf.* 72.5(e) (in part), 72.12 (in part)
958 (omitted)		*cf.* 72.12 (in part)
959		72.12 (in part); *cf.* 72.5(e) (in part)

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 58		
960	*cf.* 15.6	
961 (omitted)		
962 (omitted)		
963 (omitted)		
964		72.11 (first three sentences) (in part)
965		72.11 (first three sentences) (in part); *cf.* 72.5(d) (in part)
966 (omitted)		
ARTICLE 59		
969		72.15
970		72.14 (in part); *cf.* 72.5(e) (in part), 72.12 (in part)
971		72.14 (in part); *cf.* 72.5(e) (in part), 72.12 (in part)
972		72.14 (in part); *cf.* 72.5(e) (in part), 72.12 (in part)
973 (first sentence)		72.8(b) (in part)
973 (last sentence)		72.14 (in part)
ARTICLE 60		
974(1)		74.1(a) (part of first sentence)
974(2)		60.6
974(3)		74.1(a) (part of first sentence)
975 (second sentence)		*cf.* 33.5(c) (second sentence)
976		74.3 (in part), 74.4 (in part), 123.8 (first sentence)
977		74.1(b) (first sentence); *cf.* 74.1(b) (last sentence)
ARTICLE 61		
978 (first sentence) (omitted in part)		121.1(1)
978 (second sentence) (omitted in part)		121.1(2)
978 (last sentence) (omitted)		*cf.* 122.9
979 (part not yet considered)		121.3
979-a (omitted in part)		121.1(3)
980 (omitted in part)		121.2 (in part)
980-a		91.6
ARTICLE 62		
982		34.20 (in part)
983		34.20 (in part)
984		34.20 (in part)
988 (not yet considered)		*cf.* 23.13

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 66		
1094-a		34.1(a) (in part), 34.6(b) (in part), 34.7(a) (in part)
1104 (part not yet considered		123.6(a) (in part), 123.6(b) (in part), 123.7(c) (first sentence)
1106 (last sentence not yet considered)		123.7(a) (first sentence)
ARTICLE 67		
1143 (not yet considered)		*cf.* *31.2(a) (last sentence)
ARTICLE 68		
1150 (not yet considered)		*cf.* *31.2(a) (last sentence)
ARTICLE 70		
1174 (first sentence omitted)		43.1(b)(2) (second sentence)
ARTICLE 72		
1185 (omitted)		
1186		†26.6(e)
1187 (omitted)		
1188 (omitted)		
1195		34.1(a) (in part)
1196 (part not yet considered)	13.5(d) (in part)	
ARTICLE 73		
1197		23.1(b) (in part), 23.2(b) (in part)
1199 (first sentence)		61.9(a) (third sentence)
1199 (last two sentences)		13.1(c) (last sentence)
1201 (part not yet considered)		23.1(b) (in part)
ARTICLE 74		
1201		†26.6(e)
1202	*cf.* 5.1	110.1
1203		110.2 (first sentence)
1204 (omitted)		*cf.* 23.1, 24.1
1205 (omitted)		*cf.* 24.2
1206		110.3
1207 (omitted)		
ARTICLE 75		
1208		to be transferred to Executive Law
1209		to be transferred to Executive Law
1210		to be transferred to Executive Law

* As amended in 1958 report.
† As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 75 — *Concluded*		
1211		to be transferred to Executive Law
1212		to be transferred to Executive Law
1213 (omitted)		
1214		to be transferred to Executive Law
1215		to be transferred to Executive Law
1216		to be transferred to Executive Law
1217		to be transferred to General Corporation Law
1217-a		to be transferred to General Corporation Law
1218		to be transferred to General Corporation Law
1219		to be transferred to General Corporation Law
1220		to be transferred to General Corporation Law
1221		to be transferred to General Corporation Law
ARTICLE 75-A		
1221-a		to be transferred to Judiciary Law
1221-b		to be transferred to Judiciary Law
1221-c		34.1(a) (in part)
1221-d		to be transferred to Judiciary Law
ARTICLE 76		
1222		to be transferred to Executive Law
1223 (omitted)		
1224		to be transferred to Executive Law
1225		to be transferred to Executive Law
1226	5.13(5)	
1227		to be transferred to Executive Law
1228		to be transferred to Executive Law
1229		to be transferred to Executive Law
ARTICLE 77		
1230	7.2(a) (in part)	
1231	7.3(a) (in part)	
1232 (omitted in part)	7.2(a) (in part), 7.2(b), 7.2(c) (in part)	
1233 (omitted)		*cf.* 38.2(b)
1234	7.2(c) (in part); *cf.* 7.3(b)	

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
1235 (omitted in part)	7.3(a) (in part)	
1236 (omitted in part)	7.4(a), 7.4(b) (in part)	
1237 (omitted)		
1238 (omitted)		
1239	7.4(c), 7.4(d)	
1240	7.6(a) (in part)	
1241	7.2(a) (in part)	
1242	7.5; *cf.* 7.4(e)	*cf.* 32.3(a)
1243 (omitted in part	7.4(e) (in part)	
1244 (omitted in part)	7.6(a) (in part), 7.8(a)	
1245 (omitted in part)	7.8(b)	
1246 (omitted in part)	7.6(a) (in part)	
1247 (omitted)	*cf.* 7.1 (second sentence)	
1248	7.6(b) (in part)	
1249	7.6(c)	
1250	7.6(b) (in part)	
1251	7.9(c) (in part), 7.10(a) (in part)	
1252	7.3(a), 7.11(c)	
1253	7.3(a)	
1254 (omitted)		
1255	7.10(a) (in part), 7.10(b) (in part)	
1256	7.10(a) (in part), 7.10(c) (in part)	
1257	7.9(e)	
1258	7.9(a), 7.11 (in part)	
1259	7.9(b), 7.9(c) (in part)	
1260	7.9(d)	
1261 (omitted)		
1262 (omitted in part)	7.10(a) (in part), 7.10(c) (in part)	
1263 (omitted)		
1264 (omitted in part)	7.10(b) (in part)	123.2(a) (in part)
1265 (omitted in part)	7.10(b) (in part)	
1266 (omitted)	*cf.* 7.1 (second sentence)	
1267 (omitted in part)	7.10(a) (in part)	
1268 (omitted)	*cf.* 7.1 (second sentence)	
1269 (omitted in part)	7.12	
1270		to be transferred to Penal Law
1271	7.7 (in part)	
1272	7.7 (in part)	
1273	7.7 (in part)	
1274	7.11 (in part)	
1275	7.11 (in part)	
1276 (omitted in part)	7.10(b) (in part); *cf.* 7.11	
1277 (omitted	*cf.* 7.10(b) (in part)	
1278 (omitted)	*cf.* 7.10(b) (in part)	
1279 (omitted)	*cf.* 7.10(b) (in part)	
1280 (omitted)	*cf.* 7.10(b) (in part)	
1281 (omitted)		
1281-a (omitted)		
1282	7.1	

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 78		
1283 (first and third sentences omitted)		111.1 (first sentence)
1284 (omitted)		
1285		111.1 (second sentence)
1286	5.17; *cf.* 3.4 (second sentence)	
1287 (second sentence omitted)	*4.7	111.4(b)
1289 (first and second sentences) (not yet considered)		
1289 (third sentence)		27.2(c)
1289 (last two sentences)		25.2(g)
1290		111.2(a), 111.2(b)
1291 (all except third sentence of first paragraph omitted)		111.4(c) (first sentence)
1293 (first paragraph) (not yet considered)		
1293 (last paragraph) (omitted)		
1294 (omitted)		
1295		111.4(e)
1296(1)		111.3(1)
1296(2)		111.3(2) (in part)
1296(3)		111.3(2) (in part)
1296(4)		111.3(3) (in part)
1296(5)		111.3(3) (in part)
1296(5-a)		111.3(3) (in part)
1296 (paragraph immediately preceding paragraph 6)		111.3(4) (in part)
1296(6)		111.3(4) (in part)
1296(7)		111.3(4) (in part)
1296 (second and third paragraphs)		111.4(d)
1296 (last paragraph) (last sentence omitted)		111.4(c) (second sentence)
1297		111.4(c) (last sentence)
1298		111.2(c)
1299		111.5
1302		to be transferred to Public Officers Law
1304 (omitted)	*cf.* 16.3	
1305 (omitted)		*cf.* 80.9
ARTICLE 79		
1309 (part not yet considered)		27.2(c)

* As amended in 1958 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 80		
1320		†91.7(a) (in part)
1321		†91.7(a) (in part)
1322		†91.7(a) (in part)
1323		†91.7(a) (in part)
1324		†91.7(a) (in part)
ARTICLE 81		
1375 (part not yet considered)		123.2(a) (in part)
ARTICLE 82		
1394 (part not yet considered)		123.8 (part of first sentence)
ARTICLE 83		
1421(a)		27.2(c)
ARTICLE 84		
1448 (next to last paragraph and subparagraph 2 omitted)	17.1 (in part)	91.8
1449	17.1 (in part)	
1450	17.1 (in part), 17.2 (in part), 17.3(a) (in part)	
1451	17.3(a) (in part)	
1452 (last clause omitted)	17.4	
1453 (omitted)	*cf.* 17.4	
1454(1)	17.6(d)	
1454(2)	17.6(b) (first and second sentences), 17.6(e) (in part), 17.6(f) (in part)	
1454(3)	17.6(b) (last sentence)	
1455	17.6(a), 17.6(f) (in part)	
1456	17.5 (in part), 17.6(e) (in part)	
1457	17.13	
1458(1)	17.10 (in part)	
1458(2) (all except part of first sentence omitted)	17.3(b), 17.10 (in part)	
1459 (last paragraph omitted)	17.2 (in part)	*34.2(c) (part of first sentence)
1460	17.7 (first and last sentences)	
1460-a	17.8	
1461	17.10	
1462 (last paragraph not yet considered)	17.11(b) (in part), 17.11(d)	
1462-a	17.11(c)	
1463 (last sentence omitted)	17.10 (in part), 17.11(a)	
1464 (last two sentences not yet considered)	17.14(a) (first sentence)	

* As amended in 1958 report.
† As amended in 1959 report.

TABLE III—Continued

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 84 — *Concluded*		
1465	17.14(a) (part of last sentence), 17.14(b)	
1466	17.14(a) (part of last sentence)	
1467	17.14(a); *cf.* 16.3(a)(1)	
1468 (first and second sentences omitted)	17.12; *cf.* 17.1	
1469 (omitted)		
ARTICLE 84-A		
1469-d		27.2(c)
ARTICLE 85		
1493		94.2(b), 94.3
ARTICLE 86		
1520 (first sentence) (omitted in part)		60.1
1520 (second and third sentences and part of first tence not yet considered)		
1520 (last sentence) (omitted)		
ARTICLE 87		
1522(A) (omitted)		
1522(1)		150.1(a) (in part)
1522(2)		150.1(a) (in part)
1522(3) (omitted)		
1522(4) (omitted in part)		150.1(b) (in part)
1522(B) (omitted)		
1522(5)		150.1(a) (in part)
1522(6) (omitted)		
1522(7) (omitted)		
1523 (omitted in part)		150.1(b) (in part)
1524 (omitted in part)		123.5 (in part), 150.1(a) in part), 150.2 (in part), 150.3 (last sentence)
1525		123.2(a) (in part), 150.3 (first sentence)
1526 (first sentence)		123.6(a) (first sentence)
1526 (last sentence)		123.7(a) (first sentence)
1527 (first sentence) (omitted)		
1527 (last sentence)		123.6(a) (in part), 123.6(b)
1528		123.8 (first sentence)
1529 (first sentence) (omitted in part)		123.7(b) (in part)
1529 (last sentence) (omitted)		*cf.* 123.7(b)
1530 (omitted)		
1531	1.2(b)	

TABLE III—Concluded

Sections of Civil Practice Act Compared with Proposed Provisions

Civil Practice Act Sections	Proposed Act Sections	Proposed Rules
ARTICLE 88		
1532		31.6(a) (in part)
ARTICLE 89		
1539		160.1(a) (in part)
1540		160.1(b)
1540-a		160.1(c)
1541		160.1(a) (in part)
1545 (part not yet considered)		43.4 (part of first sentence)

TABLE IV

Rules of Civil Practice Compared with Proposed Provisions

Rules of Civil Practice	Proposed Act Sections	Proposed Rules
TITLE 1		
3 (omitted)		
6 (omitted)		
8 (omitted)		*cf.* 23.5(c)
TITLE 2		
10 (last sentence omitted)		32.1(a) (first sentence), 32.1(b), 32.1(e)
11 (first sentence omitted)		32.1(d)
12 (last sentence omitted)		32.1(f) (part of second sentence)
13 (omitted)		*cf.* 32.1(d)
14		32.1(e) (second sentence)
15 (last sentence omitted)		32.2 (first sentence)
16 (omitted)		
TITLE 3		
20 (opening paragraph)		32.3(b)(1)
20(1)		32.3(b)(2) (first sentence and part of second sentence), 32.3(c) (in part)
20(2)		32.3(b)(3) (in part)
20(3)		32.3(b)(3) (in part), 32.3(b)(4)
20(4)		32.3(d) (in part)
20(5)		32.3(c) (in part), 32.3(d) (in part)
21		27.2(c)
TITLE 4		
25(1)		123.1 (in part)
25(2)		123.2(a) (in part)
25(3)		123.11 (first sentence)
25(4)		123.2(a) (in part)
25(5)		123.2(d)
25(6) (omitted)		*cf.* 123.6(b)
25(7)		123.5 (in part)
26 (omitted)		*cf.* 123.5
27		123.2(a) (in part)
TITLE 5		
30 (first sentence) (omitted in part)		122.3
30 (last two sentences) (omitted in part)		122.4
31 (omitted)		
32 (first sentence)		122.6(2) (in part)
32 (second sentence)		122.6(2) (in part)
32 (third sentence) (omitted in part)		122.6(1)
32 (fourth sentence)		122.7 (part of first sentence)
32 (fifth and sixth sentences)		122.7 (second, third, and fourth sentences) (in part)
32 (last sentence)		122.7 (last sentence)
33		122.7 (part of third sentence)
34 (omitted in part)		122.5

TABLE IV—Continued

Rules of Civil Practice Compared with Proposed Provisions

Rules of Civil Practice	Proposed Act Sections	Proposed Rules
TITLE 6		
35		94.1(a) (part of first sentence), 94.1(b) (in part)
36 (last sentence omitted)		94.1(a) (part of first sentence), 94.2(a), 94.2(d) (in part)
37		94.1(a) (part of first sentence), 94.1(b) (in part)
TITLE 7		
39		91.2(a) (in part)
40(1) (omitted)		
40(2) (omitted)		
40(3)		91.2(c) (in part)
40(4) (omitted)		
40(5)		91.2(c) (in part)
40(6) (not yet considered)		
41 (omitted)		*cf.* 91.6
42 (omitted)		
43 (second sentence of first paragraph omitted)		91.4 (in part)
44 (omitted)		
TITLE 8		
50 (part of first sentence and second, third and last sentences omitted)		25.5(b) (in part)
51 (omitted in part)		25.5(c) (in part)
53(1) (omitted in part)		25.1(c) (in part)
53(2) (omitted in part)		32.3(a) (in part)
53(3) (omitted in part)		25.1(c) (in part)
53(4) (omitted)		
53(5) (omitted)		
53(6)		25.1(c) (in part), 38.7(c)
53(7)		25.1(c) (in part), 44.23
53(8)		25.1(c) (in part)
53(11) (omitted)		
54 (first paragraph)		23.7 (part of first sentence), *26.2
TITLE 10		
60 (first sentence)		†33.5(b) (first sentence); *cf.* 27.2(b)
60 (second sentence)		27.2(d), †33.5(e); *cf.* 27.2(b)
60-a		45.4(d) (first sentence)
61		27.3 (third sentence), †33.8 third sentence)
62		*cf.* †33.5(a) (part of first sentence)
63(1)		†33.3(a) (in part)
63(2) (omitted)		
63(3) (omitted)		
63(4) (omitted)		

* As amended in 1958 report.
† As amended in 1958 report.

TABLE IV—Continued

Rules of Civil Practice Compared with Proposed Provisions

Rules of Civil Practice	Proposed Act Sections	Proposed Rules
TITLE 10 — *Concluded*		
63(5) (omitted)		
64		†33.5(b) (third sentence), †33.5(d) (part of last sentence)
65		†33.5(d) (part of last sentence); *cf.* 27.7(a) (first and second sentences)
66		†33.7
TITLE 11		
70 (first paragraph)		33.10(a) (in part)
70 (second paragraph)		33.10(b)
71 (second sentence omitted)		33.11(a) (first and third sentences)
72		33.11(a) (first sentence)
73		33.11(a) (second and third sentences)
74		33.13
75 (omitted)		*cf.* 23.13
TITLE 12		
81		71.2(a) (last sentence)
82		71.1 (part of second sentence), 71.1 (part of last sentence)
83		71.8 (first and second sentences) (in part)
84		72.1 (part of second sentence)
TITLE 13		
85 (omitted)		*cf.* *26.2
86 (omitted)		
87 (omitted)		*cf.* *26.2
88 (omitted)		*cf.* *26.2
TITLE 14		
90		26.4 (second and third sentences)
91		26.11(a) (in part), 26.11(b) (in part)
92		26.6(a)
93(1)		26.6(b)
93(2) (omitted)		
93(3) (omitted)		
93(4) (omitted)		
94		26.7(b) (in part)
95		26.6(c)
96		26.7(d)
97		to be transferred to Civil Rights Law
98 (omitted)		*cf.* 26.5

* As amended in 1958 report.
† As amended in 1959 report.

TABLE IV—Continued

Rules of Civil Practice Compared with Proposed Provisions

Rules of Civil Practice	Proposed Act Sections	Proposed Rules
99		26.11(a) (in part)
100		26.11(b) (in part)
101		26.13(d) (in part)
102(1)		26.12(a)
102(2) (omitted)		*cf.* 23.3
103		26.12(b)
104 (omitted)		*cf.* *31.2(a)
105 (last sentence omitted)		26.12(c) (first sentence)
106(1)		*31.1(a)(2) (in part)
106(2)		31.1(a)(3) (in part)
106(3)		31.1(a)(4) (in part)
106(4) (omitted)		
107 (opening paragraph omitted)		*cf.* 31.1(b) (first sentence)
107(1)		*31.1(a)(2) (in part)
107(2)		31.1(a)(3) (in part)
107(3)		31.1(a)(4) (in part)
107(4)		31.1(a)(5) (in part)
107(5)		31.1(a)(5) (in part)
107(6)		31.1(a)(5) (in part)
107(7)		31.1(a)(5) (in part)
107(8)		31.1(a)(5) (in part)
108 (last sentence omitted)		31.1(b) (second sentence), 31.1(c) (in part); *cf.* 33.9
109(1)		*31.1(a)(2) (in part)
109(2)		31.1(a)(3) (in part)
109(3)		31.1(a)(4) (in part)
109(4)		31.1(a)(6) (in part)
109(5) (omitted)		
109(6) (omitted)		
110 (opening paragraph omitted)		*cf.* 31.1(b) (first sentence)
110(1)		*31.1(a)(2) (in part)
110(2)		31.1(a)(3) (in part)
110(3)		31.1(a)(4) (in part)
110(4)		31.1(a)(6) (in part)
110(5)		31.1(a)(5) (in part)
110(6)		31.1(a)(5) (in part)
110(7)		31.1(a)(5) (in part)
110(8)		31.1(a)(5) (in part)
110(9)		31.1(a)(5) (in part)
111 (omitted)		*cf.* 31.2
112 (omitted)		*cf.* 31.2
113		*31.2(a) (in part), 31.2(b)
114		31.2(d), 50.2
115 (omitted)		*cf.* 34.17, 34.18, 34.19, 34.25
116		26.7(a); *cf.* 34.17
117 (omitted)		*cf.* 34.19
118		26.15 (in part)
TITLE 15		
120 (omitted)		*cf.* 34.4(a), 34.6(b)
121 (omitted)		*cf.* 27.6
121-a		34.7(a) (in part), 34.8 (in part)

* As amended in 1958 report.

TABLE IV—Continued

Rules of Civil Practice Compared with Proposed Provisions

Rules of Civil Practice	Proposed Act Sections	Proposed Rules
TITLE 15 — *Concluded*		
122		*34.2(c) (in part), 34.7(a) (in part), 34.10 (in part)
123		*34.2(c) (in part)
124 (first and last sentences omitted)		34.3(a) (part of first sentence)
125 (omitted)		*cf.* 34.4(b)
126		34.8 (in part)
127		34.12(b) (in part)
128		34.8 (in part)
129		34.12(b) (in part), 34.12(c) (in part), 34.14 (in part), 34.16(a) (in part)
129-a		34.12(c) (in part)
130		34.15(a) (in part), 34.15(b) (in part), 34.15(c) (in part)
131		34.15(b) (in part)
132		34.15(b) (in part)
133		34.3(c) (in part)
TITLE 16		
136		34.2(e) (in part)
137		34.25 (in part)
TITLE 18		
140		34.20 (in part)
141		34.20 (in part)
142 (omitted)		
TITLE 19		
145	4.10(c)	
146	4.10(b)	
147 (first sentence)	4.10(d) (in part)	
147 (last sentence) (omitted)		*cf.* 82.1
TITLE 20		
150 (second and third paragraphs omitted)		36.2
151		36.3
TITLE 21		
157 (last sentence omitted)		40.5 (first sentence), 42.2 (first sentence)
158 (omitted)		
159		40.3 (in part)
160		40.2
161 (second and fourth sentences omitted)		40.6
162		38.2(b) (in part)
163		38.2(b) (in part)
164 (omitted)		
165		41.12 (in part)
166(1) (second and last sentences)		26.13(c) (in part)
166(2)		45.1 (last sentence)

* As amended in 1958 report.

TABLE IV—Continued

Rules of Civil Practice Compared with Proposed Provisions

Rules of Civil Practice	Proposed Act Sections	Proposed Rules
TITLE 22		
170 (second sentence omitted)		43.3(b) (last sentence), 45.3 (in part)
171 (part of second sentence and third and last sentences omitted)		43.1(e)
172		43.1(b) (except last sentence of (2))
174 (omitted)		
TITLE 23		
175		61.7(a) (first sentence)
176		150.1(b)
177		150.1(b); *cf.* 61.7(a) (first sentence)
179 (first sentence)		74.5 (in part)
179 (last sentence)		61.7(b), 74.1(b) (part of last sentence)
180		61.7(a) (fourth sentence), 74.1(b) (part of second sentence); *cf.* 74.1(a) (first sentence)
181		74.4 (first and second sentences) (in part)
TITLE 24		
185 (first sentence omitted)		50.1 (last sentence)
186 (omitted)		*cf.* 50.6(d)
187 (first sentence)		50.6(e)
187 (last sentence) (omitted)		*cf.* 43.1(a)
188 (omitted)		*cf.* 50.6(c)
189		31.6(e) (part of first sentence)
190		†31.6(f)
191		31.6(b) (third sentence), 31.6(d)
192(1)		31.6(e) (part of first sentence)
192(2)		31.6(e) (part of second sentence)
192(3) (omitted)		
192(4)		31.6(e) (part of first sentence)
192(5) (omitted)		
194 (omitted)		*cf.* 50.6(c)
195 (omitted)		*cf.* 50.6(c)
196 (omitted)		*cf.* 50.6(c)
197 (omitted)		*cf.* 50.6(c)
198 (omitted)		*cf.* 50.6(c)
199 (omitted)		*cf.* 50.6(c)
201 (first sentence) (omitted in part)		50.6(a)
201 (second sentence) (omitted)		
201 (last sentence) (not yet considered)		

† As amended in 1959 report.

TABLE IV—Concluded

Rules of Civil Practice Compared with Proposed Provisions

Rules of Civil Practice	Proposed Act Sections	Proposed Rules
TITLE 24 — *Concluded*		
202(1)		50.7(a) (first sentence)
202(2) (omitted in part)		50.7(b) (in part)
202(3)		50.7(b) (in part)
202(4)		50.7(b) (in part)
202(5)		50.7(b) (in part)
202(7) (omitted		*cf.* 50.7(b)
202(8)		50.7(a) (last sentence)
203 (omitted)		*cf.* 50.9(b)
204		50.11(a)
TITLE 25		
210 (omitted)		
211		†26.8(b)
212	1.4	
213 (omitted)		
214 (omitted)		
TITLE 26		
220 (omitted)		
221 (first paragraph omitted)		45.3 (last sentence)
222 (omitted in part)		45.3 (part of first sentence), 45.4(b) (in part)
223 (omitted)		
224 (omitted)		*cf.* 45.4
TITLE 27		
229 (omitted)		
230 (omitted)		*cf.* 80.20
231 (omitted)		
232 (omitted in part)		80.19 (in part)
233 (omitted)		
234 (omitted in part)		80.16 (in part)
235 (omitted in part)		80.18 (in part), 80.19 (in part)
236 (omitted)		
237 (all except first paragraph omitted)		36.1 (first sentence)
238 (omitted)		
TITLE 35		
294(1) (last sentence omitted)		91.7(f)
294(2) (last sentence omitted)		91.7(g)
294(3) (last sentence omitted)		91.7(e)
294(4)		91.7(b)
294(5)		†91.7(a) (in part), 91.7(b)
294(6)		91.7(b)
294(7)		91.7(c)
294(8)		91.7(d)
294(9)		†91.7(a) (in part)
TITLE 37		
301		31.8; *cf.* 23.5(d)
302(1)		31.6(c)

† As amended in 1959 report.

TABLE V

Present Provisions to be Transferred to Consolidated Laws and Other Statutes

Civil Practice Act Sections	Consolidated Laws Sections
35	Real Property Law §260-a
36	Real Property Law §260-b
37	Real Property Law §260-c
38	Real Property Law §260-d
39	Real Property Law §260-e
40	Real Property Law §260-f
41	Real Property Law §260-g
41-a	Real Property Law §260-h
42	Real Property Law §260-i
59	Personal Property Law §33-d
333	Negotiable Instruments Law §272
335	Real Property Law §539-a
337	Civil Rights Law §74
337-a	Civil Rights Law §75
338-a	Civil Rights Law §76
341	Decedent Estate Law §80-a
342	General Construction Law §44-a
348-a	Real Property Law §539-e
356	Agriculture and Markets Law §183-b
368	Negotiable Instruments Law §270
369	Negotiable Instruments Law §271
376	Real Property Law §539-b
377	General Corporation Law §210-a
378	General Construction Law §41-a
379	Real Property Law §539-c
379-a	Real Property Law §539-d
380 (second and third sentences)	Public Officers Law §70-b
384(3)	Real Property Law §313-b
384(4)	Real Property Law §313-b
453	Judiciary Law §§506-a, 598-a, 664-a
454 (in part)	Judiciary Law §§506-a, 598-a, 664-a
480-a	Insurance Law §166-b
533	Personal Property Law §41(2)
657	Surrogate's Court Act §212-a
876-a	Labor Law §807
882-a	Labor Law §808
915-a	Partnership Law §54(1)
1208	Executive Law §63-b
1209	Executive Law §63-b
1210	Executive Law §63-a
1211	Executive Law §63-b
1212	Executive Law §63-b
1214	Executive Law §63-b
1215	Executive Law §63-b
1216	Executive Law §63-b
1217	General Corporation Law §83
1217-a	General Corporation Law §84
1218	General Corporation Law §85
1219	General Corporation Law §86
1220	General Corporation Law §87
1221	General Corporation Law §88
1221-a	Judiciary Law §476-a
1221-b	Judiciary Law §476-b
1221-d	Judiciary Law §476-c

TABLE V—Concluded

Present Provisions to be Transferred to Consolidated Laws and Other Statutes

Civil Practice Act Sections	Consolidated Laws Sections
1222	Executive Law §63-c
1224	Executive Law §63-c
1225	Executive Law §63-c
1227	Executive Law §63-c
1228	Executive Law §63-c
1229	Executive Law §63-c
1270	Penal Law §1789
1302	Public Officers Law §75
Rule of Civil Practice 97	Civil Rights Law §77

SUPPORTING STUDIES

APPLICABILITY OF THE CIVIL PRACTICE ACT

TABLE OF CONTENTS

I. INTRODUCTION

By the terms of section one, the civil practice act is applicable to all courts of record in the state "except as otherwise expressly provided."[1] The applicability of the act is confirmed by specific provision in many of the acts establishing inferior courts of record,[2] and further extended to some courts not of record by the acts establishing these courts.[3] Nevertheless, a multitude of problems

[1] Section 62 of the civil practice act further provides:

> The courts referred to in this act are enumerated in section two of the judiciary law. Each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law according to the course and practice of the court, except as otherwise prescribed.

The courts of record, as listed in section 2 of the Judiciary Law, are:

1. The court for the trial of impeachments.
2. A court on the judiciary.
3. The court of appeals.
4. The appellate division of the supreme court in each department.
5. The supreme court.
6. The court of claims.
7. A county court in each county, except the county of New York.
8. The court of general sessions of the county of New York.
9. A surrogate's court in each county.
10. The city courts of the cities of Albany, Mt. Vernon, New York, Rochester, Schenectady, Troy, Utica and Yonkers.
11. The municipal courts of the cities of New York and Syracuse.

All other courts are courts not of record.

The history of civil practice act section 62 and section 2 and former section 3 of the Judiciary Law shows that the "enumerated" courts referred to in section 62 originally included both courts of record and not of record; and that the apparent limitation of section 62 to courts of record today may be the result of an oversight in conforming it to the repeal of former Judiciary Law section 3. See notes to proposed section 1.1.

[2] See, *e.g.*, Mt. Vernon City Ct. Act §196, N. Y. Laws 1922, c. 490, §196, *as amended by* N. Y. Laws 1944, c. 634: "The provisions of the civil practice act and the rules of civil practice . . . shall apply to the city court. . . ."

[3] See, *e.g.*, Binghamton City Ct. Act §16, N.Y. Laws 1950, c. 370, §16. For a general survey of the complex of inferior courts and a draft of a proposed Uniform City Court Act, see 2 N.Y. Jud. Conference Rep. 128 *et seq.* (1956). The Conference's study summarizes the applicability provisions of the city court acts in this way (*id.* at 147–48):

> All of the city court acts prescribe that—unless the act provides otherwise—one of the general practice acts or rules is to apply. Twenty-eight of these city court acts adopt the Civil Practice Act and the Rules of Civil Practice [Albany, Amsterdam, Binghamton, Buffalo, Ithaca, Kingston, Little Falls, Long Beach, Mechanicville, Middletown, Mount Vernon, Newburgh, New Rochelle, North Tonawanda, Norwich, Oswego, Peekskill, Rochester, Rome, Rye, Saratoga Springs, Schenectady, Syracuse, Tonawanda, Troy, Utica, White Plains and Yonkers] and twenty-seven city courts adopt the practice and procedure outlined by the Justice Court Act [Auburn, Batavia, Canandaigua, Cohoes, Corning, Dunkirk, Elmira, Fulton, Geneva, Glen Cove, Glens Falls, Gloversville, Hornell, Hudson, Jamestown, Johnstown, Lackawanna, Lockport, Ogdensburg, Oneida, Plattsburgh, Poughkeepsie, Rensselaer, Salamanca, Sherrill, Watertown and Watervliet]. Three city courts have adopted a combination of the Civil Practice Act and the Justice Court Act, *viz.*, Cortland, Niagara Falls and Oneonta. The Model Act proposed by the Judicial Council would make the Civil Practice Act and the Rules of Civil Practice apply to the city courts, except where the provisions of the Model Act are inconsistent and would govern.

arise concerning applicability, due to variations and ambiguities in particular civil practice act provisions and in the applicability provisions of different local court acts. In addition, these acts, covering some ninety local courts, contain many provisions controlling the procedure in specific courts which may be inconsistent with the general procedure established by the civil practice act. The problems which thus arise are the subject of this study.[4]

II. HISTORY OF APPLICABILITY PROVISIONS IN THE CIVIL PRACTICE ACT

A brief review of how applicability was handled in previous New York codes may shed some light on the current situation.

A. Field Code

The Field code was applicable to "courts of justice," which included courts of general and limited jurisdiction.[5] The term "court of record" was not used. However, certain provisions were specifically made applicable only to courts of limited jurisdiction.[6]

B. Throop Code

Courts were classified as of record or not of record in the Throop code, but the act purported to be generally applicable to both. Section one provided that "[t]he courts referred to in this act, are enumerated in the next two sections"; section two listed all courts of record and section three all courts not of record. "Although the term, 'court of record,' is somewhat indefinite," Throop's notes explained, "this classification has been preserved so as to distinguish those courts to which certain provisions of this act do not apply, and also to determine, as far as can be done by legislation, what courts and judges are within §§11, 18, 21 and 22 of the judiciary article of the constitution."[7]

The most important restrictions on the applicability of the code were in section 3347, which became well-known for the confusion it caused. Subdivision 4 of this section restricted large portions of the code relating to commencement of an action, parties and pleadings to "the Supreme Court, the City Court of the City of New York or the County Court."[8] The result of such particularization was to render these portions of the code inapplicable to

[4] The somewhat parallel problem of the relationship of the consolidated laws to the individual court acts will not be treated. See, *e.g.*, Matter of Estate of Sorenson, 195 Misc. 742, 743, 91 N.Y.S.2d 220, 222 (Surr. Ct. 1949).

[5] N.Y. Code Proc. §9.

[6] See N.Y. Code Proc. §§48–57.

[7] N.Y. Code Civ. Proc. §1, preliminary note (Throop ed. 1880).

[8] It has been stated that such restrictions on the operation of large parts of the Throop code were necessitated because the framers of the code "did not confine themselves to a statement of the practice or procedure in the courts of the state, but included many substantive provisions. . . ." 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 230 (1915).

inferior courts even though the act establishing the inferior court specifically adopted the practice of the code.[9] This was in large part rectified when subdivision 4 of section 3347 was amended to refer to "a court of record" rather than the named courts; the provisions then applied at least in courts of record whose governing acts conformed their practice to that of the code.[10] The restrictive effect of section 3347 was also avoided by phraseology in the reception provisions of local court acts which adopted the practice of one of the named courts rather than of the code, and by the insertion of a clause that the code shall be applicable "any statutory restriction to the contrary notwithstanding."[11]

III. APPLICABILITY OF THE CIVIL PRACTICE ACT TO COURTS OF RECORD

The civil practice act presents no special problems of applicability in the supreme or county courts since it is the sole act dealing with procedure in these courts. Not all sections of the civil practice act apply in these courts, however; for example, a summary proceeding to recover real property may only be brought in specified local courts.[12] The problems of applicability to inferior courts of record arise from three sources: the ambiguities of the civil practice act itself; the varying techniques employed by individual court acts to adopt the civil practice act; and the varying approaches of the courts in determining applicability in particular situations. These factors will be discussed separately.

A. Ambiguities of the Civil Practice Act

As earlier noted, the civil practice act is premised on the dichotomy between courts of record and not of record.[13] Although the act is generally applicable only to the former,[14] in several

[9] See *ibid.*; Lauer, Municipal Court Practice 204 n.34 (2d ed. 1928).

[10] *Ibid.*

[11] See Chase Watch Corp. v. Heins, 284 N.Y. 129, 135, 29 N.E.2d 646, 649 (1940).

[12] N.Y. Civ. Prac. Act §1413.

[13] The proposals of the Board of Statutory Consolidation rejected this distinction. "The difference between courts of record and not of record is not a substantial one. It is more a question of the jurisdiction of the courts themselves which determines the nature of the practice that should prevail in them." 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 231 (1915).

[14] N. Y. Civ. Prac. Act §1. *But cf.* note 1 *supra*. The many specific references to courts of record throughout the act (*e.g.*, *id.* §17 (attempt to commence action); *id.* §22 (effect of pending action involving decedent's estate); *id.* §1539 (fees of witnesses)) are therefore unnecessary and serve only to promote confusion when juxtaposed with sections that refer to a "court," "courts," or "each court." *E.g.*, *id.* §136 (disposition of court funds). "Court," of course, is the most usual reference.

Some sections specify that the practice in courts of record and not of record shall differ. See, *e.g.*, *id.* §451 (number of peremptory challenges); *id.* §682 (levied execution from court not of record has preference); *id.* §684(1) ("a court not of record . . . must issue . . . a court of record . . . must grant"); *cf. id.* §48(7) (six-year limitation for action upon a judgment rendered in court not of record).

sections the construction "court of record or not of record" is used,[15] thus appearing to make these sections applicable to all courts of the state. The term "any" court[16] or "all courts"[17] probably has the same sense. The confusion is compounded by two sections that provide that they shall be applicable whether or not the civil practice act itself applies.[18] However, the legislative history of these sections indicates that they were intended to overcome inconsistent provisions in inferior court acts—both of record and not of record.[19] It thus appears that the terms "any court," "all courts," and "court of record or not of record" are synonymous in referring to all the courts of the state.[20] It should be noted, however, that the effective scope of such provisions may still depend upon whether the individual court act contains any conflicting provisions.

B. Technique of the Conformity Provision

Two methods, with variants, are employed to receive the civil practice act into the practice of inferior courts. In the first, the civil practice act is received as applicable.[21] In the second, the practice of the court in question is equated to that of the Supreme Court—a court regulated by the civil practice act and the rules of

[15] *E.g.*, N.Y. Civ. Prac. Act § 144 (time for publication of notice); *id.* §228(9) (time within which corporation must appear); *id.* §682 (preferences in execution). Section 18 concerns courts not of record only, but it merely makes section 17 (attempt to commence action in court of record) applicable when an extra condition is met.

[16] *E.g.*, N.Y. Civ. Prac. Act §61-f (unlawful to commence actions on certain contracts); *id.* §336 (proof of payment by municipal officer). In section 379-a, besides "in any of the courts of this state," the phrase "any court of record" is used, indicating that different groups of courts are meant.

[17] N.Y. Civ. Prac. Act §390 (proof of books and records).

[18] N.Y. Civ. Prac. Act §163-a: "This section [method of service by mail] shall apply to the service of such paper . . . in any court whether or not the provisions of the civil practice act are applicable to such service in that court." *Id.* §463-a: "This section [verdict by five-sixths of jurors] shall apply to every civil case tried by a jury in any court of the state, whether a court of record or not of record, and whether the provisions of the civil practice act are or are not applicable to such court or to trials by jury held therein."

[19] See 17 N.Y. Jud. Council Rep. 173, 177 & n.20 (1951).

[20] Generally speaking, it is the provisions that tend to the "substantive," as opposed to those regulating details of procedure, that are applicable to all courts. See N.Y. Civ. Prac. Act §144 (computing time for effective publication of notice); *id.* §163-a (service through the post-office); *id.* §228(9) (corporation given extra time to answer when service was made on the secretary of state); *id.* §454 (when municipality is party, juror may not be challenged because he is taxpayer); *id.* §463-a (non-unanimous verdicts in all civil cases); *id.* §481 (interest on money judgment); *cf. id.* §44 (where satisfaction of judgment presumed); *id.* §682 (preference over unlevied execution). See also notes 16–18 *supra*.

[21] See, *e.g.*, Schenectady City Ct. Prac. Act §122, N.Y. Laws 1927, c. 393, §122, *as amended by* N.Y. Laws 1928, c. 226: "Except as herein otherwise provided or by the rules of this court, the provisions of the civil practice act and the rules of civil practice of the state of New York, so far as may be [sic], shall apply to this court."

civil practice.[22] The second formulation would be more effective with respect to any civil practice act provisions that are specifically limited to the Supreme Court—the problem which arose under section 3347 of the Throop code—or, in the case of a court not of record, with respect to any civil practice act provisions that are expressly limited to courts of record. As to courts of record, however, it is difficult to see why the same results should not ordinarily be reached under either formulation, although one court has indicated that the first is broader than the second.[23]

A number of local court acts, in making the civil practice act applicable, contain such phrases as "any statutory limitation to the contrary notwithstanding" or "notwithstanding express reference by name or classification therein to any other court." As earlier indicated,[24] these were apparently added to overcome the effect of such provisions as section 3347 of the Throop code, although the language of the first phrase is broader than required for this purpose.

Some reception sections specify adoption of the civil practice act as it "may be from time to time" and others are silent as to time. Even in the latter case, it would seem that a dynamic conformity is called for.[25] If this construction were not adopted, it would be impossible to legislate any uniform point of procedure without amending a multitude of particular court acts.[26]

[22] See, *e.g.*, N.Y.C. Munic. Ct. Code §15: "Except as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding." See generally Lauer, Municipal Court Practice §§102–03 (2d ed. 1928).

[23] Mitchell v. Schroeder, 94 Misc. 270, 158 N.Y. Supp. 31 (Sup. Ct. App. T.), *aff'd*, 174 App. Div. 857, 159 N.Y. Supp. 1129 (1st Dep't 1916). In this case the Appellate Term refused to apply the pre-trial examination provisions of the code of civil procedure to an action in the Municipal Court of the city of New York, although section 15 of the Municipal Court code equates the practice in that court to that of the Supreme Court. In the course of an opinion which rested largely on other grounds, the court said (*id.* at 279, 158 N.Y. Supp. at 36):

> It is somewhat significant that nowhere in the Municipal Court Code did the legislature enact that the "*provisions*" of the Code of Civil Procedure shall apply to Municipal Court as far as the same can be made applicable and are not in conflict with the provisions of the act. The Municipal Court Act, as it existed prior to Sept. 1, 1915, contains such a section (§20), but in the present Code the legislature has substituted for that section section 15. . . .

[24] See text at note 11 *supra*.

[25] The reception section of the New York city Municipal Court code was specifically adopted from the Federal Conformity Act (see Lauer, *op. cit. supra* note 22, at 204–05), which was enacted after a century of dissatisfaction with the Process Act of 1789, an act that called for static conformity. See Hart & Wechsler, The Federal Courts and the Federal System 581–86 (1953). There is no reason to assume that the New York Legislature wished to foist the unhappy experience of the Federal courts on its own courts.

[26] *But see* Hirsch v. Albany Savings Bank, 192 Misc. 505, 81 N.Y.S.2d 253 (Albany City Ct. 1948), *aff'd*, 276 App. Div. 792, 92 N.Y.S.2d 636 (3d Dep't 1949), where the court reasoned that the Legislature did not intend by the enactment of §193-a of the civil practice act to confer jurisdiction upon the City Court of Albany to implead third-party defendants.

C. Varying Approaches of the Courts in Particular Situations

A number of different approaches are evidenced in the cases construing the applicability provisions and determining applicability in particular situations.

In *Mitchell* v. *Schroeder*,[27] it was held that the Municipal Court of the city of New York had no power to grant an examination before trial. The code of civil procedure provisions governing such examtions applied in terms to any court of record.[28] Section 15 of the Municipal Court code provided that "[e]xcept as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court . . . ."

Judge Lehman stated that three questions had to be considered:[29]

> *First.* Does the Municipal Court Code make other and exclusive provisions for an examination before trial? *Second.* What, if any, powers has the legislature conferred upon the Municipal Court by making it a court of record? *Third.* Is an order of examination of a party before trial a part of the 'practice' or 'procedure' of the Supreme Court within the meaning of the Municipal Court Code?

As to the first question, the court pointed to the inclusion in the Municipal Court code of a provision for physical examination in personal injury actions, and inferred that if the Legislature had intended to allow pre-trial examinations generally in the Municipal Court it would have made a similar provision for them in the Municipal Court code.

In answer to the second question, the court made a distinction between provisions "which define the manner in which a court of record shall exercise its statutory or inherent powers"[30] and those which grant new powers, placing the code of civil procedure provisions for pre-trial examinations in the second category. While the former apply to all courts of record, the latter "do not become applicable to the Municipal Court, *which has been given a code of its own*, unless the provisions of the Code of Civil Procedure were also made applicable to the Municipal Court."[31] In this connection, the court emphasized the fact that section 15 of the Municipal Court code (the applicability provision) was phrased in terms of adopting Supreme Court practice rather than adopting the "provisions" of the code of civil procedure.[32]

Finally, the court, answering the third question, held that the right to a pre-trial examination is not "a matter of practice and procedure" within the conformity provision of the Municipal Court

[27] 94 Misc. 270, 158 N.Y. Supp. 31 (Sup. Ct. App. T.), *aff'd*, 174 App. Div. 857, 159 N.Y. Supp. 1129 (1st Dep't 1916).
[28] N.Y. Code Civ. Proc. §§870, 873.
[29] Mitchell v. Schroeder, *supra* note 27, at 273, 158 N.Y. Supp. at 33.
[30] *Id.* at 275, 158 N.Y. Supp. at 34.
[31] *Id.* at 278, 158 N.Y. Supp. at 36.
[32] See note 23 *supra*.

code, but rather "a right given to a party in the action by statute."[33]

Despite the exhaustive and careful analysis of the *Mitchell* case, the result is open to question. In *Scheidlinger* v. *Silber*,[34] decided shortly before the *Mitchell* case, this same issue had received a contrary resolution, the court brushing off in one sentence the contention that section 15 of the Municipal Court code was not equal to the purpose. That Judge Lehman may have misinterpreted the intention of the Legislature is inferable from the subsequent amendment of section 27 of the Municipal Court code to allow depositions of a party "in the same manner as such depositions are taken . . . in the supreme court." Nevertheless, the *Scheidlinger* case was reversed and the *Mitchell* case affirmed and approved by the Appellate Division.[35]

The *Mitchell* case has been followed in denying a Municipal Court judge the power to order a reply pleading, the court citing the *Mitchell* case for the proposition that the conformity provision is effective only "where, as regards the practice, pleadings, *etc.*, the Municipal Court Code is silent."[36] On the other hand, at least one case has found the civil practice act inapplicable although the local court act was silent and the point was clearly procedural.[37]

The courts will often reject a doctrinaire approach and reject a provision on the ground that it does not fit lower court needs.[38] *O'Brien* v. *Kuntz* [39] is illustrative. In holding that a lawyer could not postpone a case ad infinitum on the ground of other engagements, the court declared:[40]

> Rule 9 of the general rules of practice of the Supreme Court in this department which provides that a cause upon the day calendar shall be passed for a day when counsel is actually engaged in the trial of a cause, applies to cases in the Municipal Court only "as far as the same can be made applicable" . . . and cannot reasonably be applied to a case [such as] the case at bar, with any due regard to the prompt and orderly administration of the law and respect for the rights of both parties.

The spirit of adjustment exemplified by the *O'Brien* case usually results in an application of the civil practice act. In *Prudential*

[33] Mitchell v. Schroeder, *supra* note 27, at 280, 158 N.Y. Supp. at 37.
[34] 94 Misc. 322, 158 N.Y. Supp. 27 (Sup. Ct. App. T.), *rev'd*, 174 App. Div. 887, 159 N.Y. Supp. 1140 (1st Dep't 1916).
[35] See notes 27 and 34 *supra*.
[36] See Kern v. Caledonian Ins. Co., 109 Misc. 173, 174–75, 178 N.Y. Supp. 340, 341 (Sup. Ct. App. T. 1919). *But cf.* Matter of Estate of Unger, 172 Misc. 952, 16 N.Y.S.2d 609 (Surr. Ct. 1939), *aff'd*, 259 App. Div. 823, 19 N.Y.S.2d 28 (2d Dep't 1940).
[37] National City Bank v. A. Stein & Co., 149 Misc. 571, 267 N.Y. Supp. 727 (N.Y.C. Munic. Ct. 1933) (right to amend complaint once as of right).
[38] *Cf.* Myrus v. Commonwealth Fuel Co., 120 Misc. 201, 198 N.Y. Supp. 1 (Sup. Ct. App. T. 1923), holding that the Municipal Court lacks power to require security of plaintiffs resident outside the city but in the state because a judgment could be collected anywhere within the state if it were docketed with the county clerk. The court's confusion over the power-practice dichotomy of the *Mitchell* case was resolved by looking to the "reason" for the rule.
[39] 84 N.Y. Supp. 535 (Sup. Ct. App. T. 1903).
[40] *Id.* at 537.

Paper Co. v. *Ashland Press, Inc.*,[41] the court was faced with the problem of whether a Municipal Court judge could vacate a judgment as against the weight of evidence and grant a new trial. This would be possible in the Supreme Court.[42] The Municipal Court had statutory power to "set aside a verdict; to vacate . . . any . . . judgment . . . for any error in form or substance,"[43] and to vacate a judgment and grant a new trial for failure of service of process.[44] In holding that these were not the exclusive grounds upon which the Municipal Court could act, the court said:[45]

> We think that [sections 6(7), 129(3) and 15] of the . . . Code evince the legislative intention that a justice of that court shall have all the same reasonable power [in setting aside verdicts and vacating judgments] as resides in the Supreme Court. There is no express prohibition in the statute against its exercise.

This result has since been codified in section 6(7) of the Municipal Court code.

An interesting problem in the applicability of seemingly inconsistent provisions was resolved in *Haber* v. *Gingold*.[46] The issue involved the timeliness of notice of trial sent through the mails. Section 164 of the civil practice act provides that "where it is prescribed that a notice must be given . . . within a specified time . . .; if service is made through the post-office . . . three days shall be added to the time specified, except that service of a copy of a note of issue may be made through the post-office not less than fourteen days before the day of trial, including day of service." Rule 150 of the rules of civil practice requires service of a note of issue at least 12 days before the commencement of the term. The Municipal Court code specifies a minimum of five days and a maximum of eight[47] and makes no provision for extra days if notice is served by mail. In fact, including the day of service, there were eight days between trial and service. While the service would seem to have been timely under any construction, the court attempted to formulate a rule to guide the bar. First, reasoned the court, the theory of extended time for service by mail embodied in the civil practice act is applicable to the Municipal Court since the Municipal Court code is silent. Second, reading section 164 together with rule 150, the general rule of three days additional time is reduced to two days in the special case of notice of trial. Finally, it is this two-day extension that is applicable to the Municipal Court code and when added to the five-day minimum gives a seven-day minimum, including the day of service.

[41] 231 App. Div. 515, 248 N.Y. Supp. 52 (1st Dep't 1931).
[42] See N.Y. Civ. Prac. Act §§549, 554.
[43] N.Y.C. Munic. Ct. Code §6(7).
[44] N.Y.C. Munic. Ct. Code §129.
[45] Prudential Paper Co. v. Ashland Press, Inc., *supra* note 41, at 518, 248 N.Y. Supp. at 55.
[46] 170 Misc. 817, 11 N.Y.S.2d 187 (N.Y.C. Munic. Ct. 1939).
[47] N.Y.C. Munic. Ct. Code §95.

The applicability of the third-party practice provisions of the civil practice act have been a recent source of difficulty. Section 193-a as been held inapplicable to the Albany City Court[48] but applicable to the Municipal Court of the City of New York.[49] The Municipal Court stated and refuted some of the arguments that had carried the day in the Albany court as follows:[50]

> . . . it is contended that the intent of the Legislature to exclude courts of inferior jurisdiction from the third party practice may be gathered from the fact that neither the new statute nor the new rule makes any reference to such courts, whereas, in other instances of changes in practice, the Legislature has made express reference thereto, such as that relating to five-sixths jury verdicts, Sec. 463-a, Civil Practice Act, and Sec. 52 of the Vehicle and Traffic Law.
>
> It is argued that Rule 54, of the Civil Practice Rules, . . . giving the third party defendant 20 days to answer, cannot be made "applicable by implication" to the Municipal Court [since N.Y.C. Munic. Ct. Code §§19 and 20 allow seven days]; that an analysis of the scope and ramification of the new third party practice and the resultant confusion demontrates that it could not have been the intention of the Legislature to apply the new practice to all the courts in the state; and, finally, the fact that the Judicial Council in its report to the Legislature . . . made no reference to courts of limited jurisdiction. . . .
>
> It would seem to me that this entire argument overlooks the various provisions in the Civil Practice Act and the Municipal Court Code conforming the practice in this Court to that of the Supreme Court.

Besides the general conformity provision of the Municipal Court code, the court had in mind the joinder of party provision which adopted "the provisions of law applicable to like cases in the supreme court."[51] The Albany court's decision was reached despite the presence of a similar provision in its court act[52] and despite the fact that its conformity provision adopts "the provisions of the civil practice act as they may be from time to time . . ."[53]

The applicability of the summary judgment provision of the rules of civil practice[54] has raised similar problems. Seemingly, this provision is conformable to the practice in all courts of record

[48] Hirsch v. Albany Savings Bank, 192 Misc. 505, 81 N.Y.S.2d 253 (Albany City Ct. 1948), *aff'd*, 276 App. Div. 792, 92 N.Y.S.2d 636 (3d Dep't 1949).
[49] Thomas J. Nolan, Inc. v. Martin and William Smith, Inc., 193 Misc. 877, 85 N.Y.S.2d 380 (N.Y.C. Munic. Ct.), *aff'd*, 195 Misc. 50, 85 N.Y.S.2d 387 (Sup. Ct. App. T. 1949).
[50] *Id.* at 878–79, 85 N.Y.S.2d at 383.
[51] N.Y.C. Munic. Ct. Code §27.
[52] Albany City Ct. Act §39, N.Y. Laws 1931, c. 414, §39.
[53] *Id.* §16. It should be noted, however, that this decision rested in part on the "equitable" nature of third-party practice. See Hirsch v. Albany Savings Bank, *supra* note 48, at 506, 81 N.Y.S.2d at 255–56.
[54] N.Y. R. Civ. P. 113.

except the Court of Claims.[55] The ground given for inapplicability is that the rule assumes an answer to the complaint—it begins, "when an answer is served in an action . . ."—while rule 2 of the Court of Claims rules does not require an answer.[56]

IV. APPLICABILITY OF THE CIVIL PRACTICE ACT TO COURTS NOT OF RECORD

Since the general provisions of the civil practice act limit it to courts of record a provision in the local court act adopting the civil practice act is necessary to make it applicable in a court not of record.[57] The same techniques that are employed in the acts governing courts of record are used here, *i.e.*, either the civil practice act is adopted as applicable,[58] or the practice is equated to the Supreme Court or County Court.[59] The latter method may be more advantageous for courts not of record, because of the many sections of the civil practice act that are in terms limited to "courts of record" and would therefore present a problem in legislative intent. This problem is avoided, however, by such a formulation as is used in the Judicial Council's proposed Uniform City Court Act, which adopts the provisions of the civil practice act and rules "not withstanding express reference by name or classification therein to any other court."[60]

[55] *Compare, e.g.*, Aronstam v. Scientific Utilities Co., 196 N.Y. Supp. 306 (Sup. Ct. App. T. 1922), *aff'd*, 199 N.Y. Supp. 908 (1st Dep't 1923), *with* Muccino v. State, 164 Misc. 918, 300 N.Y. Supp. 247 (Ct. Cl. 1937) (Barret, P.J., concurring on other grounds).

[56] Muccino v. State, *supra* note 55. *But cf.* Ehde v. State, 260 App. Div. 511, 513, 23 N.Y.S.2d 616, 617 (4th Dep't): "[T]he prosecution of a claim before the Court of Claims is in effect the same as the prosecution of an action in the Supreme Court," giving the court power to order a transcript supplied to a poor person under section 1493 of the civil practice act.

[57] Fifty-five acts establishing city courts not of record were inspected. Of these, about forty make the Justice Court Act applicable, although even in these, particular provisions of the civil practice act may be adopted by reference. See, *e.g.*, Amsterdam City Ct. Act §136, N.Y. Laws 1911, c. 242, §136 (persons qualified to serve complaints); Gloversville City Ct. Act §30, N.Y. Laws 1934, c. 369, §30 (deposition practice). The compilation of statutes in the Judicial Conference Report quoted in note 3 *supra* does not fully reflect the extent of this limited adoption by reference. The Gloversville statute has served as a model for other local court acts, thus widening the effective scope of the civil practice act. See N.Y. Temp. Comm'n on the Courts Rep. III 479–80, Leg. Doc. 6(b)(1957).

In addition, some provisions of the civil practice act are specifically made applicable to courts not of record. See notes 15–18 *supra*.

[58] See, *e.g.*, Peekskill City Ct. Act §131, N.Y. Laws 1938, c. 194, §131.

[59] *Cf.* Buffalo City Ct. Act §56, N.Y. Laws 1909, c. 570, §56, *amended by* N.Y. Laws 1922, c. 142.

[60] 20 N.Y. Jud. Council Rep. 245–46 (1954). The Uniform City Court Act adopts this technique (*id.* at 245):

> §23. Civil practice; general provisions. The provisions of the civil practice act and the rules of civil practice, notwithstanding express reference by name or classification therein to any other court, shall apply to the city court as far as the same can be made applicable and are not in conflict with the provisions of this act.
>
> Where the word "state" is used in applicable provisions of the civil practice act or rules of civil practice it shall be construed to mean "county" as applied to the city court if the context of the particular section or rule permits of such construction.
>
> The court, within the limits of its jurisdiction, is vested with all the powers possessed by the county court in like causes.

In commenting on this section the Council states (*id.* at 245–46):

> The fact that a particular city court is not a court of record would not of itself interfere with the application of the Civil Practice Act. . . .
>
> . . .
>
> The third paragraph was added to clarify the procedural powers conferred upon the court by the first paragraph of the recommended section. It is intended . . . to emphasize that once the facts exist which confer jurisdiction upon the court, it may do any act . . . which might properly be done by the county court. . . .
>
> It is believed . . . that problems which have arisen in the past because of less comprehensive phraseology will be avoided [citing *Mitchell v. Schroeder*, *supra* note 27; see text at notes 27–33 supra].

Courts not of record have not been noticeably more liberal than the courts of record in their interpretations of applicability provisions. In holding the summary judgment provisions of the rules of civil practice inapplicable to the Buffalo City Court, one court said, "No attempt has been made by the Legislature to make the City Court Act of Buffalo conform to the drastic and extensive changes of the . . . Civil Practice Act and Rules . . . ."[61] Section 56 of the local act, which equated local practice with the Supreme Court, and section 115, which gave the court the same jurisdiction as Justice Courts, were explained as follows:[62]

> The difficulty of processing a new amendment to the City Court Act to conform to each change in the Civil Practice Act, Rules and Justice Court Act, are an adequate reason for sections 56 and 115 of the City Court Act. Wherever drastic changes in court practice in the higher courts are made, such as summary . . . and declaratory judgments, legislative changes should be made in the City Court Act rather than that the City Court should proceed in conflict with the City Court Act which gives it jurisdiction.

In addition to such judicially imposed restrictions, the constitution must also be reckoned with. Section 18 of article six prohibits the Legislature from conferring on courts not of record any equity jurisdiction. For this reason third-party practice was held inapplicable to these courts.[63]

An earlier study of the Advisory Committee on Practice and Procedure describes the applicability of disclosure provisions in the civil practice act and rules, reproducing the entire spectrum of applicability from the viewpoint of a particular area of procedure.[64]

[61] See A. D. Deemer Furniture Co. v. G. H. Poppenberg, Inc., 127 Misc. 117, 118, 216 N.Y. Supp. 72, 73 (Sup. Ct. 1926). Summary judgment is presently permitted because of an amendment adding section 37-a to the Buffalo City Court Act. N.Y. Laws 1927, c. 86; N.Y. Laws 1941, c. 682.

[62] A. D. Deemer Furniture Co. v. G. H. Poppenberg, Inc., *supra* note 61 at 119, 216 N.Y. Supp. at 74.

[63] See H. G. Fisher & Co. v. Lincoln Rochester Trust Co., 195 Misc. 983, 88 N.Y.S.2d 565 (Rochester City Ct. 1949) (decided when this court was not of record).

[64] See N.Y. Temp. Comm'n on the Courts Rep. III 431, 487, Leg. Doc. 6(b) (1957).

V. APPLICABILITY OF THE RULES OF CIVIL PRACTICE

Unlike the civil practice act, the rules of civil practice do not contain their own applicability provision.[65] Nor does section 83 of the Judiciary Law, pursuant to which the rules were adopted, contain such a provision. However, the derivation of this section suggests that the rules were meant to be limited to courts of record.[66] Indeed, it would be illogical to have the civil practice act limited to courts of record, while the rules, which in many provisions are dependent on the act for meaning, apply to all courts. However, as with the civil practice act, individual courts not of record may be governed by the rules.[67] The problems that accompany such adoption are similar to the problems already discussed.

[65] *But cf.* N.Y. R. Civ. P. 3: "Except where a contrary intent is expressed in . . . the context, a provision of rules applicable to . . . procedure in the supreme court applies to surrogate's courts in so far as they can be applied to the substance and subject matter of a proceeding without regard to form."

[66] See N.Y. Laws 1870, c. 408, §13 ("rules . . . shall be binding upon all courts of record").

[67] See, *e.g.*, Mechanicville City Ct. Act §19, N.Y. Laws 1930, c. 805, §19. The acts that equate their practice to that of the Supreme Court would seem to adopt the rules of civil practice in so doing.

APPENDIX

APPLICABILITY PROVISIONS IN SELECTED NEW YORK COURT ACTS

A. Courts of Record

New York City Municipal Court Code

§15: Except as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the same time in like causes in the supreme court, any statutory limitations heretofore enacted, to the contrary thereof notwithstanding.

§182: The court shall conduct hearings upon small claims in such manner as to do substantial justice . . . and shall not be bound by statutory provisions or rules of practice, procedure, pleadings or evidence, except statutory provisions relating to privileged communications and except the provisions of section three hundred and forty-seven of the civil practice act. The provisions of the civil practice act, the rules of civil practice, the provisions of this code and the rules of this court shall apply to claims brought under this title so far as the same can be made applicable and are not in conflict with the provisions of this title; in case of conflict the provisions of this title shall control.

New York City Court Act

§36:. . . . The rules of civil practice shall govern the practice in this court so far as they are applicable thereto, unless specific provision to the contrary is set forth in this act or in the rules of practice . . . established for the city court of the city of New York as authorized by this section.

§65: Except as in this act or otherwise specially provided the practice, pleadings, forms and procedure in the city court of the city of New York and on appeal shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding.

Court of Claims Act

§9(9):. . . . [E]xcept as otherwise provided by this act or by rules of this court or the civil practice act, the practice shall be the same as in the supreme court.

Surrogate's Court Act

§316: Except where a contrary intent is expressed in, or plainly implied from the context of this act, a provision of law or of rules,

applicable to practice or procedure in the supreme court, applies to surrogate's courts and to the proceedings therein, so far as they can be applied to the substance and subject matter of a proceeding without regard to its form.

Albany City Court Act

§16: The provisions of the civil practice act and rules and regulations of the supreme court as they may be from time to time, shall apply to this court so far as the same can be made applicable and are not in conflict with the provisions of this act, or the rules of practice made by the justices of this court pursuant to section 11 of this act; in case of such conflict this act or such rules shall govern.

Mt. Vernon City Court Act

§196: The provisions of the civil practice act and the rules of civil practice, notwithstanding express reference by name or classification therein to any other court, shall apply to the city court as far as the same can be made applicable and are not in conflict with the provisions of this act. Where the word "state" is used in applicable provisions of the civil practice act or rules of civil practice, it shall be construed to mean "county" as applied to the city court if the context of the particular section or rule permits of such construction.

Rochester City Court Act

§11: Except as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court. The civil practice act and the rules of civil practice, as now or hereafter amended, shall be applied to the practice, pleadings, forms and procedure in this court with only such exceptions and modifications as the limits of this court's jurisdiction and the other provisions of this act make necessary or appropriate.

Schenectady City Court Practice Act

§15: The provisions of the civil practice act and the rules of civil practice shall apply to this court.

§16(1): Except as otherwise expressly provided in this act, all questions as to the joinder of parties shall be governed by the provisions of the civil practice act.

§122: Except as herein otherwise provided or by the rules of this court, the provisions of the civil practice act and the rules of civil practice . . . so far as may be, shall apply to this court.

[The multiplicity of provisions is occasioned because each section applies only to the article to which it is attached. Section 122 is part of the article on "general provisions."]

Syracuse Municipal Court Code

§15: Except as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding.

Troy City Court Act

§12: Except as otherwise provided in this act or in the rules . . . of this court, the practice, pleadings, forms and procedures in this court shall conform, as nearly as may be, to the practice, pleadings, forms, and procedure existing at the time in like causes in the supreme court, any statutory limitations heretofore enacted to the contrary thereof notwithstanding.

§146: The provisions of the civil practice act and the rules of civil practice, so far as applicable with respect to examinations before trial, discovery and inspection, physical examinations and admissions shall apply to actions in this court.

Utica City Court Code

§6: Except as provided in this act or in the rules of the city court of Utica, the practice, pleadings, forms and procedure in the city court of Utica shall conform as nearly as they may be to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court.

Yonkers City Court Act

§18: The city judges of Yonkers may from time to time establish rules of practice for the court, not inconsistent with this act, or with the rules of civil practice. The rules of civil practice shall govern the practice of this court so far as they are applicable thereto unless specific provision to the contrary is set forth in this act or in the rules of practice from time to time established for the city court of Yonkers as authorized by this section.

§32: The forms of process, pleadings and proceedings, and the manner of pleading and procedure prescribed by the civil practice act and the rules of civil practice for actions, proceedings, provisional remedies and remedies in courts of record, shall be used in the city court of Yonkers except as otherwise provided by this act, and all the provisional remedies allowed by said civil practice act as now or hereafter amended may be had in said city court.

§39: The only modifications and limitations upon the application and effect upon the civil practice act in relation to actions and proceedings in said court, are the provisions of this act.

B. Courts Not of Record

Binghamton City Court Act

§16: a. The provisions of the civil practice act and the rules of civil practice notwithstanding express reference by name or classification therein to any other court, shall apply to the city court as far as the same can be made applicable and are not inconflict with the provisions of this act.

b. Where the word "state" is used in applicable provisions . . . it shall be construed to mean "county" as applied to the city court if the context . . . permits of such construction.

c. The city court, within the limits of its jurisdiction, is vested with all the powers possessed by the county court in like causes.

Buffalo City Court Act

§56: The provisions of the Civil Practice Act and rules and regulations of the supreme court as they may be from time to time, shall apply to the city court of Buffalo as far as the same can be made applicable and are not in conflict with the provisions of this act; in case of such conflict this act shall govern.

THE DISTINCTION BETWEEN ACTION BY A COURT AND BY A JUDGE IN NEW YORK

TABLE OF CONTENTS

I. INTRODUCTION*

A. A "Court" and a "Judge" Distinguished

Throughout the procedural laws of this state runs a distinction between the authority of a court and the authority of a judge when not sitting as a court. Some statutes and rules authorize motions or other applications to be made to, or orders to be made by a "court"; others refer instead to a "judge at chambers" or "out of court" or, most commonly, simply to a "judge". The term "court" refers to a formal term or sitting of a court, held at a fixed time and place and usually open to the public.[1] The other terms are synonymous, referring to a judge when not sitting as a court. The term "at chambers" is misleading, for anything which a judge is authorized to do when not sitting as a court he may do at any time or place, and not only at his chambers.[2]

The authority of a judge out of court includes not only the handling of particular matters in an action or special proceeding that is pending in a court. Some special proceedings may be instituted, heard and determined entirely before a judge out of court, and such a proceeding is said to be pending before the judge rather than the court.

Section 65 of the civil practice act provides generally, with respect to the Supreme Court, that "Each justice, at all reasonable times, when not engaged in holding court, must transact such judicial business as may be done out of court." Sections 74 and 75 grant to a county judge the same power and authority in an action or special proceeding brought in the County Court, or a special proceeding instituted before him out of court, that a justice of the Supreme Court possesses in a like action or special proceeding brought in the Supreme Court, or a like special proceeding instituted before him out of court.

B. Consequences of the Distinction

A number of consequences of varying degrees of importance flow from the distinction between court and judge.

1. Time and Place of Making Motion or Order

The most obvious, of course, is the time and place of making an application or order. If the statute authorizing a motion or application requires that it be made to a court, it should be made at a formal session or term of the court. Similarly, if an order is authorized to be made by the court, it should, in strict theory, be signed while the judge is sitting as a court during the term.[3] If,

* In the footnotes of this study, references to the New York Civil Practice Act are designated by section (§) or article (art.) alone and references to the New York Rules of Civil Practice are designated RCP.

[1] See Carmody, New York Practice 67 (7th ed. Forkosch 1956); Aiken v. Aiken, 96 Misc. 561, 160 N.Y. Supp. 875 (Sup. Ct. 1916); see also N.Y. Judiciary Law §§4, 86.

[2] See 1 Carmody-Wait, Cyclopedia of New York Practice 237 (1952).

[3] See Carmody, *op. cit. supra* note 1, at 67.

on the other hand, a motion may be made to, or an order signed by, a judge, the motion may be made to him or the order signed by him at any time or place.

While some provisions appear to require orders to be made only by a judge, section 128 of the civil practice act, added to the code of civil procedure in 1911, in terms nullifies this requirement. It states

> An order which is authorized by statute to be made at chambers may be made by the court.

The importance of this provision is limited, for the number of orders that are authorized to be made by a judge only is relatively small. As to matters required to be handled by a court, a new section 129 was included in the civil practice act, applicable only to the Supreme Court, less definite in statement than section 128 and subject to a number of interpretations. This statute reads:

> An order made by a justice of the supreme court, out of court, shall not be void on the ground that a statute or rule, in terms or in effect, requires the motion therefor to be made to, or authorizes the order to be made only by, such court, unless the order be made outside of a county or judicial district in which an application to the court for such order is authorized.

That these new provisions left many questions unresolved will be demonstrated later in this study.

2. *Entry of Order*

Generally, a court order determining a motion is filed with the supporting papers and entered by the clerk.[4] A judge's order generally is not entered or filed but is carried away by the attorney for the party who prevailed on the motion.[5] A judge's order to take testimony by deposition must be entered,[6] however, and any judge's order must be entered if an appeal is to be taken from it.[7] And in a special proceeding it seems that all orders must be entered, regardless of whether made by court or judge.[8]

The difference between court and judge's orders regarding entry has practical consequences when service or delivery of the order is required to effectuate it—as, for example, delivery of a warrant of attachment to the sheriff or service of an injunction order.[9] Since the original of a court order will have been filed, a copy must be used; but if the order was a judge's order, the original may be delivered or, as section 883 prescribes for an injunction order, the original shown and a copy delivered.

[4] RCP 71; see Carmody, *op. cit. supra* note 1, at 67.
[5] See 1 Carmody-Wait, *op. cit. supra* note 2, at 697.
[6] RCP 125.
[7] §559.
[8] §101.
[9] §883.

3. *Form of Order*

The distinction between court and judge's orders regarding place of making and entry have spawned differences in the form of orders.[10] Thus, the word "enter" appears at the end of a court order but not a judge's order, and the recital part of a court order begins with the words "upon reading and filing" the motion papers while a judge's order omits the words "and filing". Further, the caption of a judge's order simply states the title of the action while a court order caption recites the term and part and the justice who is presiding. Also, although rule 70 expressly makes the form of signature immaterial, it is customary for the judge to sign his initials alone on a court order and his full name on a judge's order.[11]

4. *Authority of Judges to Exercise Powers of Judge of Another Court*

Sections 77 and 130 of the civil practice act allow judges to exercise out of court powers of a judge of a court other than their own. They read:

> [§77] A county judge within his county possesses and upon proper application must exercise the power conferred by law in general language upon an officer authorized to perform the duties of a justice of the supreme court at chambers or out of court.
>
> [§130] 1. An order in an action or special proceeding in a county court which a county judge may make out of court may be made without notice (except an order to stay proceedings which may be made only upon notice) by a justice of the supreme court, or by the county judge of any other county.
>
> 2. Where an order, in an action in any other court, may be made by a judge of the court, out of court, and without notice, and the particular judge is not specially designated by law, it may be made by any judge of the court in any part of the state; or, except to stay proceedings after verdict, report or decision, by a justice of the supreme court, or by the county judge of the county where the action is triable or in which the attorney for the applicant resides.

The ambiguity of these provisions as well as their lack of symmetry is readily apparent. While section 77 refers to all chambers duties, subdivision two of section 130 refers only to *ex parte* chambers orders and subdivision one less clearly seems to do the same. Further, it is unclear to what courts subdivision 2 applies other than the Supreme Court and County Courts.[12]

[10] See 1 Carmody-Wait, *op. cit. supra* note 2, at 696–98; Carmody, *op. cit. supra* note 1, at 70–71.
[11] Another minor distinction is that in a long form court order the date appears in the caption while a judge's order and a short form court order are dated at the end. *Ibid.*
[12] See *Applicability of the Civil Practice Act* at pp. 557–576 *supra*.

Another such provision, section 2 of article 6 of the constitution, states:

> No justice of the appellate division shall, within the department to which he may be designated to perform the duties of an appellate justice, exercise any of the powers of a justice of the supreme court, other than those of a justice out of court. . . .

The operation of these provisions, and the effect on them of any changes in the court-judge division of powers, are discussed later in this study. It suffices to note at this point that their application depends upon the distinction between powers of a court and those of a judge out of court.

5. *Venue of* Ex Parte *Motions*

Motions upon notice in an action in the Supreme Court, with certain exceptions, are to be made within the judicial district in which the action is triable or in a county adjoining the county in which it is triable.[13] No venue provision exists for *ex parte* motions except to the extent that section 130(2) may be read as such; it states that an order that can be made without notice *and out of court* "may be made by any judge of the court in any part of the state."

C. Development of the Present Provisions

The distinction between judges acting at a term of court and at chambers dates back to earliest common law. The origin of terms of court in England was carefully traced in a discourse written by Sir Henry Spelman in 1614;[14] from this discourse Blackstone's account was taken.[15] The development of the English terms, as described in these authorities, was summarized in an opinion of the New York Court of Appeals in this way:[16]

> In the common law courts, the regular terms were derived from canonical prohibitions, which "exempted certain holy seasons from the turmoil of forensic litigations," such as the time of Advent and Christmas, giving rise to the winter vacation; the time of Lent and Easter, giving rise to that of the spring; the time of Pentecost, from which was derived the third vacation. There was, finally, the long vacation between mid-summer and Michaelmas, for the season of harvest. In this way, there came to be four well known terms of court; St. Hilary, Easter, Holy Trinity and St. Michael. Strict judicial business could only be transacted at these terms, though, after a time, many incidental matters were transacted out of court.

[13] RCP 63(1).
[14] Spelman, *The Original of the Four Terms of the Year*, in 2 The English Works of Sir Henry Spelman Kt. 67-103 (2d ed. 1727).
[15] 3 Blackstone, Commentaries* 275–79.
[16] Brown v. Snell, 57 N.Y. 286, 299–300 (1874) (opinion of the Commission, per Dwight, C.)

The rule that required a court of common law to do business at stated terms had no application to the Court of Chancery. As Spelman states, "the Chancery, being a Court of Piety, is said to be always open,"[17] and the business of that court could be done at any time.

In the common law courts, certain matters were very early exempted from the requirement that judicial business be done during a term. These exemptions, resting on considerations of piety, necessity and the public good, were:[18]

> For matters of a Peace and Concord, by reason whereof our Judges take the acknowledgment of *Fines, Statutes, Recognizances,* &c. upon any Day, even the *Sabbath-day* (tho' it were better then forborn, if Necessity require it not.)
>
> For suppressing of Traitors, Thieves, and notorious Offenders, which may other wise trouble the Peace of the Common-wealth, and endanger the Kingdom.
>
> For manumission of Bond-men: a Work of Piety.
>
> For saving that which otherwise would perish: a Work of Necessity.
>
> For doing that, which time overslipt, cannot be done: As for making Appeals within the time limited, &c.
>
> For taking the Benefit of a Witness that otherwise would be lost, as by *Death* or *Departure.*
>
> For making the Son *Sui Juris:* as if, amongst us, the Lord should discharge his ward of Wardship.

Apparently, as time went on and judicial business increased, the practice of hearing additional matters out of court grew.[19] Developing as it did before the era of procedural codes, there is a paucity of evidence concerning the early growth and extent of the practice and the basis for drawing the line between those matters that could be handled out of court and those that could not. References to the power of judges out of court in early New York statutes, however, indicate that its extent was by this time well defined in practice. Thus, in 1813, the first judge of any court of common pleas was authorized to make orders in vacation "in like manner, and with like effect as is now practiced by the justices of the supreme court at chambers. . . ."[20] The Revised Statutes of 1828 gave Supreme Court commissioners all powers of a justice of the Supreme Court out of court, "according to the rules and practice of such court, and pursuant to the provisions of any statute. . . ."[21] and also provided for various petitions to go to a court or to a judge or justice thereof. An indication of the basis for distinguishing between in-court and out-of-court powers

[17] Spelman, *op. cit. supra* note 14, at 94.
[18] *Ibid.*
[19] See Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109 (1893).
[20] N.Y. Laws 1813, c. 65, §16 [in 2 N.Y. Laws (Revision of 1813) 149].
[21] 2 N.Y. Rev. Stat., pt. 3, c. 3, tit. 2, art. 2, §18 (1828).

appears in the 1840 rules of the Court of Common Pleas for the City and County of New York. These provided for enumerated motions—generally, those that dispose of a case[22]—to be "brought before the court"[23] and non-enumerated motions, except those "required by law to be made in open court," to be "made before a Judge at Chambers."[24]

With the Field code came a comprehensive codification of the respective areas of court and judge authority, albeit against the original wishes of the authors of the code. In their 1848 report, the commisioners advocated that the distinction be dropped. Sections 359 and 360 of the proposed code of procedure provided for all motions, except for a new trial on the merits and on an attachment for a contempt and upon appeals, to be made either to "the court, at a special term" or a "judge, out of court." In a note the commisioners explained:[25]

> We are unable to perceive any good reason, against allowing special motions to be heard before a judge at any time, when not otherwise employed. It has been suggested, that courts held for that purpose at stated terms, only in presence of a numerous bar, would be more imposing, and that the judge would feel a higher responsibility, and the dignity of the judicial forum be better secured. There may be something in this of more force than is apparent to us, but we think the advantages of a hearing near the parties, and of a speedier decision outweigh it.

Possibly to allay the fears of certain judges that their privacy would be disrupted with out of court business, section 360 was amended to include the following:[26]

> The judges of the supreme court in each district may appoint certain days and places for hearing motions out of court, so that there shall be a motion day in the district once at least in every week, where there is not a general or special term in session therein . . . . After such appointment, the judges shall not be obliged to hear motions out of court, at other times.

The formulation "shall not be obliged" still retained the flexibility the commissioners desired.

The Field code as enacted rejected this approach. All that remained of it was section 401(2), providing that "Motions may be made in the first judicial district to a judge or justice out of court, except for a new trial on the merits." Elsewhere the provisions authorizing particular motions and orders referred to a court or a judge or either, and the result was a codified delineation of the areas of court powers and chambers powers.

[22] Rules and Orders of the Court of Common Pleas for the City and County of New York, Rule 60 (1840).
[23] *Id.*, Rule 59.
[24] *Id.*, Rule 77.
[25] First Report of Commissioners on Practice and Pleadings 252 (1848).
[26] Second Report of Commissioners on Practice and Pleadings 46–47 (1849).

This has been continued, modified and expanded by the Throop code and the civil practice act and the many additions and amendments that have been made to them. Only an analysis of the entire civil practice act and rules will present a thorough picture of the respective areas of court and judge authority, and even this fails to take account of the many procedural provisions scattered through the consolidated and unconsolidated laws. The next section of this study presents the results of such an analysis.

II. CIVIL PRACTICE ACT AND RULES PROVISIONS AUTHORIZING PARTICULAR ACTION BY A COURT, A JUDGE, OR EITHER

A. Preliminary Remarks

Section 115 of the civil practice act purports to define generally when a motion must be made to a court and when it may be made to a judge or a justice out of court. It states, in effect, that all motions and applications in an action or special proceeding must be made to a court, except (1) a motion for an additional extension of time to plead, on two days notice, may be made to a judge;(2) any motion or application may be made to a judge out of court where the defendants have defaulted in appearing, or where the defendants consent to having it made out of court, or where it is otherwise authorized by law. The phrase "where it is otherwise authorized by law" is by far the most important exception for, as earlier indicated, such specific authorization appears throughout the civil practice act and rules.

Table II, appended to this study, lists and briefly describes all such provisions. Most of them refer to a court or judge; some only to a judge. Table I, for purposes of comparison, lists and describes all the provisions authorizing action only by a court. This section of the study presents a summary and analysis of the tables. They do not treat the provisions covering motions and orders generally[27] or the general provisions governing courts, judges and referees,[28] since these are discussed where pertinent elsewhere in the study.

A few preliminary remarks should be made concerning the tables.

1. Reference to Either Motion or Order

The statutes and rules authorizing judicial action sometimes refer only to the motion or application and sometimes only to the resulting order. For example, a provision may authorize a motion to be made to the court and say nothing of the resulting order; must it then be a court order rather than a judge's order? Or if the statute only states that a court may make a given order, must the application for it be made to the court rather than a judge?

[27] Arts. 10, 13; RCP tits. 10, 11.
[28] Art. 3.

Logic would demand that, as Professor Forkosch states, "When the Civil Practice Act refers to a motion made to the court, the order obtained on the determination thereof should be a court order, and when it requires the motion to be made to a judge or justice of the court, the order obtained thereon should be a judge's order."[29] Yet provisions exist that in terms require application to the court but allow the court or a judge thereof to make the order, and vice versa.[30] In the absence of such express treatment, however, where a provision speaks *only* of the application, or *only* of the order, there is no reason to believe that the one should not correspond with the other on the matter of court or judge authority. Accordingly, the provisions in the tables have been placed in the court category or the judge category accordingly as they refer to courts alone or to judges, without taking account of whether they speak only of the application or only of the order or of both.

2. *All Types of Applications Included*

The tables include provisions authorizing all kinds of judicial action and applications therefor, regardless of whether denominated motion, application, proceeding or special proceeding; and they also cover judicial action that may not result in an order, such as approval of sureties, fixing the amount of an undertaking or settling a case or bill of exceptions. They omit, however, matters as to which no question of acting out of court could arise, such as the conduct of a trial,[31] the admission or exclusion of evidence[32] and the determination of an appellate court.[33]

3. *Ambiguities*

The language of the provisions has of necessity been the only signpost, since there is little decisional law as to whether particular provisions authorize a court or a judge to act. Provisions which refer only to a court have been placed in Table I; those which refer only to a judge, or to a court or judge, in Table II. However, not all the provisions are artfully drawn with reference to this distinction, although the great majority are. Some simply authorize applications or orders without referring to either a court or judge.[34] Presumably, section 115 would require that these be handled by a court, since it is not "otherwise authorized by law." Some provisions refer to a court in one place and a judge, or court or judge, in another, in a manner which leaves it unclear which is authorized to act; usually, this is the result of an amendment in which the court or judge references do not conform with those of the original

[29] Carmody, *op. cit. supra* note 1, at 68.
[30] §§884, 977-b(4); *compare* §295, *with* RCP 123.
[31] *E.g.*, §§344-a, 363, 365, 427–428.
[32] *E.g.*, §§313, 348, 348-a, 354, 374-a, 374-b.
[33] *E.g.*, §§583, 606.
[34] *E.g.*, §§521, 522, 655; RCP 106, 107, 109–111.

provision.[35] Most of these provisions have been placed in the tables with some appropriate indication of their uncertainty.

B. General Practice Provisions: Commencement of Action to Judgment

Most of the provisions governing general practice in actions and proceedings authorize action only by a court. Thus, the court controls such matters as abatement and continuance;[36] consolidation and severance;[37] the correction of mistakes, defects and irregularities,[38] including relief from default judgments;[39] notice of pendency;[40] payment into and out of court;[41] dismissal for want of prosecution;[42] venue;[43] parties,[44] including such matters as joinder,[45] third-party practice,[46] intervention,[47] leave to sue and defend as a poor person[48] and guardians ad litem;[49] interpleader;[50] appearance,[51] including defendant's special appearance to contest jurisdiction over the person;[52] pleadings,[53] including such matters as amendments and supplemental pleadings,[54] joinder and severance of causes of action and defenses,[55] compelling a reply,[56] pleading over after a motion or

[35] *E.g.*, §§294, 915-a, 1558; *compare* §1320, *with* RCP 294.
[36] Art. 4, §§83–86, 88, 90.
[37] Art. 5, §§96-a, 97, 97-a.
[38] Art. 9, §§105, 107–109, 109-a, 111, 112. The provisions in this article, however, concerning removal of cases brought in the wrong court (§110) and removal from or to a court of limited jurisdiction (§§110-a, 110-b), specify only a judge or justice. *Cf.* §§97, 190, 190-a.
[39] §108.
[40] Art. 11, §§121-a, 123, 124.
[41] Art. 14, §§133, 136; RCP 32.
[42] Art. 22, §§180, 181.
[43] Art. 23, §§182-b, 185–187, 189, 190, 190-a.
[44] Art. 24, §§192, 193(2), 193-a, 193-b, 193-c, 196, 198, 202, 205–208, 212, 215, 217.
[45] §§192, 193, 212; see also §180, RCP 102(2).
[46] §193-a.
[47] §193-b.
[48] §§196, 198; see also RCP 35, 36.
[49] An exception is the general provision for appointment of a guardian ad litem for an infant party, section 202. Such appointment may be made by the court or a judge thereof or, if the action is in the Supreme Court, by the county judge of the county where it is triable. In an action for partition, however, section 202 apparently requires that the appointment be made by the court. Further, appointment of a guardian ad litem for an infant or incompetent by the Supreme Court without application (§207) and in other specified cases (§§206, 208) must be by the court; and the rules governing such matters as the duties and compensation of guardians and the security required of them refer only to the court. RCP 40(6), 41–44; *but cf.* RCP 41(1) (approval of security by judge of the court or a county judge).
[50] Art. 28, §§285, 286.
[51] Art. 26, §§237-a, 240; RCP 55.
[52] §237-a.
[53] Art. 27, §§244, 245, 245-a, 245-b, 257, 258, 262, 274, 283; RCP 102–104, 108, 112.
[54] §§244, 245, 245-a, 245-b.
[55] §§258, 262.
[56] §274.

disposition of a point of law,[57] corrective motions and motions to strike pleadings[58] and motions for judgment on the pleadings.[59]

Most matters concerning trial are quite naturally in the court's hands since they ordinarily arise while a court is in session conducting trials and there is no need to permit them to be handled out of court.[60] These include hearing challenges to jurors or to the panel,[61] directing advisory jury verdicts and references[62] and, of course, such matters as requests to find, decision and direction of a verdict or judgment notwithstanding the verdict.[63] Motions for a new trial must be heard at special term[64] except a motion made on the judge's minutes[65] or one made to an appellate court;[66] the court may direct restitution when a new trial is granted.[67] All the provisions relating to judgments likewise authorize action only by a court[68] except that applications for default judgments, where the case is not one in which the clerk can enter the judgment, may be made to the court or a judge thereof.[69]

The areas of general practice in which a judge, or either a court or judge, may act are considerably more limited. The most

[57] §283.

[58] RCP 102–104.

[59] Some of the rules governing motions for judgment on the pleadings (*i.e.*, RCP 106, 107, 109–111) do not themselves state that the motion is to be made to the court. However, the provisions authorizing judgment on the pleadings generally state that it may be granted by the court. §476; RCP 112. Further, subdivision 6 of rule 109 refers to "the court hearing the motion," and rule 108, governing the determination of a motion under rule 107, also refers only to the court. Rule 113, governing the motion for summary judgment, is ambiguous, referring alternately to "the judge" and "the court," and stating in one place that "the judge hearing the motion may award judgment" and in another that "the court shall forthwith render an appropriate judgment or order."

[60] Art. 34, §§426, 426-a, 429–431, 433-a, 434, 437, 439–443, 449-a, 450, 457-a, 459, 460, 464–467; RCP 156, 157, 164.

[61] §450.

[62] §§430, 465–467.

[63] §§439–442, 457-a. Even among the few provisions in this area that refer to a "judge," that word seems to be used loosely to denote the judge holding the term rather than to authorize action out of court. See, *e.g.*, RCP 161; *compare* RCP 166 *with* §434. *Quare* as to §§433, 437(1). *But see* §438 (trial at a term of the Supreme Court adjourned to chambers pursuant to N.Y. Judiciary Law §148); RCP 157 (court or judge to settle issues); RCP 162 (subpoena issued by judge for production of books and papers by library association or public department or officer).

[64] §552; see also §556. Under §556, the court or a judge thereof may direct that a case be prepared and settled.

[65] §549.

[66] §§550, 551. Under §550, the judge who presided at the trial orders that the motion be heard by the appellate court, and, until the motion is heard, either that judge or the court at special term may set such order aside. RCP 220.

[67] §554.

[68] §§473, 474, 476, 478, 479, 482, 484(3), 494-a, 495, 497, 505–507, 511, 516, 529, 538, 538-a, 548; RCP 187, 195(2), 196, 197, 200, 203, 204. *But see* RCP 188 (interlocutory judgment may direct that final judgment be settled by a judge or referee). Motions to set aside a judgment apparently must also be made to a court although the governing provisions (§§521–528) do not so state. See Berson v. Berson, 243 App. Div. 801, 278 N.Y. Supp. 349 (2d Dep't 1935).

[69] §§489, 490, 491 (upon consent of appearing defendants), 493; RCP 189, 190, 192. *But cf.* §494-a, RCP 191.

significant are the granting of orders to show cause,[70] extensions of time, security and stays and a considerable number of matters in the area of pre-trial disclosure and procuring of evidence.

Section 98 of the civil practice act grants a court or judge the general power to extend the time for doing any act or taking any proceeding.[71] In the area of security, a court or judge may approve a bond or undertaking in an action or proceeding,[72] hear the justification of the sureties thereon[73] and discharge sureties on a fiduciary bond.[74] On the other hand, a court order is apparently required for additional security,[75] to vacate proceedings for failure to file a required bond or undertaking[76] and certain incidental matters regarding security.[77]

The court in which an action or proceeding is pending or a judge thereof has the general power to grant a stay of proceedings;[78] however, with certain exceptions, a judge out of court may not grant a stay *ex parte* for longer than twenty days.[79] In the area of service of summons, a court or judge may make an order for substituted service or service by publication.[80]

In matters concerning preparation for trial and the obtaining of evidence, the provisions are more equally divided between court powers and judge powers, but it is difficult to discern any rational basis for the distinctions that are made.

Orders concerning the service and content of bills of particulars, or precluding the giving of evidence at the trial for failure to furnish a bill, may be made by either the court or a judge.[81] On the other hand, all the provisions concerning admissions (as to matters of fact, papers, documents and photographs), discovery and inspection (of books, documents and other articles), and disclosure in aid of discovery refer only to orders of the court.[82] Upon the trial, however—although it is difficult to see why this should make a difference—production of a book of account[83] or corporate records[84] may be ordered by a judge.[85]

[70] RCP 60.

[71] *But see* §§99(3), 217, 227-a, 229-b.

[72] RCP 25; see also §154 (bond to protect infant or incompetent).

[73] §151.

[74] §158. See also §§152, 159.

[75] §149.

[76] RCP 26.

[77] §151 (setting aside exception to sureties as vexatious; payment of expenses of reference); §153 (withdrawal of deposited items for which sureties are responsible); §154 (upon breach of condition of bond to protect infant or incompetent, court must direct it to be prosecuted).

[78] §167; see also §§167-a, 168; RCP 155.

[79] §169.

[80] §§230, 234. See also RCP 50. Only a court, however, is authorized to make certain orders regarding service upon an infant or incompetent party (§§225(1), 225(2), 226) and to allow extensions of time for a non-resident to defend under sections 227-a and 229-b. See also §217.

[81] RCP 115, 116.

[82] §§322, 324, 325, 327, 328; RCP 140–142.

[83] §411.

[84] §413.

[85] *But cf.* §410 (production of official records of certain counties only by order of Supreme or County Court "made in court").

Pre-trial depositions are usually taken upon notice without an order.[86] Any objection to the proposed taking of depositions must be raised by a motion to vacate or modify the notice; and if such motion is brought on by order to show cause, the order may be returnable either at chambers or to the court.[87] However, if the party desiring to take the deposition chooses to proceed by order in the first instance, instead of by notice, a court order is apparently required.[88] Again, depositions before an action is commenced[89] or depositions for use on a motion[90] may be ordered by either a court or judge, while depositions during trial and after judgment require a court order.[91]

The provisions of article 31, concerning perpetuation of testimony in real property actions, afford a good example of how complicated the court and judge distinctions can be: while section 316 speaks of application "to the supreme court, by petition," rule 138 states that the person desiring to perpetuate testimony may present the petition "to a justice of the supreme court." Upon presentation of the petition, the *judge* must make an order as to notice, time and place of hearing the petition.[92] After the hearing, the *court* may appoint a referee to take the testimony and prescribe notice, time and place for taking it.[93] If the person to be examined is without the state, the *judge* may direct that a commission be issued to take his testimony and that interrogatories be settled on notice.[94] If a witness refuses to answer a question, the referee must report the fact to the *court or a judge* thereof, who must determine whether he is bound to answer it.[95]

Although it is difficult to generalize in this area, to a certain extent it may be said that the ordering of examinations, apart from the general provisions noted above, is in the hands of a court, while matters incidental to the examination may be handled by either a court or judge. Thus, a court may order depositions taken of a public corporation[96] or of a person imprisoned for a felony,[97] may direct a physical examination[98] or blood grouping tests,[99] or physical examination of a child during trial to determine its age,[100] and may order written interrogatories[101] or issue letters rogatory.[102] A court or judge, in contrast, may make restrictions and directions concerning physical examinations[103] and blood

[86] §290.
[87] §291. See also RCP 124.
[88] §292.
[89] §295; *but cf.* RCP 123.
[90] RCP 120.
[91] §293.
[92] §317.
[93] §317.
[94] §318.
[95] §320.
[96] §292-a.
[97] §297.
[98] §306.
[99] §306-a.
[100] §334.
[101] §302.
[102] §309.
[103] §306.

grouping tests,[104] settle interrogatories[105] and determine the propriety of a witness' refusal to answer a question on a pre-trial examination.[106] And, where the taking of a deposition for use without the state is authorized pursuant to the law of the state where it is to be used, the witness may be subpoenaed upon petition to the Supreme or County Court or a judge of either.[107]

Striking out a party's pleading as a penalty for failing to appear for an examination or produce books and papers requires court action.[108] So too does an order to suppress a deposition.[109]

C. Post Judgment: Appeal, Execution, Supplementary Proceedings

In the area of appeals, judges are authorized to act in most matters concerning stays of execution, the security required for such stays, and settlement of a case or bill of exceptions.

Thus, the amount of the undertaking required to obtain a stay of execution without an order is to be fixed by the court below or a judge thereof.[110] Where an order is required for a stay, it may be granted by the Supreme Court or a justice thereof if the appeal is to the Appellate Division;[111] if the appeal is to the Court of Appeals, it may be granted by either that court or the Appellate Division or the Supreme Court or a judge of any of these courts.[112] However, on an application for leave to appeal to the Court of Appeals, only a court (*i.e.* the court to which the application is made) may stay execution pending disposition of the application.[113] The Supreme Court or a justice thereof may dispense with or limit the security required to stay execution during appeal in specified cases.[114]

A case or bill of exceptions generally is to be settled before the judge or referee who tried the case[115] but resettlement may be ordered by the reviewing court.[116]

[104] §306-a.
[105] RCP 126; see also §309-a.
[106] RCP 129; see also §309-a.
[107] §311; RCP 136. The last sentence of rule 136, however, inexplicably authorizes application to "the court which issued the subpoena" to vacate or modify it. Rule 137, dealing with punishment for failure to obey the subpoena, is an interesting and intricate court-judge provision. It states that a *justice* of the Supreme Court or a county *judge* must grant an order that the offending witness show cause before the Supreme *Court* why he should not obey the subpoena; if he then fails to obey the resulting Supreme *Court* order, the *court or judge* shall order the witness to show cause before "it or him" why he should not be punished for contempt and may prescribe the punishment.
[108] §§299, 405; see also §302.
[109] §304; RCP 133.
[110] §§595, 596, 598; see also §615. Section 594, however, although dealing with the same subject, refers only to a judge of the court below and not the court.
[111] §615; *but cf.* §613.
[112] §598-a.
[113] §601.
[114] §568; see also §586; *cf.* §571 (security unnecessary on appeal by municipal corporation unless court orders otherwise).
[115] RCP 230; *cf.* §§575, 576.
[116] RCP 232.

A court order is required, on the other hand, for substitution on appeal,[117] supplying omissions in taking the appeal,[118] dismissal for failure to make substitution[119] or failure to file and serve required papers[120] and for restitution.[121]

Most orders regulating executions are required to be made by a court.[122] In a few important areas, however, a court or judge may act. These include the issuance of executions against the person,[123] orders to prevent waste to real property during the redemption period,[124] proceedings to determine a third person's claim to personal property levied upon[125] and, apparently, issuance of executions against earnings or income (garnishment).[126] Although a levy upon debts and causes of action arising out of contract is analogous to garnishment, most orders relating to such a levy must be made by a court.[127]

With respect to supplementary proceedings, section 786 provides generally that "The proceeding shall be deemed pending in the court in which it is instituted and not before any individual judge or justice thereof," but that "All powers granted to the court under this article may be exercised by a judge or justice thereof."

D. Provisional Remedies

The provisional remedies of arrest, injunction and attachment are primarily court or judge procedures. Section 817 provides that except as otherwise provided by statute or rule an arrest or temporary injunction order or a warrant of attachment may be granted "either by the court in which the action is brought or a judge thereof or any county judge." Section 817 also states that "the rules may provide, either generally or as to any department, that an application for a warrant of attachment or for an order for the arrest of a party, other than an order which by express provision of statute may be granted only by the court, shall be made to such a judge and not to the court." Apparently the rules have not made such provision.[128]

[117] §579.
[118] §107.
[119] §578.
[120] RCP 234.
[121] §587.
[122] See §§636, 639, 649, 651, 656, 677, 687-a, 689, 699–704, 707, 755, 761, 767.
[123] §764.
[124] §§720–723.
[125] §696.
[126] §684 (*semble*). This section provides that application is to be made to "the court" but, somewhat ambiguously, provides further that upon satisfactory proof "the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue. . . ." See Neu v. Fox, 151 App. Div. 17, 135 N.Y. Supp. 208 (2d Dep't (1912)); Matter of Parkman, 108 Misc. 316, 177 N.Y. Supp. 589 (Sup. Ct. 1919).
[127] §687-a. The only exception is that a court or judge may direct an examination of a person served with a copy of the execution (subdivision 3).
[128] See RCP 80–84.

An exception regarding arrest is made by section 827 where the right to arrest depends not on the nature of the action but on extrinsic facts—*viz.*, where the judgment demanded requires performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt and the defendant is a non-resident or is about to depart from the state. In this case "the order of arrest can be granted only by the court."[129]

The only other exception in the civil practice act concerns an injunction to restrain a state officer or board from performing a duty imposed by statute; section 879 requires that such an injunction "shall not be granted except by the supreme court at a term thereof sitting in the department in which the officer or board is located, or the duty is required to be performed. . . ."

The majority of the remaining provisions governing arrest, injunction and attachment likewise authorize action by a court or judge.[130] No rational basis appears to exist for distinguishing those that refer only to a court.[131]

Most of the provisions of the civil practice act and rules regarding receivers refer only to the court.[132] Among these, section 974 provides generally that "[i]n addition to the cases where the appointment of a receiver is specially provided for by law," the Supreme or County Court may appoint a receiver of property which is the subject of an action therein. Only two provisions refer to a court or judge. One, allowing the court or judge who appointed the receiver to remove him or fix the penalty of his bond,[133] apparently has reference to cases where a judge is authorized elsewhere than in the civil practice act to appoint a receiver. The other allows application to the court or a judge thereof to appoint a *temporary* receiver pending determination of an action for appointment of a receiver to liquidate the local assets of a foreign corporation.[134]

E. Particular Actions and Proceedings

Articles 62 through 76 of the civil practice act concern particular actions and articles 77 through 84-A particular proceedings. In considering them in relation to the distinction between court and judge powers, it should be remarked that actions are always

[129] This type of case is also referred to in §§263, 829, 836, 839, 846, 847, 849. 859, 861, 871; RCP 83.
[130] Arts. 46–59, §§822, 823, 830, 841, 844, 850, 852, 866, 880, 892, 893, 897, 898, 900, 907, 919, 920 (judge only), 923, 927, 928–932, 934–939, 943, 944, 945–947, 949, 950, 952, 954, 957–959, 962, 964, 965, 971; RCP 80. Section 880 provides that "An injunction order granted by a judge may be enforced as the order of the court."
[131] §§838, 846, 859, 874, 875, 887, 888, 894, 895, 915-a, 917(2), 941, 942, 969(5), 972, 973. A few provisions, some ambiguously, contain references both to a court and to a court or judge. §§843, 856, 876-a (*cf.* §882-a), 882, 891, 922, 924.
[132] §§974, 975, 977-a, 977-b (except subdivision 4); RCP 175–177, 180, 181.
[133] §976.
[134] §977-b(4). Although this provision allows application to a court or judge, it states that "the court must . . . appoint such receiver."

brought in a court while special proceedings may be brought before a court or a judge or other officer. In the articles governing actions, then, references to a judge will be found only where a particular matter affecting the action may be handled by the judge; whereas in those governing proceedings, we may expect to find a number of proceedings which are instituted before, and in which all matters are handled by, a judge.

The more important particular actions covered in articles 62–76 of the civil practice act[135] are actions to recover real property (article 63), for partition (article 64), to foreclose a mortgage (article 65), to recover a chattel (article 66), matrimonial actions (articles 67–70), judgment creditors' actions (article 72) and certain actions by the attorney-general and in behalf of the people (articles 74–76). There are only a handful of provisions in these articles that authorize action by a judge as opposed to a court. In the general provisions governing real property actions, a court or judge is authorized to grant an order restraining a defendant from committing waste upon property in litigation.[136] In an action to recover a chattel, the court or a judge thereof may order depositions taken to ascertain the location of the chattel,[137] direct the sale of perishable property[138] and impound property in the custody of the sheriff;[139] and a judge of the court or the county judge of the county where a chattel was replevied is to tax the sheriff's expenses.[140] In an action by the attorney-general for usurping office, the court or a judge thereof may grant an order of arrest;[141] and if the attorney-general fails to bring an action for unlawful practice of the law, a bar association may apply to the Supreme Court or a justice thereof for leave to bring such an action.[142]

Of the particular proceedings treated in articles 77 through 84-A, those that may be instituted before a court or judge are habeas corpus and certiorari to inquire into the cause of detention (article 77), proceedings for the settlement of an infant's claim (article 80), summary proceedings to recover real property (article 83) and some but not all applications relating to arbitration (article 84).

Applications for a writ of habeas corpus or certiorari may be made to the Supreme Court at a special term, the Appellate Division, a justice of the Supreme Court or an officer authorized to perform the duties of a justice of the Supreme Court at chambers.[143] An application for settlement of an infant's claim is to be made to a court or judge of a court in which an action could have

[135] See also RCP, tits. 30, 31, 33.
[136] §981.
[137] §1094-a. Such an order may also provide that the defendant shall not dispose of the chattel until further order of the court or judge, if an undertaking is submitted in an amount approved by the court or judge.
[138] §1102.
[139] §1103.
[140] §1101; see also §1102 (last sentence).
[141] §1212.
[142] §1221-a.
[143] §1232.

been brought.[144] All of the provisions relating to these proceedings refer to a court or judge.[145]

Summary proceedings to recover real property are to be brought before specified judges, justices or courts, depending on the location of the property.[146] Although the remaining provisions governing such proceedings are not consistent in the use of the terms court, judge and justice,[147] it would seem that the entire proceeding is in the hands of the person or body to which the application is made, be it court, judge or justice, and that all the powers granted may be exercised accordingly.

In the area of arbitration, a petition for an order enforcing an agreement to arbitrate may be made to the Supreme Court or a justice thereof;[148] and an action or proceeding brought in violation of such an agreement may be stayed by the Supreme Court or the court in which it is brought or a judge thereof.[149] However, a motion to confirm, vacate, modify or correct an award must be made to a court.[150]

Article 78 proceedings against a body or officer must be brought before a special term of the Supreme Court or, if the petition is directed against certain judges, the Appellate Division, "except that the petitioner may apply to any court or judge expressly authorized by statute to grant relief."[151] All of the provisions of article 78 authorizing judicial action refer only to the court, except that a court or judge may shorten the required eight days' notice of application by order to show cause[152] and may grant a stay upon appeal.[153]

Proceedings relating to express trusts (article 79) are to be heard and determined by the Supreme Court but must be instituted by an order to show cause granted by a justice of the court.[154] The provisions of article 81, relating to the committee of an incompetent, refer only to a court,[155] except that specified judges are granted certain supervisory powers over the committee[156] and that, where the incompetent is an inmate of a state institution,

[144] §1320.
[145] *But cf.* §§1264, 1265 (judge only); §§1279, 1280 (order of appellate court).
[146] §1413.
[147] Most of them refer only to "the judge or justice" (§§1415, 1419, 1422, 1428–1432, 1435, 1436, 1438, 1440), some refer only to "the court" (§§1410(6), 1425, 1426-a, 1435(7), 1446-a), some only to particular courts (§§1420, 1420-a) and some to the court or a judge or justice thereof (§§1436-a, 1447).
[148] §1450.
[149] §1451. See also §§1452 (Supreme Court or justice thereof to appoint arbitrators when not designated by the agreement), 1463 (judge may stay proceedings to enforce award), 1468 (judge may extend time for motion to confirm, vacate, modify or correct an award).
[150] §§1461, 1462, 1462-a, 1464. See also §§1448(1) (permission of court to arbitrate required where one party is infant or incompetent), 1454(3) (court may direct arbitrators to proceed promptly with hearing and determination).
[151] §1287.
[152] §1289.
[153] §1305.
[154] §1308; see also §§1309, 1312.
[155] §§1356–1360, 1362–1366, 1370–1372, 1375–1377-b, 1381–1384.
[156] §§1379, 1380; see also §1358-a(3).

the petition for appointment of a committee may be presented to a justice of the Supreme Court at chambers.[157]

The actions and proceedings treated in this portion of the civil practice act that have not been discussed deal with more particularized matters, and all the provisions governing them refer only to a court.[158]

III. PRESENT TREATMENT OF THE COURT-JUDGE DISTINCTION: SECTIONS 128 AND 129 OF THE CIVIL PRACTICE ACT

Sections 128 and 129 of the civil practice act were prompted by a series of cases in which the courts were asked to invalidate orders because they were made by, or the applications for them were made to, a judge instead of a court or vice-versa.

In *Heishon* v. *Knickerbocker Life Insurance Co.*,[159] the Court of Appeals held a court order for taking depositions before trial invalid because the statute[160] stated that the application should be made to a judge of the court; the Court of Appeals reasoned that the right, being purely statutory, must be exercised according to the statutorily prescribed procedure and that a court had no inherent or common law power to make the order. Another Court of Appeals decision held invalid a writ of mandamus issued by a judge in the first district because code of civil procedure section 2068 required the application to be made at a special or general term.[161] In support of its decision, the Court reviewed the history of mandamus, emphasizing its extraordinary nature and the fact that it was from early times issuable only by the court of Kings Bench, only in term and not in vacation. The "peremptory and unequivocal" language of section 2068 was held to override even the special provision allowing motions in the first district which elsewhere must be made to a court to be made out of court.[162]

Most of the decisions, however, refused for one reason or another to invalidate the challenged orders. Some courts looked behind the form of the order to ascertain whether it was actually made at a term or at chambers and strained to uphold it if there was any

[157] §1374(3).

[158] Art. 63-A (action against infant or incompetent to compel conveyance); art. 65-A (action to foreclose preemptive rights against the city of New York); art. 71 (action for penalty, forfeiture or on forfeited recognizance); art. 73 (action against persons jointly liable); art. 81-A (proceeding relative to incompetent veterans and infant wards of the United States Veterans' Bureau); art. 82 (proceeding for disposition of real property of infant or incompetent); art. 82-A (proceeding for release of claim against the state of infants or incompetents by reason of the appropriation of real property not held in trust or subject to valid power of sale); art. 84-A (proceeding for discovery of names and addresses of bondholders). *But see* art. 80-A, §1335 (valuing interests in real property).

[159] 77 N.Y. 278 (1879).

[160] N.Y. Code Civ. Proc. §§872, 873.

[161] People *ex rel.* Lower v. Donovan, 135 N.Y. 76, 31 N.E. 1009 (1892). *But cf.* People *ex rel.* Grout v. Stillings, 76 App. Div. 143, 78 N.Y. Supp. 942 (1st Dep't 1902).

[162] N.Y. Code Civ. Proc. §770, *now* N.Y. Civ. Prac. Act §116.

factual basis for finding that it was actually made in the proper place, regardless of the presence or absence of a special term caption and direction to enter.[163] Sometimes a presumption was applied that the judge "acted in the capacity . . . in which he had a right to act" and the caption was disregarded.[164] Still obeisance was frequently made to form by having the order amended to the proper form.[165]

Many of the decisions evidenced an impatience with the technicality of the objection. In one case, the Court of Appeals was "not inclined to differ with the court below on such a technical point of practice."[166] In *Aiken* v. *Aiken*,[167] Judge Rodenbeck, reviewing the authorities, concluded that:[168]

> . . . it is absurd to say that a judge sitting on the bench at a term of court can not issue a judge's order or that the same judge upon retiring to his chambers without having adjourned the term can not issue a court order.
>
> . . . the dispute in this case is an illustration of the evil of statutory provisions controlling the court in [illegible] matters of procedure.

The unreality of insisting on a strict dichotomy between court and chambers activity was what most impressed the courts. Thus, one court said, long before the enactment of section 128[169]

> . . . certainly no one will claim that a judge order is invalid simply because made in court. It would be absurd to argue that a judicial officer is less a judge in court than out of it. He may make chambers orders at any place, including the courtroom. It is the constant practice in this county and elsewhere to attend to ex parte business in court in the intervals of hearing motions, and probably 75% of the chambers orders granted are signed by a judge while on the bench.

Present section 128 first appeared as an amendment to section 768 of the code of civil procedure in 1911.[170] It read: "Except in the first judicial department an order which is authorized by statute to be made at chambers may be made by the court." The First Department exception was removed when it was transposed to the civil practice act.

It was not an astounding rule for, as the majority of decisions had long argued, it would be absurd to say that a judicial officer was less a judge in court than out of court. Further, its operation

[163] See, *e.g.*, Phinney v. Broschell, 80 N.Y. 544 (1880); Mojarrieta v. Saenz, 80 N.Y. 553 (1880); Whitney v. Considine Investing Co., 178 N.Y. Supp. 68 (Sup. Ct. 1919), *aff'd*, 200 App. Div. 193, 192 N.Y. Supp. 957 (2d Dep't 1922).

[164] Albrecht v. Canfield, 92 Hun 240, 241, 36 N.Y. Supp. 940, 941 (N.Y. Gen. T. 4th Dep't 1895); Whitney v. Considine Investing Co., *supra* note 163.

[165] See Mojarrieta v. Saenz, 80 N.Y. 553, 554 (1880); Aiken v. Aiken, 96 Misc. 561, 563, 160 N.Y.S. 876, 879 (Sup. Ct. 1916).

[166] Phinney v. Broschell, 80 N.Y. 544, 547 (1880).

[167] 96 Misc. 561, 160 N.Y. Supp. 876 (Sup. Ct. 1916).

[168] *Id.* at 563, 160 N.Y. Supp. at 878.

[169] Regan v. Traube, 9 N.Y. Supp. 495, 496 (Com. Pleas 1890).

[170] N.Y. Laws 1911, c. 763.

was limited: it validated only orders required to be made by a judge, and these are very few compared with those that are authorized to be made by a court, or by either a court or judge. The more common offender and the one conceptually more difficult to overlook was a judge's order which should have been made by a court. Even Judge Rodenbeck's approval of such an order in *Aiken* v. *Aiken* was conditioned by the fact that the order was made while a term was in session.

The new section 129 of the civil practice act was directed to this problem. However, the precise effect of the statute is unclear, and it fails to take account of any of the consequences of the court-judge distinction other than the validity of the order.

The Joint Legislative Committee on the Simplification of Civil Practice, which proposed the civil practice act, made these statements about the new section:

> Among the changes proposed by the Board which met with general approval were the following: That the distinction *in form* between court orders and judges' orders be abolished. . . .[171]
>
> The distinction between court orders and judges' orders when in effect made by supreme court justices has been abolished in the new practice by [section 129]. This section is not intended to give a county judge the power to make a "court" order in a supreme court action.[172]
>
> This section permits a justice of the supreme court, out of court, to make a "court" order . . . . The section will *practically* abolish the distinction between "court" and "judges'" orders in the supreme court when made by supreme court justices.[173]

In the only case which has discussed section 129 at any length, the court stated:[174]

> Senator Walters, chairman of the joint legislative committee on the simplification of the civil practice, says in his paper entitled "The New Practice Acts," which he presented at the annual meeting of the New York State Bar Association in January, 1921 (Report of N.Y. State Bar Assn., 1921, vol. 44, pp. 400, 407) and which is included with the editorial preface notes in Parsons' Practical Manual, 1921, at page ix: "The distinction between court orders and judges' orders when in effect made by Supreme Court justices has been abolished in the new practice." He cites section 129 of the Civil Practice Act, to which should be added section 128. The fact is that this distinction has been abolished throughout the State since 1911 except in the First Department. (See Code Civ. Proc. §768, as amd. by Laws of 1911, chap. 763, 5th sentence.)

[171] Report of the Joint Legislative Committee on the Simplification of Civil Practice 26 (1919) (emphasis supplied).
[172] *Id.* at 43.
[173] *Id.* at 119 (emphasis supplied).
[174] Matter of Rockwood & Co., Inc. v. Trop, 211 App. Div. 421, 424, 207 N.Y. Supp. 507, 510 (2d Dep't 1925).

But section 115, requiring all motions to be made to a court except where "otherwise authorized by law," was not repealed by the new provision; nor was the comprehensive pattern of court-judge references in all the provisions of the civil practice act and rules authorizing judicial action. The question remains, what effect do these provisions have? The phraseology of section 129 suggests that it may have been meant as a harmless error rule, leaving vitality to the court-judge provisions as prescribing the proper procedure but decreeing that orders should not be invalidated if the proper procedure is not followed. The effect would be to make the court-judge provisions only precatory but, from the draftsman's point of view, of no less significance.

This is the view taken by the text-writers that have touched on the question. Warren's Bender states that ". . . to a very large extent the distinction between court orders and judges' orders has been abolished. Nevertheless, it would seem clear that the provisions of Section 115 must be observed and that the motion should be made either to a judge or the court as that section requires."[175] And, again, "It should be said, however, that . . . the courts and the lawyers still continue to recognize a distinction [between court and judge orders], even though this is of minor importance."[176] Carmody's New York Practice cautions that "it is still important carefully to follow the practice prescribed by the Civil Practice Act, as this provision [section 129] was intended to relieve against mistakes rather than to authorize a disregard of the statutory requirements."[177]

Judge Levy seems to have taken the same view in a 1955 case involving section 128.[178] Removal of a case under civil practice act section 110-a, which speaks of a judge's order, had been effected by a court order. Recognizing that the matter could be overlooked because of section 128, he stated nevertheless that the "proper procedure" would have been to apply to a justice.

The wording of section 129 lends credence to this view. If the revisors had meant to authorize judges to make all court orders, they could have expressed the statute as the converse of section 128. The "shall not be void" terminology suggests tolerance of a procedure that is not entirely proper. This construction is also supported by the comment of the revisors that the section will *practically* abolish the distinction between court and judges' orders in the supreme court when made by supreme court justices.[179]

On the other hand, the revisors' notes indicate that this wording may have been chosen in order to avoid the result that County Court judges be given the power to make all orders that a Supreme Court justice may make, both in court and out of court. They say, "This section is not intended to give a county judge the power to

[175] 2 Bender, New York Practice 24 (Warren ed. 1954).
[176] *Id.* at 52.
[177] Carmody, *op. cit. supra* note 1, at 69.
[178] Helfgott v. Tannen, 208 Misc. 335, 141 N.Y.S.2d 307 (Sup. Ct. 1955).
[179] See text at note 173 *supra*.

make a 'court' order in a supreme court action."[180] If the statute had read, "An order which is authorized by statute to be made by the [supreme] court may be made at chambers"—the converse of section 128—such a result might be reached under section 77, which gives a county judge within his county the powers of "an officer authorized to perform the duties of a justice of the supreme court at chambers or out of court."

Even if section 129 were taken to authorize court orders by a judge, however, and to supersede the "proper procedure" of section 115, it would be difficult to reconcile it with provisions that emphatically require an order to be made by a court. Perhaps it could be read to repeal section 115 and the references to court or judge in most of the provisions authorizing judicial action. But could it override language requiring an "order of the supreme court, or a county court, made in court, and entered in the minutes"[181] or the provision stating that an order of arrest may be granted "only by the court" in certain cases[182] or that an injunction to restrain a state officer or board from performing an official duty "shall not be granted except by the supreme court at a term thereof sitting in the department in which the officer or board is located . . ."?[183] It is these provisions that Professor Forkosch seems to have in mind in stating:[184]

> The power of a judge or justice of the court to make orders which the statutes requires the court to make is limited. A judge may make some orders which the statute requires the court to make but not all orders.

The footnote to this statement cites only section 827 of the civil practice act.

The provisions authorizing motions to be made to a special term would also be difficult to reconcile. For instance, an article 78 proceeding must be made to a special term of the Supreme Court; or, if the petition is directed against certain judges, to the Appellate Division.[185] This language was held by the Court of Appeals to override the special provision allowing all motions which elsewhere must be made to a court to be made out of court in the first judicial district.[186] With this case on the books, it seems unlikely that the less positive language of section 129 would be given effect over the article 78 provision.

Sections 128 and 129 also fail to take account of some of the consequences of the court-judge distinction other than that of the place where motions and orders should be made.

Thus, the distinction in form between the two types of orders has been retained in practice. So too has been the practice of entering court orders and not entering those of a judge. This is not surprising, for the statutes do not in terms purport to deal with either of these matters.

[180] See text at note 172 *supra*.
[181] §410 (production of official records of certain counties upon a trial).
[182] §827.
[183] §879.
[184] Carmody, *op. cit. supra* note 1, at 68.
[185] §1287.
[186] People *ex rel.* Lower v. Donovan, 135 N.Y. 76, 31 N.E. 1009 (1892); see text at note 161 *supra*.

Sections 128 and 129 are also silent as to their effect on other provisions whose operation depends on the court-judge distinction. As earlier indicated, two sections of the civil practice act authorize judges of the County Court to exercise certain out of court powers of justices of the Supreme Court.[187] If section 129 empowers Supreme Court justices to make court orders out of court, these provisions might be read to permit judges of such inferior courts to make court orders of the Supreme Court.

Such a result seems clearly not to have been intended. As to section 77, giving County Court judges the power of a Supreme Court justice at chambers, the revisors have stated their intention that section 129 not be read to expand the county judges' power in this way.[188] The same comment of the revisors could be taken to cover so much of section 130(2) as authorizes orders that may be made "out of court, and without notice" in Supreme Court actions to be made by specified county judges.

Neither the statute nor the revisers' notes, however, afford any indication of its effect on the constitutional provision limiting Appellate Division justices' powers to those of a Supreme Court justice out of court.[189] In the one case that has touched upon this point,[190] the parties had made a stipulation that a referee's fees and disbursements "shall be fixed by the court" and the referee had instead obtained an order fixing fees and disbursements from a justice of the Appellate Division. The court invalidated the order, distinguishing *Matter of Rockwood & Co., Inc.* v. *Trop*[191] since a court order was there involved. It stated that, "Concededly, this Justice was without jurisdiction to grant an order 'by the court,' or exercise 'any of the powers of a justice of the supreme court, other than those of a justice out of court.' (N.Y. Const., art. VI, §2; Owasco Lake Cemetery Co. v. Teller, 110 App. Div. 450.)"[192] Of course, this case is not strictly in point since the order involved was not required to be a court order by statute or rule, within the terms of section 129, but by a stipulation of the parties.[193]

Section 65 of the civil practice act must also be considered if section 129 is taken to give Supreme Court justices the power to make court orders out of court. Since court orders would then be "such judicial business as may be done out of court," Supreme Court justices would be required by section 65 to make them "at all reasonable times, when not engaged in holding court." Further,

[187] §§77, 130; *cf.* N.Y. Const. art. 6, §2. See text at note 12 *supra*.
[188] See text at notes 172 and 180 *supra*.
[189] N.Y. Const. art. 6, §2.
[190] People *ex rel.* N.Y.C.R.R. v. State Tax Comm., 280 App. Div. 627, 116 N.Y.S.2d 595 (4th Dep't 1952).
[191] See text at note 174 *supra*.
[192] People *ex rel.* N.Y.C.R.R. v. State Tax Comm., *supra* note 190, at 628, 116 N.Y.S.2d at 596.
[193] Further, the discussion of this question is at most an alternative holding, for the court relied chiefly on the fact that the order was made *ex parte* and should have been made on notice.

if made without notice, such court orders would come within the provision of section 130(2) allowing orders that may be made "out of court, and without notice" to be made by "any judge of the court in any part of the state." This might be limited, however, by the clause of section 129 limiting *its* application to orders made in "a county or judicial district in which an application to the court for such order is authorized."

Research has unearthed no reported cases, other than the ones herein cited, dealing with the particular questions raised above about the meaning of sections 128 and 129 and their effect upon other provisions. These questions concern matters that would not often be litigated, much less produce opinions. Yet they are matters basic to a procedural system and concerning which lawyers and judges must have clear guidance. In leaving them open, the present provisions relating to the court-judge distinction are wholly inadequate and in need of revision.

IV. PROPOSALS FOR REVISION

A. Time and Place of Making Motion or Order

It has been seen that under present law the distinctions in form and entry between court and judges' orders have remained; that the operation of provisions concerning venue and judges' powers to make orders in matters pending in other courts has been obscured; and, perhaps most important, that forceful arguments exist for treating section 115 and the present distribution of court and judge provisions as still prescribing the proper procedure, precatory though it may be, despite the enactment of sections 128 and 129. These problems are due to the fact that sections 128 and 129 were piecemeal reforms. They were superimposed upon the complex existing scheme of court and judge authority as stop-gaps in the face of the confusion and wasteful overturning of orders that the distinction had engendered.

Nevertheless, the provisions do point in the right direction. Implicit in them is the judgment that judges may act upon judicial business at any time, whether sitting at a formal session of court or not. As to orders required to be made by a judge, section 128 unequivocally authorizes a court to act. And as to those required to be made by a court, section 129 operates at least to sustain their validity though made by a judge out of court. To this extent, the present sections accord with the consistent trend of reform and proposed reform in this area.

As early as 1848, it has been noted above, the authors of the Field code were "unable to perceive any good reason against allowing special motions to be heard before a judge at any time, when not otherwise employed."[194] In 1850, shortly after the enactment of the code, the Commissioners on Practice and Pleadings submitted a similar proposal, to the effect that, in addition to special terms, "the court is always open, before each of the judges, for the hearing of motions, applications for judgment upon failure

[194] First Report of Commissioners on Practice and Pleadings 252 (1848); see text at note 25 *supra*.

to answer, and upon complaint and answer, and for the trial of issues of law."[195] A comment to this section stated that "The distinction between the powers of a judge at special term and at chambers, is rather nominal than real. . . ." A Short Practice Act approved by a committee of the New York County Lawyers Association contained another such recommendation, based on a scheme of having the courts continuously open for the transaction of business. Its recommendations provided:[196]

> 12. The courts shall always be open for the transaction of business; a term of court shall continue until a succeeding term is commenced, although the court is not actually in session. . . . Terms for the hearing of motions shall be known as "motion terms." An order whether issued by a court or a judge thereof shall be the same in form and effect.

The most thoroughgoing proposal along these lines was advanced in 1915 by the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York.[197] Section 14 of its proposed civil practice act provided that:[198]

> §14. The courts shall always be open for the transaction of business and a term of court shall continue until a succeeding term although the court is not actually in session. A stated term of court is the period designated for the term and during which the court is actually sitting. The use of "special" term shall be discontinued and trial terms shall be designated as jury terms and court terms. A term for the hearing of motions shall be known as a motion term. The distinction in form between a court order and a judge's order heretofore made is abolished and an order whether issued by a court or a judge shall be the same in form. An order, where authorized to be issued by the court, unless otherwise provided, may be issued by a judge thereof.

Proposed rule 22 stated that "Unless otherwise provided, a motion may be made in an action or proceeding before the court or a judge thereof in which the matter is pending or before the county judge of the county where the action or proceeding is triable";[199] and rule 23 that "When rules do not provide that a motion shall be made at a term of the court, it may be made to a judge of the court."[200] The purpose of these proposals, as stated in the notes, was to abolish the "confusing" distinction between court and judge orders and make the practice uniform, leaving "the matter

[195] Report of Commissioners on Practice and Pleadings 36, §57 (1850).
[196] 73 Annals of The American Academy of Political and Social Science 83 (1917).
[197] 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York (1915).
[198] *Id.* at 19.
[199] *Id.* at 39.
[200] *Ibid.*

of the hearing of motion to be regulated in each district according to the necessities of the case."[201]

The Federal and New Jersey rules take an approach similar to that proposed by the Board of Statutory Consolidation. Federal rule 77(a) provides that "The district courts shall be deemed always open for the purpose of" filing papers, issuing and returning process, and "making and directing all interlocutory motions, orders and rules." All acts and proceedings other than trials upon the merits may be conducted "by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district," except that contested motions may not be heard outside the district without the consent of all parties.[202] Each district court is required, to the extent practicable, to "establish regular times and places" for the hearing and disposition of motions requiring notice and hearings, "but the judge at any time and place, on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions."[203]

The New Jersey rules also provide that "the courts in the State shall be deemed to be always open."[204] Rule 1:28-6 states that "all judicial business involving conferences with members of the bar or litigants shall be transacted in open court, including the hearing of motions . . ."; according to the Authors' Comment, this rule "was designed to eliminate the suspicion which sometime arose if matters were heard in chambers rather than in open court."[205] However, its significance seems limited: the Comment further states it "should not preclude the presentation of ex parte orders and judgments in chambers especially when the court is not actually sitting"; and another rule allows proceedings during vacation and summer recess "in emergent matters, or when ordered by the Chief Justice, or a judge of the particular court as the judicial business and public welfare may require."[206]

A plan of the kind advanced by the Board of Statutory Consolidation presents the best approach. There is certainly no reason why motions and orders should have to be made during a term of court. The origin of terms, it has been noted, was in canonical prohibitions which "exempted certain holy seasons from being profaned by the tumult of forensic litigations."[207] As the Court of Appeals has stated, "The terms of court, thus, have a purely historical character, and there is no reason, in the nature of judicial business, why they should exist, nor why such business should be confined to them."[208]

[201] *Id.* at 179, 250 (notes 12, 89).
[202] Fed. R. Civ. P. 77(b).
[203] Fed. R. Civ. P. 78.
[204] N.J. R. Civ. P. 1:28-4.
[205] 1 New Jersey Practice 268 (rev. ed. Waltzinger 1954); *cf.* N.Y. Judiciary Law §4.
[206] N.J. R. Civ. P. 1:28-4.
[207] 3 Blackstone, Commentaries* 276.
[208] Brown v. Snell, 57 N.Y. 286, 300 (1874) (opinion of the Commission, *per* Dwight, C.).

Nor is there any reason why motions must be heard in open court. Surely it would be absurb to think that judges decide motions with less responsibility or fairness in chambers than they do while on the bench.[209] In Chancery, historically, anything could be done at chambers. Common law judges have traditionally been allowed to hear many important matters requiring expeditious treatment out of court—matters such as supplementary proceedings, the provisional remedies of arrest, injunction and attachment and habeas corpus proceedings. Today, under sections 128 and 129, there is nothing to prevent a judge from making any order out of court. Furthermore, the distinction between judicial action in court and at chambers has always been to a large extent meaningless. Even if a motion is made "in court", there is considerable informality and judicial discretion in determining whether to hold arguments and conferences in court or at chambers. And, as to the making of the order, the absurdity of trying to determine whether it was signed in court or after the judge retired to his chambers has been amply demonstrated by the cases prior to the enactment of sections 128 and 129.[210]

The proposed rules of practice should provide that the courts are always open and that motions may be made to a court or a judge, except as otherwise provided by law or local court rules. The civil practice law and statewide rules could require that some motions be made at a term, if it is thought advisable to retain or add to those present provisions that most emphatically require action in court.[211] All other regulation of the hearing of motions would be by local court rule, and could thus be adapted to local needs and court schedules. Many such local rules today provide that *ex parte* business or particular kinds of motions shall be heard in certain parts or on certain days.[212]

The provision that the courts are always open would allow the transaction of judicial business at any time, but it would not affect the schedule of terms or actual sitings of court. A judge would have discretion, when presented with an application in vacation, to refuse to hear it until the term begins; presumably, he will consider it if it is one requiring expeditious action. A provision granting judges such discretion should be substituted for the last sentence of section 65 of the civil practice act, which presently requires Supreme Court justices "at all reasonable times, when not engaged in holding court," to "transact such judicial business as may be done out of court."

B. Form and Entry of Order

Under the proposed plan, all orders would be the same in form and all would be entered.

[209] Compare the comments of the authors of the Field code, text at note 25 *supra*.
[210] See text at notes 159–169 *supra*.
[211] See text at notes 181–186 *supra*.
[212] *See, e.g.*, Bronx Co. Sup. Ct. Rules, Rule VII; Kings Co. Sup. Ct. Rules, Rule 13; N.Y. Co. Sup. Ct. Rules, Special Term Rules III, IV.

There is no reason even under present law why judges' orders should not be entered and filed with the supporting papers just as court orders are.[213] The rule probably rests on the notion that such orders involve less formality than court orders and frequently involve only incidential matters. But many court orders also involve incidental matters, and many orders that presently may be made by a judge involve matters of considerable importance. The only effect of the distinction regarding entry is to spawn another meaningless distinction—between using the original order or a copy—where service or delivery of the order is required to give it effect.[214] If an appeal is to be taken, the judge's order must be entered in any event.[215]

The filing of all orders probably will not substantially increase the paper work of clerks. Under present law most judges' orders must eventually be filed anyway as part of the judgment-roll if they involve the merits or necessarily affect the judgment.[216] It would be no substantial additional burden to enter and file the order immediately[217] and, if desired, local rules could dispense with entry of particular kinds of orders.

Nor would there be any reason under the proposed rules to retain the present distinctions in form between court and judges' orders.[218] Since all orders would be entered, all could contain the word "enter" at the end and the reference to "filing" in the recital part; these are presently used only in court orders. The caption need only recite the title, the court and the judge who made the order, whether it is made during a term or not. The minor differences regarding the judge's signature and the place where the date appears could be resolved either way and presented in a form appended to the proposed rules.

C. Authority of Judges to Exercise Powers of Judge of Another Court

Another problem that must be considered if the court-judge distinction is dropped concerns the present provisions authorizing judges to make orders in matters pending in a court other than their own.[219] One of these is the constitutional provision stating that an Appellate Division justice shall not exercise any of the powers of a Supreme Court justice "other than those of a justice out of court."[220] There is no corresponding provision in the civil practice act or rules. Since this is a part of the Constitution it cannot be altered by any proposed laws. Although it allows

[213] N.Y. R. Civ. P. 71; 1 Carmody-Wait, Cyclopedia of New York Practice 697, 704 (1952); see text at notes 4–8 *supra*.
[214] See text at note 9 *supra*.
[215] §559.
[216] See RCP 202; 1 Carmody-Wait, Cyclopedia of New York Practice 700 (1952).
[217] *Cf. id.* at 704.
[218] See text at notes 10–11 *supra*.
[219] In this discussion, the Appellate Division of the Supreme Court is treated as if it were a separate court from the Supreme Court.
[220] N.Y. Const. art. VI, §2.

Appellate Division justices to make chambers orders of a Supreme Court justice, this power is rarely exercised; should a question concerning it arise under a new civil practice law that does not distingush court and judge powers, reference would have to be made to the distinction as it existed before the revision.

A somewhat related provision is section 66 of the civil practice act, which allows the Appellate Division to "grant any order or provisional remedy which has been applied for without notice to the adverse party and refused by the supreme court or a justice thereof." This provision differs from the constitutional one in that it applies only after an application has been refused by the lower court or justice, and in that it refers to orders without notice rather than orders that can be made by a judge out of court. There is not a strict correspondence between *ex parte* business and chambers business. *Ex parte* matters generally may be handled by a judge out of court, although there are some matters that must be handled by a court in which notice is not required or may be dispensed with in the discretion of the court.[221] Conversely, the civil practice act specifically requires notice for a number of matters that may be handled by a judge, such as granting a stay for more than twenty days,[222] dispensing with security on appeal[223] or granting a temporary injunction.[224]

A more difficult problem concerns the power of Supreme and County Court judges to exercise each other's chambers powers. This area is governed by sections 77 and 130 of the civil practice act, which provide:

> [§77] A county judge within his county possesses and upon proper application must exercise the power conferred by law in general language upon an officer authorized to perform the duties of a justice of the supreme court at chambers or out of court.
>
> [§130] 1. An order in an action or special proceeding in a county court which a county judge may make out of court may be made without notice (except an order to stay proceedings which may be made only upon notice) by a justice of the supreme court, or by the county judge of any other county.
>
> 2. Where an order, in an action in any other court, may be made by a judge of the court, out of court, and without notice, and the particular judge is not specially designated by law, it may be made by any judge of the court in any

[221] *E.g.*, §687-a(7) (extension of time to commence judgment creditor's action where execution against debts or contract causes of action has not been satisfied); RCP 276 (order allowing next friend of infant, idiot or lunatic to maintain action to annul a marriage). *Compare* RCP 123 (order to perpetuate testimony for future action), *with* Matter of National City Bank, 205 App. Div. 513, 199 N.Y. Supp. 698 (1st Dep't 1923).
[222] §129. See also RCP 249 (order by judge out of court to stay sale under a judgment in partition; two days notice required).
[223] §568.
[224] §882.

> part of the state; or, except to stay proceedings after verdict, report or decision, by a justice of the supreme court, or by the county judge of the county where the action is triable or in which the attorney for the applicant resides.

The obscurity of these provisions and their lack of coherence are readily apparent. Neither their history nor the decisions interpreting them sheds much light upon their meaning.

Section 77 seems to give a county judge within his county *all* the powers of a Supreme Court justice at chambers, without qualification. This would authorize the county judge to make all orders that may be made out of court in both actions and special proceedings pending in the Supreme Court, whether made with or without notice, as well as to hear special proceedings that may be instituted before a Supreme Court justice out of court. The peculiar language of the section, referring to the "power conferred upon . . . an officer," *etc.*, stems from the Throop code. As the provision first appeared in section 403 of the Field code, it stated simply:

> In an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the supreme court at chambers, according to the existing practice, except as otherwise provided in this act. . . .

The authors of the Throop code made the provision apply also to a "judge of a superior city court, within his city" and utilized the "power conferred . . . upon an officer" formulation;[225] this was done, according to Throop's comments to the section, to preserve not only section 403 but "various other enactments, granting in general language, the powers of a justice of the supreme court at chambers, to several officers, including recorders of cities, etc., as well as those . . . named."[226] It is unlikely that this change was meant to affect the power of county judges to handle chambers business of Supreme Court justices. Thus, under the Throop code formulation, the Court of Appeals held that a county judge had no power to determine the custody of infants after the law was changed to require that such an application be made to the Supreme Court in court rather than to a justice at chambers; and it stated that "The powers of a county judge alter with alteration of the powers of the justice of the Supreme Court at chambers, for the powers of that officer at chambers form the standard by which to measure those of the county judge in that respect."[227] Nevertheless, at least one decision has treated the present language, introduced by the Throop code, as granting less power to county judges than the Field code provision did.[228]

Subdivision 1 of section 130 treats the reciprocal matter of a Supreme Court justice's power to make orders that a county

[225] N.Y. Code Civ. Proc. §241.
[226] N.Y. Code Civ. Proc. §241, note (Throop ed. 1880).
[227] People *ex rel.* Parr v. Parr, 121 N.Y. 679, 680, 24 N.E. 481 (1890).
[228] Gates v. Gates, 171 N.Y. Supp. 1036 (Sup. Ct. 1918).

judge may make out of court in actions and special proceedings pending in the County Court. It also authorizes the county judge of any other county to make such orders. However, the language of this provision indicates that it may apply only to orders that may be made out of court *and* without notice, and the wording of section 354 of the Throop code, from which it was derived, supports this interpretation.[229]

The meaning of subdivision 2 of section 130 is even more obscure. It seems to overlap with both subdivision 1 and with section 77, but says less than these provisions because it applies only to orders in an action. Also, like subdivision 1 but unlike section 77, it refers only to orders made out of court *and* without notice. However, its application is extremely unclear. The reference to "any judge of the court, in any part of the state" was probably only meant to apply to orders in Supreme Court actions, although the Court of Claims and Court of Appeals are also statewide courts. On the other hand, the grant of authority to "a justice of the supreme court" is meaningless unless it applies to actions in a court other than the Supreme Court. But the phrase "in any other court"—referring to a court other than the County Court treated in subdivision 1—clearly indicates that the provision does not apply to actions in a County Court.

The confused nature of this provision, which derives from section 401(3) of the Field code and section 772 of the Throop code, seems to stem from artless changes made as it was transposed from code to code to civil practice act. As it first appeared in the Field code, it provided:

> Orders made out of court, without notice, may be made by any judge of the court, in any part of the State; and they may also be made by a county judge of the county where the action is triable, or by the county judge of the county in which the attorney for the moving party resides, except to stay proceedings after verdict.

The authors of the Throop code made a number of changes, among them limiting the provision to orders in an action and adding the words "by a justice of the Supreme Court."

Although Throop's comments to the section[230] assign no reason for the latter addition, it must have been meant to make the provision apply to actions in courts other than the Supreme Court. Yet there was no need for such a provision as to county court actions, since these were covered by the newly added section 354 (the forerunner of present section 130(1)). There is nothing in

[229] The Throop code provision read:
> In an action or special proceeding in a county court, an order may be made without notice, or an order to stay proceedings may be made upon notice, by a justice of the supreme court, or by the county judge of the county where the attorney for the applicant resides, in a case where the county judge, in whose court the action or special proceeding is brought, *may make the same, out of court;* and with like effect. (Emphasis supplied.)

[230] N.Y. Code Civ. Proc. §772, note (Throop ed. 1880).

Throop's comments to indicate that it was meant to cover any other courts below the Supreme Court level, nor has research unearthed any reported cases so applying it. The words "in *any* other court" (emphasis supplied), might be taken to cover such other courts, but they were not added until the provision was transposed to section 130(2) of the civil practice act and their purpose, as stated in the revisor's notes, was "to exclude orders in a county court action which a county judge may grant out of court and which are covered by subd. 1."[231] In any event, it is quite clear that, unless it covers actions in courts other than the Supreme and County Courts, there is no need for the provision in view of sections 77 and 130(1), which encompass its terms.

The cases implementing these three provisions and their forerunners demonstrate both confusion as to their meaning and an inclination to limit their scope. As to section 130(1), governing a Supreme Court justice's power to make orders in County Court actions, one court severely limited its scope in disregard of its plain words by excluding "matters affecting substantial rights of the parties or interfering with the jurisdiction and authority of the County Court."[232] As to a county judge's power in Supreme Court matters, the cases have not satisfactorily dealt with the dual coverage of sections 77 and 130(2). While some courts in stating the rule follow the literal terms of section 77,[233] others stress the additional *ex parte* requirement that section 130(2) contains.[234] In one case Judge Rodenbeck, citing the Throop code forerunners of these sections, stated that "There is no provision of the Code of Civil Procedure which confers upon a county judge . . . the power exercised by a Supreme Court justice at chambers in all cases."[235] This seems to fly in the face of the language of section 77.

Some decisions, although citing both of these provisions, have practically read them out of existence by holding that these "sections being general in scope, are controlled by the special provisions" governing particular motions or applications.[236] The "special provisions" referred to in these cases were provisions

[231] Report of the Joint Legislative Committee on the Simplification of Civil Practice 119 (1919).

[232] Curry v. Earll, 209 App. Div. 205, 207–08, 203 N.Y. Supp. 750, 752 (4th Dep't 1924); *cf.* Edwards v. Shreve, 83 App. Div. 165, 82 N.Y. Supp. 514 (2d Dep't 1903); *In re* National Bank of Oxford, 16 N.Y.S.2d 429, 430 (County Ct. 1939).

[233] *E.g.*, People *ex rel.* Parr v. Parr, 121 N.Y. 679, 680, 24 N.E. 481 (1890); People *ex rel.* Williams v. Corey, 46 Hun 408 (N.Y. Gen. T. 3d Dep't 1887); Lowman v. Billington, 65 Misc. 111, 118, 119 N.Y. Supp. 825, 831 (Sup. Ct. 1909).

[234] Town of Rochester v. Davis, 12 Abb. Pr. (n.s.) 270 (N.Y. Sup. Ct. 1872); Parmenter v. Roth, 9 Abb. Pr. (n.s.) 385 (N.Y. Ct. App. 1870).

[235] Matter of Parkman, 108 Misc. 316, 317, 177 N.Y. Supp. 589, 590 (Sup. Ct. 1919).

[236] Larkin v. Steele, 25 Hun 254, 256 (N.Y. Gen. T. 4th Dep't 1881); see also Kline v. Snyder, 133 Misc. 128, 231 N.Y. Supp. 275 (Sup. Ct. 1928); Gates v. Gates, 171 N.Y. Supp. 1036 (Sup. Ct. 1918); *cf.* Matter of Parkman, 108 Misc. 316, 177 N.Y. Supp. 589 (Sup. Ct. 1919).

authorizing "the court or a judge thereof" to make an order to show cause,[237] to require security for costs[238] and to render a default judgment.[239] The "court or a judge thereof" formulation is, of course, used in almost all the provisions that allow action out of court, except those that refer to a judge alone. If sections 77 and 130(2) mean anything, they must apply to such provisions, and if the "special provisions" reasoning of these cases were uniformly applied it would practically render sections 77 and 130(2) nugatory.[240]

The obscurity of these provisions and the confusion they have produced in the courts indicate that revision is necessary. Under the proposed rules, the operation of such provisions could not in any event be based upon the distinction between court and chambers business. This is of no consequence, for the present criterion, of orders that may be made out of court, or out of court and without notice, is not strictly pertinent to the purpose of the provisions. That purpose is to allow immediate hearing of applications by another judge when a judge of the court in which the action or proceeding is pending is not available.[241] Consequently, the matters in which it is most important that such action should be permitted are those in which delay might prejudice a party. The category of chambers business under present law includes many such matters, but it also includes many matters of an incidental nature in which speed is not important. As demonstrated in section II of this study, the distinction between court and chambers business fails to a large extent to follow any coherent pattern. Furthermore, there are many areas of court business, or business requiring notice, which might require expeditious handling, and to accommodate these the present act is liberally sprinkled with provisions specifically authorizing county judges to make such orders. These provisions were intended to supplement the authority granted county judges under sections 77 and 130(2).[242]

There is no reason why a county judge should not be allowed to handle any kind of motion in a case pending in the Supreme Court when a Supreme Court justice is not available. The same is true with respect to Supreme Court justices acting in cases pending in County Courts. This was the approach advanced in 1915 by the Board of Statutory Consolidation.[243] Such a rule would con-

[237] N.Y. Code Civ. Proc. §780.

[238] *Id.* §3272.

[239] N.Y. Civ. Prac. Act §489.

[240] To be distinguished is the situation where the provision actually is special, in the sense that it authorizes only a particular judge to make the order. Such a case would come within the exception in section 130(2) ("and the particular judge is not specially designated by law"). See People v. Windholz, 68 App. Div. 552, 74 N.Y. Supp. 241 (4th Dep't 1902).

[241] See Peebles v. Rogers, 5 How. Pr. 208, 214 (N.Y. Sup. Ct. 1850).

[242] N.Y. Code Civ. Proc. §241, note (Throop ed. 1880).

[243] 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 39, 43 (1915) (rules 22, 39).

tribute greatly to the convenience of counsel in those upstate counties where there is no resident Supreme Court justice. A few specific kinds of motions might be excluded—for example, motions made during or immediately after the trial and motions which might dispose of a case, such as one to dismiss the complaint or for summary judgment.

As an alternative, the kinds of motions that may be heard in this manner could be specifically listed. In this way the matters to be included could at least be chosen with a view to the need for expeditious action, and the vagaries of the distinction between court and chambers business would be avoided.

The provisions should be limited—as the present ones are not—to the situation where no judge of the court in which the case is pending is available; otherwise they serve no purpose save to induce judge-shopping. The judge's sphere of power should also be limited—that of a county judge to cases triable in his county and that of a Supreme Court justice to cases triable in his district. This was the limitation proposed in the rules of the Board of Statutory Consolidation.[244] The additional authorization to the county judge of the county where the attorney for the applicant resides, contained in section 130(2) and the rules of the Board, is not necessary. Its original purpose probably was more to serve the convenience of counsel than to provide an expeditious hearing, and there is little reason for it under modern conditions of transportation.

D. Venue of *Ex Parte* Motions

Part of section 130(2) is a venue provision, allowing orders that may be made out of court and without notice to be made "by any judge of the court in any part of the state." The "out of court" reference is sometimes ignored in cases discussing this provision, and the general rule is stated that there is no venue limitation for *ex parte* motions.[245] An analogous portion of section 130(1) allows the "county judge of any other county" to make *ex parte* orders in an action or proceeding pending in a County Court.

These provisions should be retained, but without the confusing references to out of court business. Insofar as *ex parte* motions are concerned, there is no need to impose venue limitations. The convenience of attorneys is not involved, since there is no need for the opposing party's attorney to appear and contest the motion. If the judge to whom the application is made feels too unfamiliar with the case to decide it, he can deny it on this ground. The possibility of judge-shopping does exist but this possibility is a necessary evil even within a particular district.

[244] *Ibid.*

[245] See Rhodes v. Wheeler, 48 App. Div. 410, 63 N.Y. Supp. 184 (3d Dep't 1900); Farquehar v. Wisc. Cond. Milk Co., 30 Misc. 270, 62 N.Y. Supp. 305 (Sup. Ct. 1900).

TABLE I

PROVISIONS IN CIVIL PRACTICE ACT AND RULES AUTHORIZING PARTICULAR ACTION BY A COURT

CIVIL PRACTICE ACT

Article 2—*Limitations of Time*

§51-a. Application to court on notice for order limiting time within which contract action may be brought, where conflicting claimants.

§51-b. Same, in action to recover specific personal property.

Article 4—*Abatement and Continuance*

§83. Court may direct substitution or joinder where there is a transfer of interest or devolution of liability.

§84. Death of a sole plaintiff or defendant; court to order action or proceeding continued by or against representative or successor in interest.

§85. Death of one of two or more plaintiffs or defendants, where entire cause of action survives; court may order repretatives brought in and may order a severance.

§86. Death of one of two or more plaintiffs or defendants, where part of cause of action survives; court may require successor to be brought in. See also §87.

§88. After death or marriage of plaintiff, where it affects rights of either party, court upon notice may order that action abate unless continued by proper parties within specified time.

§90. Court to order substitution of successor where public officer, receiver or trustee dies or is removed.

Article 5—*Consolidation and Severance*

§96-a. Court may order joint trial without consolidation.

§97. Supreme or County Court may remove to itself an action pending in lower court and order it consolidated or jointly tried with one pending in Supreme or County Court.

§97-a. Court may consolidate actions based on libels of similar purport.

Article 6—*Extension of Time*

§99(3). Where attorney becomes incapacitated within the time to take an appeal without having done so, court, upon application within 60 days, may permit notice of appeal to be served.

Article 9—*Mistakes, Defects and Irregularities*

§105. Mistake, omission, irregularity or defect may be corrected in discretion of court.

§107. Appellate court may permit omission in taking appeal to be supplied.

§108. Court may relieve party from default judgment or order.

§109. Specified defects in proceedings may be corrected by court which rendered judgment or appellate court.

§109-a. Court may set aside judicial sale for irregularity.

§111. Correction by court of mistake in remedy demanded.

§112. Appellate court may by order require a body or officer whose proceedings are under review to supply defect in papers.

Article 11—*Notice of Pendency*

§121-a. Court may extend duration of notice.

§123. Court may direct cancellation of notice for causes specified.

§124. Cancellation of notice by deposit or undertaking, upon application to court.

Article 14—*Payment into and out of Court*

§133. Party bringing money into court pursuant to direction of court discharged from liability to extent of money paid in. See also §134-a.

§136. Court to direct disposition of money or security deposited, by order or decree.

Article 17—*Security*

§149. Additional security may be required by court.

§151. This section provides for justification of sureties to bond or undertaking in an action or proceeding before court or a judge thereof or county judge, but refers only to the court in authorizing a reference, a direction that either party pay the costs of such reference, and a motion to set aside the exception to the sureties as vexatious.

§153. Deposit of items for which sureties are responsible; withdrawal by consent of sureties or order of court.

§154. This section provides for approval of bond to protect infant or incompetent by court or a judge thereof, but states that upon breach of condition of the bond, the court must direct it to be prosecuted for the benefit of the person injured.

Article 21—*Tender and Offer*

§174-b. Withdrawal of amount deposited by order of court.

Article 22—*Want of Prosecution*

§180. Dismissal by court for neglect to serve indispensable or conditionally necessary party.

§181. Dismissal by court for neglect to proceed.

Article 23—*Venue*

§182-b. Power of court to change place of trial of actions against New York City or New York City Transit Authority.

§185. Issue triable by court may be tried at a special term in any county within judicial district embracing the county where the action is triable, in discretion of court or upon stipulation of parties.

§186. Action may be tried in county improperly designated unless changed upon demand of defendant and order of court or consent of plaintiff.

§187. Court may change place of trial in specified cases.

§189. Supreme Court may order that an issue of fact in an action or proceeding pending in any other court of record be tried at a term of the Supreme Court in another county.

§190. Supreme Court may remove to itself action in County Court, where county judge incapable of action. *Cf.* last sentence of section.

§190-a. Supreme Court may remove action pending therein to Surrogate's Court of certain counties.

Article 24—*Parties*

§192. Parties may be added, substituted or dropped by order of the court.

§193(2). Court to order indispensable or conditionally necessary party brought in; dismissal of action.

§193-a(4). Third party complaint; court may dismiss, order separate trial or make any other order to further justice.

§193-a(5). Third party claim; court on motion may require special findings from jury.

§193-b. Intervention upon application to court, *semble*.

§193-c. Application to court to add parties in certain real property actions.

§196. Leave to sue as poor person, by order of court.

§198. Leave to defend as poor person, by order of court.

§202. Appointment of guardian ad litem for infant; generally by court or judge but *semble* by court alone in action for partition.

§205. Infant or his guardian ad litem not liable for costs unless specially charged by order of court.

§206. Court to appoint guardian ad litem for infant absent from state.

§207. Supreme Court may appoint guardian ad litem or guardian for infant or incompetent, at any stage of action, without application.

§208. Court to appoint guardian ad litem for incompetent where protection by his committee is inadequate.

§212. Permissive joinder of parties; *semble* in discretion of court.

§215. When name of unknown defendant is learned, court shall order proceedings amended by inserting true name.

§217. Court to allow defendant served by substituted service to defend after default, *semble*.

Article 25—*Summons*

§225. Personal service on a natural person; court may make special orders regarding infants and incompetents.

§226. Court may order summons delivered to designated person where defendant incompetent, in certain cases.

§227-a. Commencement of action by non-resident as designation of attorney to receive service; court may order extensions to give non-resident reasonable opportunity to defend. See also §229-b.

Article 26—*Appearance*

§237-a. Special appearance to contest jurisdiction over defendant's person; question raised by motion to the court.

§240. Death or disability of attorney; notice to appoint another attorney to be given personally or as court directs.

Article 27—*Pleadings*

§244. Amendment of pleadings of course; court may strike out if for delay.

§245. Court may allow supplemental pleadings alleging material facts which occurred after former pleading or of which pleader was then ignorant.

§245-a. Court may allow supplemental pleading alleging new or additional causes of action.

§245-b. Court may allow supplemental pleading and permit adverse party to withdraw defense or counterclaim.

§257. Application to court for dismissal of complaint for failure to serve it upon demand.

§258. Joinder of causes of action; court may sever or direct separate trials.

§262. Pleading several defenses or counterclaims; court may sever, order separate trials or strike out.

§274. Court may compel plaintiff to reply to new matter in answer.

§283. After decision of point of law court may allow party to plead anew or amend.

Article 28—*Interpleader*

§§285, 286 (*passim*). All applications to be made to court.

Article 29—*Testimony by Deposition*

§292. Party desiring to take deposition may proceed by order of court instead of by notice.

§292-a. Court may direct taking deposition of officer, agent or employee of public corporation.

§293. Depositions during trial and after judgment, upon order of court.

§297. Testimony of person in prison for felony only by order of court.

§299. Court may strike out pleading of party for failure to appear for examination.

§302. Testimony to be taken without the state; court may order written interrogatories. Court may strike pleading of party for refusing to subscribe deposition.

§304. Conditions under which deposition may be read in evidence must appear to satisfaction of court. Order of court for suppression.

§306. Court may direct physical examination. [Physicians to be designated by court or judge and examination subject to restriction and direction by court or judge.]

§306-a. Court may direct blood grouping tests [under such restrictions and directions as court or judge shall deem proper].

§309. Letters rogatory may be issued by court.

§309-a. If witness does not understand English, court may direct foreign language interrogatories. [Judge who settles interrogatories may call experts and fix their compensation.]

Article 31—*Perpetuation of Testimony in Real Property Actions*

§316. Petition to Supreme Court to take deposition. But *cf.* §317, R. 138.

§317. Court to appoint referee to take testimony and prescribe manner of giving notice of time and place of taking testimony.

Article 32—*Admissions, Discovery and Inspection*

All the provisions in this article authorizing judicial action refer only to the court. See §§322, 324, 325, 327, 328.

Article 33—*Evidence*

§334. Court may direct examination of child to determine age.

§398-a(4). Proof of foreign public records; court may appoint person to certify that copy was attested in manner prescribed by law of the foreign country.

§405. Court may strike out pleading of party who fails to obey subpoena or order made by court or judge requiring him to attend an examination or bring a book or paper.

§406-a. Court to enforce subpoena of absent witness to appear before legislature or commission appointed by governor, by contempt proceedings and seizure of his property within the state. [Supreme Court or justice may issue subpoena and direct service by publication.]

§410. Production of official records kept by register of New York, Kings, Bronx or Queens county for use at trial by order of Supreme or County Court made in court.

§412. Production of records of hospital or of any department of municipal corporation or state; certified transcript or photograph sufficient unless court orders otherwise; court may dispense with notice.

Article 34—*Trial*

§426. Court may relieve party from failure to comply with requirements for demanding jury trial.

§426-a. Same, with respect to Supreme Court in Erie County.

§429. Application to court for order directing questions in jury trial as of right to be distinctly and plainly stated.

§430. Court upon application may direct jury trial of issues where no jury trial as of right.

§431. Trial of remaining issues after reference as court directs.

§433-a. Court to grant continuance where attorney is member of state Legislature while Legislature is in session.

§434. Court may disregard variance or order amendment.

§437. Stipulation, with consent of judge, for trial elsewhere than at court house; court may adjourn term to such place and order manner of notice.

§§439–442. Requests to find; decision of court.

§443. Court to direct order of trial of issues or separate trial.

§449-a. Court may direct calling of alternate jurors.

§450. Challenge of a juror or to the panel must be tried and determined by the court only.

§457-a. Direction of verdict; judgment notwithstanding verdict.

§459. Court may direct general or special verdict.

§460. Jury, under court's direction, to assess damages where court directs judgment for plaintiff on the pleadings.

§464. Reference by consent of parties; court designates referee where not named by stipulation or where one named refuses to serve or where new trial granted.

§465. Reference in discretion of court despite consent of parties, in specified cases.

§466. Compulsory reference; court may direct on own motion or application where examination of long account required.

§467. Reference to take an account and report, or upon question incidentally arising; court may direct on own motion or application.

Article 35—*Judgment*

All the provisions in this article authorizing judicial action refer only to the court (see §§473, 474, 476, 478, 479, 482, 484(3), 494-a, 495, 497, 505-507, 511, 516, 521-526 (*semble; cf.* 527), 529, 538, 538-a, 548; see also §112-g) except sections 489-491 and 493, which deal with the rendering of default judgments, and section 527, concerning notice on a motion to set aside a judgment.

Article 36—*Motions for New Trial*

§551. Motion for new trial in appellate court after interlocutory judgment.

§552. In a case not specified in sections 549-551, motion for new trial must be heard at special term. See also R. 221.

§554. Court may direct restitution where new trial granted.

§555. Motion for new trial may be made during hearing of an exception in discretion of the court.

§556. Motion for new hearing at special term after trial of specific questions by a referee. [To be made on affidavits unless court or a judge thereof directs a case to be prepared and settled.]

Article 37—*Appeals; General Provisions*

§564. Appellate court may direct manner of keeping and disposing of money deposited by appellant in lieu of an undertaking.

§571. Security unnecessary to stay execution on appeal by municipal corporation unless court in or from which the appeal is taken orders otherwise. [If appeal is from order made in special proceeding by a judge of a court of record, Supreme Court may require security.]

§575. Case to be settled in such manner as court directs in case of death or disability of trial judge.

§576. Case to be settled by court upon motion.

§578. Where party dies pending appeal and substitution not made, appellate court may make order to show cause why it should not reverse, affirm or dismiss.

§579. Application for order of substitution to be made in appellate court.

§587. Appellate court may compel restitution upon reversal or modification.

Article 38—*Appeals to the Court of Appeals*

§599-a. Court of Appeals, on motion, may cancel undertaking on appeal from reversal by Appellate Division.

§601. Court to which application is made for leave to appeal shall stay execution pending disposition of application.

Article 39—*Appeals to the Appellate Division of the Supreme Court*

§613. Appellate Division may grant stay of judgment or order from which appeal is pending. *Cf.* §598-a.

§618. Removal of appeal by order of Appellate Division to another department.

Article 42—*Executions Generally*

§636. Court by order to designate person to whom execution shall be directed in certain cases. See also Table II.

§639. Court to designate person to enforce execution where sheriff disabled and there is no under-sheriff.

§649. Court, on motion, may control enforcement of separate executions issued upon a single judgment.

§651. Order of court granting leave to issue execution required after five years from entry of judgment.

§656. Where judgment debtor deceased, leave to issue execution may be granted by Surrogate's Court which has granted letters on the estate (subdivision 2) or court from which the execution is to be issued where letters have not been granted within eighteen months (subdivision 4).

Article 43—*Executions against property*

§677. Court must marshall proceeds of sale of homestead exceeding $1,000 in value; court may direct that interest of deceased judgment debtor in proceeds be invested for benefit of persons entitled to exemption.

§684. [Ambiguous; see Table II]

§687-a. Levy upon debts and causes of action arising out of contract. Persons served with copy of execution may not dispose of debt or cause of action except by direction of officer making the levy or order of court (subdivision 2). Application to court upon notice to release property in excess of amount necessary to satisfy the execution (subdivision 4). Application to court by third person who claims the property (subdivision 5). Application to court on notice for order authorizing judgment creditor to maintain an action (subdivision 6). Time to commence an action may be extended by order of court, upon *ex parte* application of judgment creditor (subdivision 7).

§689. Court in which judgment was rendered may discharge levy upon personal property where appeal has been taken.

§699. Application to court to substitute indemnitors in place of officer in action against him. [Procedure prescribed in §§700-704.]

§707. Court may direct sale of perishables levied upon.

§755. Court to appoint person to execute deed after sale by virtue of execution, in certain cases.

§761. Contribution between owners of real property after sale by virtue of execution; court in which action for contribution brought may permit plaintiff to use original judgment.

Article 44—*Executions against the Person*

§767. Simultaneous executions against person and property cannot be issued without leave of the court.

Article 45—*Proceedings Supplementary to Judgment*

Section 786 provides, with respect to this entire article, that "The proceeding shall be deemed pending in the court in which it is instituted and not before any individual judge or justice thereof. All powers granted to the court under this article may be exercised by a judge or justice thereof."

Articles 47-50—*Arrest; When Allowed; Granting, Executing and Vacating the Order; Discharging Defendant; Bail or Deposit; Charging and Discharging Bail*

§827. An order to arrest may be granted *only by the court* [despite section 817] where refusal to perform an act required by the judgment would be punishable by the court as a contempt and defendant is not a resident of the state or is about to depart. [Such orders are referred to in sections 829, 836, 839, 846, 847, 849, 859, 861, 871 and rule 83; see also section 263.]

§838. Time within which defendant may be arrested, in order of arrest, may be extended by court.

§846. Discharge of defendant from arrest for inexcusable or collusive delay by plaintiff in proceeding, except in a case where the order of arrest can be granted only by the court; application to court, *semble*.

§856. Deposit of money in lieu of bail; to be applied by court in satisfaction of any judgment for escape of prisoner. [*But cf.* end of last sentence.]

§859. Disposition by court of money deposited in certain cases.

§874. Court order for relief of bail where defendant imprisoned on criminal charge.

§875. Court may make certain orders upon exoneration of bail. *Cf.* §866.

Articles 51-53—*Injunction; Granting and Service of the Order; Security; Vacating or Modifying the Order*

§879. Injunction to restrain state officer or board from performing official duty may be granted only by Supreme Court.

§887. Court may order payment of money deposited as security to party whose proceedings are stayed.

§888. Court to cancel undertaking of successful party.

§§894-895. Court to determine amount of damages sustained by reason of the injunction.

Articles 55-59—*Attachment; Executing Warrant; Vacating or Modifying the Warrant; Discharge; Two or More Warrants; Proceedings after Vacation of Warrant or Discharge of Attachment, or after Judgment*

§915-a. Attachment of defendant's interest in a partnership; court to appoint receiver and make other orders.

§917(2). Person served with warrant forbidden to dispose of debt or right levied upon for 90 days, except by direction of sheriff or order of court.

§941. Court may direct sheriff to pay proceeds into court or deposit them in bank or trust company.

§942. If proceeds exceed plaintiff's demand, court may order sheriff to pay excess to applicant.

§969(5). Court may order sheriff to sell portion of debts and things in action that remain uncollected.

§972. Court may direct cancellation of notice attaching real property where attachment vacated or discharged.

§973. Court may direct sheriff to file warrant with return of his proceedings thereon, when warrant vacated or annulled.

Article 60—*Receivers*

§974. Appointment of receivers, generally, by the court. *But cf.* §976.

§975. Court may appoint temporary receiver, where summons to be served by publication.

§977-a. In action to foreclose mortgage, court may direct receiver to apply rents toward payment of accrued interest.

§977-b. Action in Supreme Court for appointment of receiver to liquidate local assets of foreign corporation; section refers only to court throughout except that court or any judge thereof may appoint temporary receiver pending determination of action (subdivision 4).

Article 61—*Disposition of Property in Litigation*

§978. Court may order that property which is the subject of an action be deposited in court or delivered to party; court may also order deposit in court where party entitled to money or personal property would not have benefit, use or control of it; such deposits to be paid out only by special order of the court.

§979. Court may direct sheriff to deposit, deliver or convey property where party disobeys court's direction to do so.

§979-a. Order for sale of goods which neither party will accept during dependency of action; refers both to court alone and to court or judge.

§980-a(1). Court to order disposition of proceeds of infant's or incompetent's cause of action for personal injuries.

Article 62—*Real Property Actions; General Provisions*

§982. Court in which action relating to real property is pending may order survey, upon application with notice.

§985. Court may require sheriff to put person entitled into possession.

§985-a. Court may apportion and adjust amount of tax lien in favor of the people.

§986. Application to court to appoint another person to make sale pursuant to a judgment, where officer originally appointed does not appear at time and place advertised.

§988. Court may allow person who would be bound by judgment to intervene or make other order for his protection.

Article 63—*Action to Recover Real Property*

§1000. Where judgment taken by default, amount of rent due to be ascertained by or under direction of the court.

§1002. Court upon application may restore property to person paying rent in arrear.

§1006. Costs in discretion of court in certain cases.

Article 63-A—*Action against Infant or Incompetent to Compel Conveyance*

§1011-b. Court to appoint special guardian for incompetent.

Article 64—*Action for Partition*

All the provisions in this article authorizing judicial action refer only to the court. See §§1013, 1019, 1023–1026, 1031, 1032, 1036–1038, 1041, 1042, 1046–1049, 1052–1053-a, 1055, 1056, 1058, 1060, 1061, 1063, 1064, 1066, 1068–1072, 1075. *But cf.* the reference to sureties "approved by the judge or justice of the court making such order" in §1047, and the reference to a certificate of sufficiency of security by a judge in §1063(3).

Article 65—*Action to Foreclose a Mortgage*

All the provisions in this article authorizing judicial action refer only to the court. See §§1077-c, 1077-e, 1078, 1082, 1083, 1083-a, 1084, 1088.

Article 65-A—*Action to Foreclose Preemptive Rights Against the City of New York*

Section 1088-a, the only section in this article, refers only to the court.

Article 66—*Action to Recover a Chattel*

§1096. Affidavit to be delivered to sheriff requiring him to replevy chattel; mistake, omission, irregularity or defect may be corrected in discretion of court.

§1099. If service by sheriff of affidavit, requisition and undertaking cannot be made as herein provided, then court shall direct manner of service on application of plaintiff.

§1103. Expenses incidental to impounding of property to be taxed as costs in the action as court directs.

§1114. If sheriff fails to comply with §1113, any party may require him to show cause at a term of court designated in the notice why he should not be punished for contempt.

§1119. If jury fails to fix value of chattel, court upon application may empanel another jury for that purpose.

§1122. When plaintiff entitled to judgment by default, court to ascertain damages or direct reference or writ of inquiry.

§1124. If action discontinued or dismissed, court shall take proof concerning defendant's right to possession of the chattel replevied and award appropriate judgment.

§1131. [Reference to court order directing abatement of action.]

Articles 67–70—*Action to Annul a Marriage; Action for a Divorce; Action for a Separation; Matrimonial Actions; Provisions Applicable to Two or More*

All the provisions in these articles authorizing judicial action refer only to the court. See §§1133, 1135, 1138, 1140, 1140-a, 1142, 1144, 1145, 1149, 1155, 1160, 1164, 1164-a, 1165, 1169, 1169-a, 1170, 1170-a, 1170-b, 1171, 1171-a, 1171-b, 1172, 1172-a, 1172-c, 1172-d, 1173, 1175, 1176.

Articles 71-73—*Action for Penalty, Forfeiture or on Forfeited Recognizance; Actions by Judgment Creditors; Actions Against Persons Jointly Liable*

All the provisions in these articles authorizing judicial action refer only to the court. See §§1180, 1182, 1184, 1192, 1194, 1197.

Article 75—*Action by People for Usurpation of Office, Franchise or Corporate Right*

§1216. Court may fine defendant not exceeding $2,000, in action for usurping office.

§1219. In trial of action for unlawful exercise of corporate rights, court may confer immunity.

§1220. Court may direct costs to be collected by execution or warrant of attachment.

Article 76—*Action by People Founded upon the Spoliation or other Misappropriation of Public Property*

§1223. Court may stay proceedings in another action brought for same cause by a public authority other than the people.

§1227. Court by final judgment or subsequent order may direct disposition of proceeds of action.

§1228. Public body not a party to the action may petition Supreme Court in county of Albany, claiming right to proceeds of action.

Article 78—*Proceeding against a Body or Officer*

All the provisions in this article authorizing judicial action refer only to the court (see §§1286, 1287, 1293–1302, 1304, 1305), with the following exceptions: Section 1287 requires application to a special term of the Supreme Court or, if the petition is directed against a judge, to the Appellate Division, "except that the petitioner may apply to any court or judge expressly authorized by statute to grant relief"; section 1289 provides that the eight days' notice of application required by this article may be shortened by an order to show cause granted by the court or a judge; and section 1305 allows a stay upon appeal by the court or a judge.

Article 79—*Proceeding Relating to Express Trusts*

§1309. Court at any stage of proceeding may issue supplemental order to show cause, to bring in parties not named in original order. *Cf.* §1308 and remainder of §1309.

§1313. Court to appoint guardian ad litem.

§1314. Court to enter intermediate and final orders.

§1315. A proposed final order by consent may be presented at special term as an uncontested motion, and court to make such disposition as justice requires.

§1316. Court may appoint a referee to hear and determine or to hear and report.

Article 81—*Proceeding for Appointment of Committee of Incompetent; Powers and Duties of Committee*

All the provisions in this article authorizing judicial action refer only to the court (see §§1356–1360, 1362–1366, 1370–1373, 1375–1377-b, 1381–1384), with the following exceptions: Section 1374 provides that where the incompetent is an inmate of a state institution, the petition for appointment of a committee may be presented to the Supreme Court or to a justice thereof at chambers (*but cf.* last sentence of subdivision 4); section 1379 provides for an annual examination of the accounts and inventories of the committee to be supervised by specified judges; and section 1380 allows these judges to appoint a person to bring proceedings for removal of the committee where the judge believes that cause exists for such removal. See also §1358-a(3).

Article 81-A—*Proceedings Relative to Incompetent Veterans and Infant Wards of the United States Veterans' Bureau*

All the provisions of this article authorizing judicial action refer only to the court. See §§1384-c—1384-e, 1384-g—1384-k, 1384-m—1384-p. *But cf.* single reference to "judge" in §1384-j, which appears to be an oversight.

Articles 82, 82-A—*Proceeding for Disposition of Real Property of Infant or Incompetent; Proceeding for Release of Claim against the State of Infants or Incompetents by Reason of the Appropriation of Real Property not Held in Trust or Subject to Valid Power of Sale*

All the provisions in these articles authorizing judicial action only to the court. See §§1388–1395, 1400–1402, 1404-1406, 1409-a, 1409-d—1409-f, 1409-h.

Article 84—*Arbitration*

§1448(1). Controversy cannot be arbitrated where one party is infant or incompetent unless court approves petition for permission to arbitrate.

§1454(3). Court may direct arbitrators to proceed promptly with hearing and determination.

§1461. Motion to confirm award to be made to court upon notice.

§1462. Court must vacate award in specified cases and may direct a rehearing.

§1462-a. Court must modify or correct award in specified cases.

§1464. Court may award costs upon confirming, modifying or correcting an award.

Article 84-A—*Proceeding for Discovery of Names and Addresses of Bondholders*

§§1469-b, 1469-f. Proceeding before Supreme or County Court.

Article 85—*Costs, Allowances and Awarding; Liability for*

§1476. Costs in discretion of court where plaintiff entitled to costs against one or more but less than all defendants.

§1477. Except as prescribed in preceding sections of this article, the court, on rendering final judgment, may award costs to any party in its discretion.

§1481. Court to direct costs in case of transfer of cause of action.

§1490. Costs upon appeal from final judgment in discretion of court.

§1491. Costs upon appeal from interlocutory judgment or an order in an action are in discretion of the court, with two exceptions.

§1492. Costs in special proceeding, where not specially regulated by civil practice act, in discretion of court.

§1493. Costs awarded to poor person to be distributed among attorneys assigned to him, as court directs. Court to provide for payment to county treasurer of amount of county's lien upon any money or property recovered by the poor person.

§1499. Court may award costs and disbursements against executor or administrator in certain cases.

§1500. In action by or against executor, administrator, trustee or person authorized by statute to sue or be sued, costs are collectable from the estate, fund or person represented unless court directs them to be paid by the party personally for mismanagement or bad faith.

Article 86—*Costs; Amount of; Additional Allowances; Disbursements*

All of the provisions in this article authorizing judicial action refer only to the court (see §§1508(2), 1510(4), 1513, 1514-a, 1515, 1518(10), 1520) except section 1505, which states that the court or judge shall fix the amount of costs upon a motion or a reference specified in section 1486.

Article 87—*Costs; Security for*

§1523. In listed actions, the court may require plaintiff to give security for costs.

Article 88—*Costs; Taxation*

§1532. Costs to be taxed by clerk except court may direct that interlocutory costs or costs in a special proceeding be taxed by a judge; where the value of property is involved, it must be ascertained by the court.

§1535. Court may direct a retaxation of costs.

§1536. A taxation or retaxation may be reviewed by the court upon a motion for a new taxation.

Article 89—*Fees*

§1546. Specific fees of referees upon sales of real property; where property sold for $10,000 or more, court may allow additional compensation.

§1547-a. Where funds are depleted at the termination of a receivership, the court may fix the receiver's allowance and his attorney's fees.

§§1548, 1548-a. Court to allow expenses and commissions of trustee.

§1554-b, subdivision V(c). Fees of county clerk of Putnam County; for service for which no fee is listed, fee to be fixed by county clerk subject to review by Supreme Court. See also §1557-e, subdivision V(c) (Westchester County).

RULES OF CIVIL PRACTICE

Title 1—*Courts; Miscellaneous Provisions*

R. 6. If officer fails to file paper required to be filed, party may require him to show cause at special term of the Supreme Court why an attachment should not issue against him.

R. 9-a. Court may enforce demand for verified statement setting forth address of party.

Title 2—*Papers and the Filing Thereof*

R. 14. If original pleading or paper lost, court may authorize copy to be filed.

Title 4—*Security*

R. 26. If required bond or undertaking is not filed, any party may move court to vacate proceedings or order.

Title 5—*Payment into Court*

R. 32. Payment of money out of court; court may take proof or may direct reference to take proof.

Title 6—*Action By or Against Poor Person*

R. 35. Application for leave to prosecute as a poor person made by petition to the court.

R. 36. Court may assign an attorney to poor person and may allow attorney a fee if there is a recovery.

Title 7—*Guardians Ad Litem and Special Guardians*

R. 40(6). Attorney or officer of the court must act as guardian of an infant defendant whenever appointed for that purpose by an order of the court. *But cf.* §202.

R. 41. Guardian or petitioner under article 80 may not receive money or property other than costs and expenses allowed him by the court, until he gives security to account for and apply the same under direction of the court, unless security is dispensed with in discretion of the court (subdivision 1). Court may require additional security (subdivisions 2, 4). [Security to be approved by a judge of the court or a county judge (subdivision 1).]

R. 42. Moneys received by guardian to be invested according to directions of the court.

R. 43. Compensation of guardian to be determined by the court.

R. 44. Person designated by the court to receive summons on behalf of infant or incompetent; compensation to be fixed by the court.

Title 8—*Summons and the Service Thereof*

R. 53(9). Proof of service of summons in matrimonial actions; court may require affiant or sheriff to appear and be examined.

Title 9—*Appearance*

R. 55. Attorney for non-resident defendant in real property action may be compelled by plaintiff, on application to the court, to produce evidence of his authority to begin the action.

Title 14—*Pleadings*

R. 102. Motion to court to correct indefinite or obscure pleading or to correct a nonjoinder or misjoinder of parties.

R. 103. Court may order stricken out sham, irrelevant, or prejudicial matter in a pleading.

R. 104. Court may treat a sham or frivolous answer or reply as a nullity.

R. 108. Where factual issue is presented on a motion under rule 107, court may hear and determine the issue or order it tried by a jury or referee, or may overrule the objections and allow them to be stated in the answer.

R. 112. Court may give judgment on the pleadings without regard to which party made the motion.

R. 113. Summary judgment; this rule refers alternately to the judge hearing the motion and to the court.

Title 15—*Depositions to be Used within the State*

R. 122. Where testimony of a business entity is sought and applicant does not know what officer or agent has knowledge of the facts, court shall order the business entity to produce the proper person for examination.

R. 132. All depositions must be filed with clerk of the court unless court orders them filed with another clerk.

R. 133. A disposition taken without the state may be suppressed by the court on application with notice.

Title 16—*Depositions to be Used without the State*

R. 136. Party may apply to court which issued subpoena to vacate or modify it. [*But cf.* remainder of rule and §311.]

R. 137. Punishment of disobedient witness. Upon failure to obey the subpoena, *justice of Supreme Court or county judge* shall grant order requiring person to show cause before *Supreme Court* why he should not obey it. On failure to obey resulting *Supreme Court* order, the *court or judge* shall order person to show cause why he should not be punished for contempt, and shall prescribe punishment.

Title 18—*Discovery and Inspection*

All three rules of this title (rules 140-142) refer only to the court. See also article 32, *supra.*

Title 20—*Note of Issue*

R. 150. Cause shall retain its place on the calender unless court directs otherwise.

Title 21—*Trial*

R. 156. Motion to court to dismiss complaint for failure to prosecute diligently.

R. 157. Motion to have issues of fact framed for trial by jury, not as a matter of right but in discretion of *court; court or judge* to settle issues.

R. 164. Court may exclude jurors during argument.

Title 22—*References*

R. 172. Referee appointed by court must be free from objection by the parties, except in marital action.

R. 173. Moneys received by a referee appointed to sell property to be deposited as court designates, withdrawn on order of the court.

Title 23—*Receivers*

All the rules in this title authorizing judicial action refer only to the court. See rules 175-177, 180, 181.

Title 24—*Judgment*

R. 187. Where a judgment requires appointment of a referee to do any act, referee must be appointed by the judgment or by the court on motion.

R. 191. Place of application for default judgment when relief demanded requires that application be made to the court.

R. 195(2). Application for judgment, in discretion of court, at term where last issue tried.

R. 196-197. Application to court for judgment.

R. 200. Application for additional allowance can only be made to court before which trial had or judgment rendered.

R. 203. Stay of judgment and enforcement granted in open court at close of trial.

R. 204. [Reference to vacation of a return of execution by the court.]

Title 25—*Declaratory Judgment*

R. 213. Court may submit questions of fact to a jury.

Title 27—*Appeals*

R. 232. Court may withhold an award of disbursements for matter unnecessarily printed in the record. Reviewing court may order resettlement where case or bill of exceptions does not conform to this rule. [Rule also contains references to judge or referee; see Table II.]

R. 234. Motion in appellate court to dismiss appeal for failure to file and serve required papers.

Titles 30-31—*Action for Partition; Action for Foreclosure*

All the provisions in these titles authorizing judicial action refer only to the court (see rules 246–248, 250, 251, 256, 257, 259, 261, 263, 265; see also articles 64 and 65, *supra*) except for provisions prohibiting the stay of a sale under a judgment for partition or foreclosure by a judge out of court without notice (rules 249, 260).

Title 33—*Matrimonial Actions*

All the provisions of this title authorizing judicial action refer only to the court. See rules 276, 278, 281, 283.

Title 34—*Committee of Incompetent Person*

R. 288. Execution of a commission of lunacy; commissioners' allowance to be fixed by court; court order required for payment out of estate where costs and expenses exceed $250.

Title 35—*Infants; their Guardianship and Maintenance*

R. 290. Petition to court for appointment of general guardian. See also rule 291.

R. 292. Court may vary the security required of the general guardian, may direct investment of principal of estate, and may direct that only income be received by the guardian.

R. 293. Petition for application of infant's property for his maintenance or education, to Supreme Court or Surrogate's Court. *But cf.* last sentence of rule.

R. 294. Procedure on application to compromise infant's claim, in a pending action or under article 80; refers alternately to "court" and "court or judge." See article 80, in Table II.

Title 36—*Disposition of Real Property of Infants or Incompetents*

All the provisions in this title authorizing judicial action refer only to the court. See rules 295–297, 299, 300.

Title 37—*Discontinuance and Dismissal*

R. 301. Except before answer or by stipulation, an action may not be discontinued without an order of the court.

Title 38—*Actions Involving Property in which Persons in Certain Foreign Countries are Interested*

R. 303. [Country at war with United States or one occupied by or contiguous to such country.] Court may order that papers and testimony be kept secret.

TABLE II

PROVISIONS IN CIVIL PRACTICE ACT AND RULES AUTHORIZING PARTICULAR ACTION BY A JUDGE, OR BY EITHER A COURT OR A JUDGE THEREOF

CIVIL PRACTICE ACT

Article 4—*Abatement and Continuance*

§90-a. Notice required to be served for revival of an action or for any purpose under §§82-90 to be made personally or in such manner as court or judge shall direct.

Article 6—*Extension of Time*

§98. Court or a judge may extend the time for doing any act or taking any proceeding, except as provided in §99.

Article 7—*Filing Papers*

§100. Court or judge may order a summons or pleading deemed abandoned if not filed after notice by adverse party requiring such filing.

§101. Return or other paper in special proceeding to be filed, and an order therein must be entered, with clerk of county where proceeding taken if proceeding before county officer or judge of a court established in a city; if before a Supreme Court justice, with clerk of a county designated by the justice.

Article 8—*Mandates*

§102(5). Judge in a special proceeding may fine one who fails to execute the mandate.

Article 9—*Mistakes, Defects and Irregularities*

§110. Justice of Supreme Court may by order remove action brought in wrong court to the proper court.

§110-a. Removal from court of limited jurisdiction; application to a judge or justice of the court to which removal is sought.

§110-b. Removal to court of limited jurisdiction by order of judge or justice of court in which the action is pending.

Article 17—*Security*

§151. Where party objects to sufficiency of sureties to a bond or undertaking in an action or proceeding, he may by notice require them to justify before court or a judge thereof or a county judge. [But parts of this section refer only to the court; see Table I.]

§152. Court or judge may allow the sum in which a surety is required to justify to be made up by justification of two or more sureties each in a smaller sum.

§154. Bond to protect infant or incompetent to be approved by court in which action or proceeding pending or a judge thereof. [But upon breach of condition of the bond, court must direct it to be prosecuted for benefit of person injured.]

§158. Surety on a fiduciary bond may apply for discharge to court that accepted the bond or of which the judge that accepted it was a member or to any judge thereof.

§159. Application for leave to bring an action on a bond or undertaking given to the people or a public officer; *semble* to court or judge.

Article 18—*Stay*

§167. Stay generally; court in which an action or proceeding is pending or a judge thereof may grant. See also §167-a, rule 155.

§168. Stay upon application for removal to Surrogate's Court of certain counties or to Supreme Court may be granted by surrogate, county judge or a judge authorized to make such an order in the Supreme Court.

§169. Judge out of court may not stay proceedings for longer than 20 days, except to stay proceedings under an order or judgment appealed from, or where stay made on notice or where special provision otherwise made by law.

Article 23—*Venue*

§190. On application to Supreme Court for removal in certain cases, stay may be granted by county judge or a judge authorized to make such an order in the Supreme Court.

Article 24—*Parties*

§202. Guardian ad litem for infant to be appointed by court or judge thereof; if action in Supreme Court, guardian may be appointed by county judge of county where triable; in action for partition guardian can be appointed by the court, *semble*.

Article 25—*Summons*

§230. Order for substituted service, by court or a judge thereof or county judge of the county where action is triable.

§234. Order for service by publication, by court or a judge thereof or county judge of county where action triable or attorney for applicant resides.

Article 27—*Pleadings*

§264. Claims between parties on same side or against another party for liability over; pleading asserting such claim to be served personally or as court or judge directs.

Article 29—*Testimony by Deposition*

§291. Motion to vacate or modify notice of taking testimony by deposition; if motion brought on by order to show cause, order may be returnable either at chambers or to the court. *But cf.* last sentence of section. See also R. 124.

§295. Depositions before action commenced, by order of court in which the action may be brought or a judge thereof. *But cf.* R. 123.

§296-a. Testimony of physicians, surgeons or nurses before referee appointed by a judge of the court in which action pending; any judge of the court may, notwithstanding such deposition, order subpoena issued for such person to be examined upon the trial.

§306. *Court* may order physical examination of plaintiff by physicians designated by *court or judge,* under such restrictions and directions as *court or judge* deems proper; *court* may direct that relative be present if party examined is a female.

§306-a. *Court* may order blood grouping tests under such restrictions and directions as *court or judge* deems proper.

§309-a. If witness does not understand English, *court* may direct foreign language interrogatories. *Judge* who settles interrogatories may call experts and fix their compensation.

Article 30—*Depositions Taken within the State for Use Without the State*

§311. Supreme or County Court or a judge of either to issue subpoena to witness; court or judge may punish for contempt.

Article 31—*Perpetuation of Testimony in Real Property Actions*

§317. Upon presentation of petition, judge shall make an order as to notice, time and place of hearing; after hearing, court may appoint referee to take the testimony and prescribe notice, time and place of taking. *Cf.* §316.

§318. If person to be examined is without the state, judge may direct that commission be issued and that interrogatories be settled on notice.

§320. Court or a judge thereof to determine whether witness must answer question.

Article 33—*Evidence*

§333(2). Undertaking to indemnify adverse party against claim upon lost negotiable paper, to be approved by judge or referee.

§359. Oath or affidavit in foreign language; translator to be designated by, and to certify translation before, a justice of the Supreme Court or county judge.

§405. Penalty for person failing to obey subpoena or order of a court or judge requiring him to be examined or bring a book or paper. [The court, as additional punishment, may strike out his pleading if he is a party.]

§406. Judge or other officer, in a proceeding or matter not in a court of record, may issue subpoena, may issue warrant to sheriff to apprehend defaulting witness, and may commit him to jail.

§406-a. Supreme Court or justice thereof may issue subpoena to witness absent from state to appear before Legislature or commission appointed by Governor, and direct service by publication. [Court may enforce by contempt proceedings and seizure of his property within the state.]

§408. Court which issued subpoena or order requiring attendance, or a judge thereof, or a Supreme Court justice in any part of the state, or a county judge, shall discharge a witness from an arrest made in violation of §§25 and 26 of the Civil Rights Law.

§411. Production of book of account; order may be made by a judge of the court or an officer before whom a special proceeding is pending out of court or a referee duly appointed in the cause. See also §413.

§§415–420. Production of prisoner as a witness. Order may be made by specified courts or judges (§§415-417) but only by Supreme Court justice where prisoner confined for a felony (§418). Fees for producing prisoner may be waived by the court or judge granting the order (§420).

Article 34—*Trial*

§433. After cause placed on calendar, party may proceed and take dismissal, verdict, decision or judgment in absence of adverse party, unless judge holding the term otherwise directs.

§437(1). Parties, with consent of judge who is to try the case, may stipulate for trial elsewhere than at court house.

§438. Trial by court at a term of the Supreme Court adjourned to chambers, pursuant to Judiciary Law §148, with consent of parties.

Article 35—*Judgment*

§489. Default where summons served personally within state or by substituted service; in case where clerk cannot enter judgment, plaintiff may apply to the court or a judge thereof for judgment.

§490. Court or judge to render default judgment; may make computation, take proof, direct reference or writ of inquiry.

§491. Where one or more defendants has appeared and others have not, application for default judgment must be to the court unless the appearing defendants consent to an application to a judge out of court.

§493. Default where summons served otherwise than personally within state or by substituted service; plaintiff may apply to the court or a judge thereof for judgment.

§527. Notice in a case specified in §§521–526 [motions to set aside judgment], where person cannot be found within state, to be given as court or a judge thereof directs.

Article 36—*Motions for New Trial*

§549. Judge presiding at trial may entertain motion for new trial upon his minutes. But see second paragraph (if action tried without jury, court may set aside decision, take additional testimony, *etc.*) See also R. 223.

§550. Judge presiding at trial, upon application, may order that exceptions be heard in appellate court.

§556. Motion for new hearing after trial of specific questions by a referee to be made upon affidavits unless court or a judge thereof directs that a case be prepared and settled.

Article 37—*Appeals; General Provisions*

§559. Judge of appellate court may compel entry of an order made by a judge out of court (for the purpose of appealing from the order).

§563. Judge of appellate court to direct mode of service of notice of appeal where neither adverse party nor his attorney can be found.

§568. Supreme Court or a justice thereof may make order, on notice to respondent, dispensing with or limiting security required to stay execution during appeal in certain cases.

§573. Despite stay, court or judge from whose determination appeal is taken may proceed in any matter not embraced by the appeal.

§586. Undertaking an appeal from judgment in favor of owner in certain real property actions; sum to be fixed by court or a judge thereof, upon notice.

Article 38—*Appeals to the Court of Appeals*

§594. Stay of execution on appeal to Court of Appeals without order, where judgment is for a sum of money only; amount of undertaking to be fixed by a judge of the court below.

§595. Same, where judgment is for delivery of a document or personal property; amount of undertaking to be fixed by the court below or a judge thereof.

§596. Same, where judgment is for recovery of a chattel; amount of undertaking to be fixed by the court below or a judge thereof.

§598. Same, where judgment directs sale or delivery of real property; amount of undertaking to be fixed by a judge of the court below.

§598-a. In case not within sections 594–598, stay of execution may be granted by Supreme Court or Appellate Division or Court of Appeals or "a judge of any of said courts."

Article 39—*Appeals to the Appellate Division of the Supreme Court*

§615. Stay of execution on appeal to Appellate Division by order of the Supreme Court or a justice thereof.

Article 42—*Executions Generally*

§636. Bond by person to whom execution directed to be approved by a judge of the court or a county judge. See also Table I.

Article 43—*Executions against Property*

§684(1). Order for execution against earnings or income of judgment debtor; application to "court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor"; "the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant" the order upon satisfactory proof; county judge of any county where Supreme Court judgment docketed, except Kings, Queens and Bronx, may grant the order.

§685(4). Application for modification of execution against earnings or income; to court from which it issued, or any judge or justice who issued it, or county judge or, in county where there is no county judge, to any justice of the city court.

§687-a(3). Levy upon debts and causes of action arising out of contract; court or judge, or county judge of the county to which the execution is issued, may direct person served with copy of execution to submit to examination.

§696. Judgment creditor may institute proceeding before court or judge to determine third person's claim to personal property levied upon. After entry of order, any party may apply to court or judge to stay further proceedings pending appeal.

§720. Order to prevent waste to real property during redemption period, by Supreme Court, any justice thereof within the judicial district or the county judge of the county in which property situated. [Proceedings for punishment upon violation of order prescribed in §§721–723.]

Article 44—*Executions against the Person*

§764. Execution against the person may be issued by the court or a judge or justice thereof, without notice or upon such notice as is directed.

Article 45—*Proceedings Supplementary to Judgment*

Section 786 provides, with respect to this entire article, that "The proceeding shall be deemed pending in the court in which it is instituted and not before any individual judge or justice thereof. All powers granted to the court under this article may be exercised by a judge or justice thereof."

Article 46—*Arrest, Injunction and Attachment; General Provisions*

§817. Order or warrant for arrest, temporary injunction or attachment may be granted by court in which the action is brought or a judge thereof or any county judge. Rules may provide that application for warrant of attachment or order for arrest, other than an order which by express provision of statute may be granted only by the court, shall be made to a judge and not to the court. See also §§833, 834. *But cf.* §§827, 879.

§822. Application to vacate order or warrant for arrest, temporary injunction or attachment, to court or judge. *But cf.* third sentence.

§823. Court or judge may require plaintiff to elect between arrest, injunction and attachment.

Articles 47–50—*Arrest; When Allowed; Granting, Executing and Vacating the Order; Discharging Defendant; Bail or Deposit; Charging and Discharging Bail*

§830. Lunatic, idiot or infant under fourteen may be discharged from arrest in discretion of court or judge.

§841. A privileged person may be discharged from arrest by court or a judge thereof or the county judge of county where arrest was made.

§843. On motion to vacate order of arrest plaintiff may be permitted to amend complaint to sustain order, by court or judge, *semble*. *But cf.* first sentence.

§844. Application to vacate order of arrest, reduce bail or increase security; to court or judge depending upon who issued the order. See also §845.

§850. Undertaking given as bail to be approved by court or judge or county judge.

§852. Justification of bail, before a judge of the court or a county judge. See also §§853–855, 858. *But cf.* last sentence of §855.

§856. Deposit of money in lieu of bail on attachment against the person shall abide disposition of court or judge or county judge. *But cf.* beginning of last sentence.

§866. Judge of court or county judge may order bail exonerated, where bail surrender the defendant. *Cf.* §875.

Articles 51–53—*Injunction; Granting and Service of the Order; Security; Vacating or Modifying the Order*

Temporary injunction orders, like orders for arrest or warrants of attachment, may be granted either by the court in which the action is brought or a judge thereof (§817; *but cf.* §879), and the provisions in these articles dealing with granting the order, security, modification and vacation likewise refer to a court or judge. See §§880, 892, 893, 897, 898, 900. In addition, section 880 provides that "An injunction order granted by a judge may be enforced as the order of the court." Five sections refer only to the court (see §§879, 887, 888, 894, 895; Table I), and three are ambiguous in that they contain references both to a court alone and to a court or judge (§§876-a [injunctions in labor disputes; see also §882-a], 882 [temporary restraining order], 891 [undertaking]).

Articles 55–59—*Attachment; Executing Warrant; Vacating or Modifying the Warrant; Discharge; Two or More Warrants; Proceedings after Vacation of Warrant or Discharge of Attachment, or after Judgment*

Warrants of attachment, like arrest and injunction orders, may be granted either by the court in which the action is brought or a judge thereof (§817) and all but a few of the provisions in these articles authorizing judicial action likewise refer to a court or judge. See §§907, 919, 920 (judge only), 923, 927, 928–932, 934–939, 943, 944, 945–947, 949, 950, 952, 954, 957–959, 962, 964, 965, 971. Two provisions refer both to a court alone and to a court or judge (§§922, 924) and seven refer only to a court. See §§915-a, 917(2), 941, 942, 969(5), 972, 973; Table I.

Article 60—*Receivers*

§976. Receiver must file bond in a penalty fixed by the court, judge or referee making the appointment. Court or, where order appointing receiver was made out of court, the judge who made it, may remove receiver or direct new bond. *Cf.* §974.

§977-b(4). Action in Supreme Court for appointment of receiver to liquidate local assets of foreign corporation; court or any judge thereof may appoint temporary receiver pending determination of action. [Remainder of section refers only to court throughout.]

Article 61—*Disposition of Property in Litigation*

§979-a. Order for sale of goods which neither party will accept during pendency of action; refers both to court alone and to court or judge.

§980. Court or judge may order sale of perishable goods.

§980-a(2). Upon approving an application for settlement of an infant's claim under article 80, court or judge may order disposition of proceeds as under subdivision 1 of this section.

Article 62—*Real Property Actions; General Provisions*

§981. Court or judge, on application without notice, may grant order restraining defendant from committing waste upon property in litigation.

Article 66—*Action to Recover a Chattel*

§1094-a. Depositions to ascertain location of chattel, by order of court in which action brought or judge thereof or any county judge except in Bronx, Kings, Queens and Richmond. Where undertaking submitted, order to provide that adverse party shall not dispose of chattel until further order of court or judge. Amount of undertaking to be approved by court or judge.

§1101. Sheriff's expenses to be taxed by a judge of the court or county judge of county where chattel was replevied, upon notice.

§1102. Court in which action brought or judge thereof may make order, with or without notice, directing sale of perishable property at public auction. Court or judge to allow sheriff's expenses.

§1103. Court or judge may make order, after application and hearing upon notice, impounding property in custody of the sheriff.

Article 75—*Action by People for Usurpation of Office, Franchise or Corporate Right*

§1212. Order of arrest may be granted by court or a judge thereof in action by attorney-general for usurping office.

Article 75-A—*Action by Attorney-General for Unlawful Practice of the Law*

§1221-a. Bar association may apply to Supreme Court or a justice thereof for leave to bring such action, where attorney-general fails to do so.

Article 77—*Habeas Corpus and Certiorari to Inquire into Cause of Detention*

All the provisions in this article authorizing judicial action refer to a court or judge (see §§1232, 1235, 1236, 1239, 1241, 1243(3), 1248, 1249, 1251, 1252, 1255, 1257, 1258 [*semble*], 1259–1263, 1264 [first paragraph], 1267, 1271, 1273, 1276, 1277, 1278, 1282), except that two provisions relating to recognizances refer only to a judge (§§1264 [second paragraph], 1265) and two provisions relating to appeals refer to orders of the *appellate* court (§§1279, 1280).

Article 78—*Proceeding against a Body or Officer*

§1287. Application for relief under this article must be made to a special term of the Supreme Court or, if the petition is directed against a judge, to the Appellate Division, "except that the petitioner may apply to any court or judge expressly authorized by statute to grant relief."

§1289. Eight days' notice of application required by this article may be shortened by an order to show cause granted by the court to which application is made or a judge thereof.

§1305. Upon appeal from final order, proceedings may be stayed by the court or a judge thereof.

Article 79—*Proceeding Relating to Express Trusts*

§1308. Proceeding to be brought on by order to show cause signed by a justice of the Supreme Court.

§1309. Justice granting order to show cause to fix time and place where order returnable, and may prescribe manner and time of service. Court or any justice may issue a supplemental order to show cause and adjourn return date, where all interested persons have not been served. *Cf.* last clause of section.

§1312. Answer and objections to be filed on return day or within period fixed by rule of court, direction of the justice or stipulation of the parties.

Article 80—*Proceeding for the Settlement of an Infant's Claim*

All the provisions in this article authorizing judicial action refer to a court or judge. The application is to be made to a court or judge of a court in which an action could have been brought (§1320); and the court or judge is authorized to direct the notice to be given (§1322), to deny the application without prejudice if the amount of an adequate settlement would exceed the court's jurisdiction (§1323) and to direct a final order of settlement (§1324).

Article 80-A—*Valuing Interests in Real Property*

§1335. "Any court, judge, referee or other judicial or administrative officer by whom any valuation under this article must be made" may transmit a statement of facts to Superintendent of Insurance for purpose of making a computation.

Article 81—*Proceedings for Appointment of Committee of Incompetent; Powers and Duties of Committee*

§1358-a(3). Security bond of committee may be approved by a justice of the court which appointed the committee, *semble*. *Cf.* §1375.

§1374. Where incompetent is an inmate of a state institution, petition for appointment of committee may be presented to Supreme Court or a justice thereof, or county court.

§1379. Annual examination of committee's accounts and inventories to be supervised by specified judges. Where annual account has not been filed or is unsatisfactory, such judge may make an order, enforceable as a Supreme Court order, requiring the committee to supply the deficiency.

§1380. Where committee fails to comply with an order made under §1379, or the judge has reason to believe that cause exists for its removal, he may appoint a special guardian of the incompetent to bring proceedings for removal of the committee.

Article 83—*Summary Proceedings to Recover Possession of Real Property*

Section 1413 prescribes that applications under this article are to be brought before particular judges, justices or courts, depending upon the location of the property. The remaining sections of the article are not consistent in the use of the terms court, judge and justice. Thus, most of them refer only to "the judge or justice" (§§1415, 1419, 1422, 1428-1432, 1435, 1436, 1438, 1440), some refer only to "the court" (§§1410(6), 1425, 1426-a, 1435(7), 1446-a), some only to particular courts (§§1420, 1420-a) and some to the court or a judge or justice thereof (§§1436-a, 1447). Nevertheless, it seems that the entire proceeding is in the hands of the person or body to which application is made, be it court, judge or justice, and that all the powers granted may be exercised accordingly. Further, since most of the provisions refer only to "the judge or justice," it would seem that most of the powers granted may be exercised by a judge or justice even where the petition is made to a court, although the provisions certainly are not clear on this.

Article 84—*Arbitration*

§1450. Petition for order directing arbitration to proceed may be made to Supreme Court or a judge thereof. Court or judge may hear and determine issue as to making of contract or failure to comply or, where jury is demanded, refer the issue to a jury.

§1451. Action or proceeding brought in violation of agreement to arbitrate may be stayed by Supreme Court or court in which it is brought or a judge thereof.

§1452. Supreme Court or a judge thereof shall appoint arbitrators where not designated under the agreement.

§1459. Any application hereunder to a court or judge shall be made and heard in same manner as a motion, except as otherwise expressly provided.

§1463. Upon motion to vacate, modify or correct award, any judge who could grant a stay in an action brought in the same court may stay adverse party's proceedings to enforce the award.

§1468. Upon death or incompetency of a party, a judge of the court may make an order extending the time to move to confirm, vacate, modify or correct an award.

Article 85—*Costs, Allowances and Awarding; Liability For*

§1486. Costs upon a motion and upon other listed proceedings may be awarded in discretion of court or judge.

§1493. Stenographic minutes to be furnished to poor person only on order of the court or justice and issuance of a certificate to stenographer of the sum to which he is entitled as statutory fees.

§1502. Where, upon trial, any fact appears entitling either party to costs or increased costs, judge presiding at trial or referee must make a certificate stating the fact; such certificate is the only competent evidence of the matter before the taxing officer.

Article 86—*Costs; Amount of; Additional Allowances; Disbursements*

§1505. Amount of costs upon a motion or a reference specified in section 1486 to be fixed by court or judge.

Article 87—*Costs; Security for*

Section 1523 allows only the court, in its discretion, to order plaintiff to give security for costs in certain listed actions. In all other cases where security is required, the court or a judge thereof may require plaintiff to pay $250 into court or file an undertaking (§1524); justification of the sureties is made before a judge of the court or a county judge (§§1526–27); and the court or judge may require additional security (§1528).

Article 88—*Costs; Taxation*

§1532. Costs to be taxed by clerk but court may direct that interlocutory costs or costs in a special proceeding be taxed by a judge.

Article 89—*Fees*

§1545. Specifies fees of referees generally, unless different rate fixed by court or a judge thereof.

§1547. Commissions of receiver to be fixed by court or judge that appointed him. *Cf.* §1547-a, Table I.

§1549. Certain fiduciaries may include cost of bonds as necessary expenses, as court or judge allows.

§1558. Fees and allowances of sheriff for specified services to be fixed by a judge, or the court or judge, in subdivisions 2, 7, 18, 19. *But see* first sentence of section.

§1565. Taxation of fees of certain officers by a justice of the Supreme Court or the county judge, upon demand of person liable to pay the fees.

Article 90—*Saving Clauses; Repeal; When to Take Effect*

§1569. Court or judge may apply a remedial provision of the civil practice act in actions commenced before the act took effect.

RULES OF CIVIL PRACTICE

Title 4—*Security*

R. 25. Bond or undertaking generally; must be approved by the court or a judge thereof or the judge before whom the proceeding is taken.

Title 7—*Guardian Ad Litem and Special Guardians*

R. 41. Security of guardian or petitioner under article 80 to be approved by a judge of the court or a county judge (subdivision 1).

Title 8—*Summons and the Service Thereof*

R. 50. Order for service by publication; court or judge may dispense with mailing of papers to defendant where plaintiff cannot ascertain address or where defendant is in a country occupied by military forces of a country with which the United States is at war.

Title 12—*Arrest, Injunction and Attachment*

R. 80. Application to vacate warrant or order, to court or judge who granted it, where attorney has failed to file the petition or affidavit.

R. 82. Order for arrest, unless granted by the court, to be signed by the judge. See also R. 84 (attachment).

Title 14—*Pleadings*

R. 113. Summary judgment; this rule refers alternately to the judge hearing the motion and to the court.

R. 115. Bill of particulars to be served within 10 days after demand, unless court or judge otherwise directs. Upon failure to furnish bill of particulars court or judge may preclude offending party from giving evidence at the trial.

R. 116. Specifies items that may be required in bill of particulars in personal injury action. Court or judge may deny any of the listed particulars or grant different ones.

Title 15—*Depositions to be Used within the State*

R. 120. Court or judge may appoint referee to take deposition of person not a party for use on a motion.

R. 125. If order to take testimony by deposition made by a judge out of court, it must be entered in clerk's office.

R. 126. Settlement of interrogatories on notice before a justice of of the court or a county judge.

R. 129. In an examination within the state before a person other than a judge of the court, refusal to answer a question shall be reported to the court or judge, who shall determine if the witness should answer.

R. 131. Depositions and papers from without the state to be delivered to clerk or judge of the court, who must endorse them and file them in clerk's office.

Title 16—*Depositions to be Used without the State*

R. 136. Application for subpoena to court or judge. See also §311. [*But cf.* last sentence of rule: party may apply to court which issued subpoena to vacate or modify it.]

R. 137. Punishment of disobedient witness. Upon failure to obey the subpoena, *justice of Supreme Court or county judge* shall grant order requiring person to show cause before *Supreme Court* why he should not obey it. On failure to obey resulting *Supreme Court* order, the *court or judge* shall order person to show cause why he should not be punished for contempt, and shall prescribe punishment.

Title 17—*Perpetuation of Testimony in Real Property Actions*

R. 138. Petition presented to a justice of the Supreme Court. *But cf.* §316.

Title 20—*Note of Issue*

R. 151. Preferences; application to court or a judge thereof.

Title 21—*Trial*

R. 155. A stay served less than 10 days before beginning of term is ineffective unless made by the judge appointed to hold such term; this provision does not apply to orders of the Appellate Division or a judge thereof.

R. 157. Motion to have issues of fact framed for trial by jury, not as a matter of right but in discretion of *court; court or judge* to settle issues.

R. 161. Counsel's summing up not to exceed one hour unless by permission of judge

R. 162. Production of books and papers by library associations, public departments and officers; subpoena to be issued by a Supreme Court justice or judge of the court in which action pending.

R. 166. Defective pleading, variance or failure of proof; judge may permit amendment, adjourn trial or make other order.

Title 24—*Judgment*

R. 188. An interlocutory judgment may direct that the final judgment be settled by a judge or referee.

R. 189. Proof on application to court or judge for default judgment.

R. 190. Notice on application to court or judge for default judgment.

R. 192. Proceedings on application to court or judge for default judgment where service made otherwise than personally or by substituted service. [Subdivision 5 refers to an order of the court touching restitution in case defendant is subsequently admitted to defend and succeeds.]

Title 26—*New Trial*

R. 220. Order that motion for new trial be heard in Appellate Division; until hearing of motion, trial judge or court at special term has jurisdiction to set order aside.

Title 27—*Appeals*

R. 230. Settlement of case or bill of exceptions before judge or referee before whom case was tried; court, judge or referee may extend time.

R. 232. Case shall not contain opening and closing statements of counsel, or voluminous documents or exhibits, unless judge or referee otherwise directs. [Rule also contains references to court alone; see Table I.]

Titles 30–31—*Action for Partition; Action for Foreclosure*

R. 249, 260. A judge out of court may not stay a sale under a judgment for partition or foreclosure without notice to plaintiff's attorney.

Title 34—*Committee of Incompetent Person*

R. 286. Designates venue for petition for appointment of committee to special term of Supreme Court or justice at chambers, except as otherwise provided.

Title 35—*Infants; Their Guardianship and Maintenance*

R. 294. Procedure on application to compromise infant's claim, in a pending action or under article 80; refers alternately to "court" and "court or judge." See article 80, *supra.*

Title 37—*Discontinuance and Dismissal*

R. 302. If plaintiff neglects to take proceedings for entry of a default judgment within one year, court or judge may dismiss complaint.

HABEAS CORPUS PROVISIONS IN THE CODE OF CRIMINAL PROCEDURE AND CONSOLIDATED LAWS

HABEAS CORPUS PROVISIONS IN THE CODE OF CRIMINAL PROCEDURE AND CONSOLIDATED LAWS

Code of Criminal Procedure

§10-b. When necessary to bring any prisoner confined in a county jail before Supreme Court, County Court or Court of General Sessions sitting in such county, court may direct prisoner to be brought before it without writ of habeas corpus.

§10-c. Order (not termed habeas corpus) to bring up prisoner to testify as witness in an action or proceeding pending before a court of record or before any officer or body authorized to examine a witness.

§25. During session of Supreme Court in any any county, no person detained in county jail upon criminal charge shall be removed therefrom by writ of habeas corpus, unless such writ shall have been issued by or made returnable before such court.

§298-a. Habeas corpus to bring imprisoned defendant indicted for offense committed during imprisonment into court for arraignment or trial may be issued by court in which indictment pending.

§298-b. Habeas corpus to bring imprisoned defendant indicted for felony into court for arraignment or trial may be issued by court in which indictment pending.

§490-a. Record of trial to be furnished by clerk to officer in charge of criminal sentence to a reformatory, to be used against criminal as evidence in any proceeding taken by him for release by habeas corpus or otherwise.

§838. Prisoner in extradition proceeding may apply for writ of habeas corpus to test legality of his arrest.

§898-a. Person confined by police magistrate or justice of the peace as professional criminal may apply for writ of habeas corpus to court having power to issue; on return there shall be a rehearing of the evidence and commitment may be discharged, modified or confirmed.

Correction Law

§446. Evidence on return of a writ of habeas corpus for release of an inmate of institution for defective delinquents at Napanoch.

Debtor and Creditor Law

§173. Person imprisoned for contumacy shall not be discharged under writ of habeas corpus by reason of any insufficiency in form of the warrant of commitment.

Domestic Relations Law

§70. Husband or wife who are separated but not divorced may apply for writ of habeas corpus to obtain custody of child.

§71. If parent detaining child is attached to a society of Shakers and is secreting child court may issue a search warrant in aid of writ of habeas corpus.

Judiciary Law

§767. If person accused of contempt is in custody of sheriff or other officer court must issue writ of habeas corpus to such officer to bring accused before court to answer for contempt.

§771. Disposition upon return of writ of habeas corpus issued under section 767.

Mental Hygiene Law

§201(4). Habeas corpus for release of person detained in institution as an inebriate.

§204. Habeas corpus for release of person in custody as a mentally ill person, mental defective, epileptic or inebriate; procedure specified.

Penal Law

§1715. Person committed by magistrate for violation of sections 1710, 1712 or 1713 of Penal Law (*e.g.*, illegal prize-fighting, betting or stakeholding on fight) may at any time be discharged on writ of habeas corpus, upon executing bond required by magistrate.

§1788. Re-confining person discharged upon writ of habeas corpus or certiorari for same cause is a misdemeanor.

§1789. Concealing or refusing to produce person entitled to writ of habeas corpus or certiorari is a misdemeanor.

Real Property Law

§575. In proceeding to discover the death of tenant for life, if it appears on petition for production of the life tenant that he is imprisoned or detained within the state for any cause, except a felony, the court may issue writ of habeas corpus to bring him before it.

Social Welfare Law

§472-d. Habeas corpus for release of inebriate female detained in House of Good Shepherd.

SPECIAL PROCEEDINGS

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I. HISTORICAL DEVELOPMENT

It has long been recognized that some kinds of cases should be disposed of by a more summary procedure than is available generally. The civil law met the need by creating a uniform summary procedure generally applicable to a broad class of cases, to be administered by the same courts in which the traditional practice was applicable.[1] Common law jurisdictions have solved the problem piecemeal. Separate statutes have been passed creating a relatively summary mode of procedure as the need was recognized in particular types of cases.

The proceedings brought under such statutes came to be known collectively as "special proceedings," but little or no effort was made to standardize them. A wide variety of special proceedings with varying procedure is thus found today not only in the civil practice act but throughout the consolidated laws.[2]

II. DEFINITION

The Field code recognized a procedural dichotomy between actions and special proceedings. All judicial remedies were divided into these two classifications and each was separately defined.[3] Although criticized by Throop and Rodenbeck as well as by the courts as "not remarkable for . . . perspicuity or distinction"[4] the essentials of these definitions have been retained in the present act.

Section 4 of the civil practice act defines an action as "an ordinary prosecution in a court of justice by a party against another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." The same language is used in section 11-a of the General Construction Law. A special proceeding is defined by section 5 of the civil practice act as "every other prosecution by a party for either of the purposes specified" in section 4. The requirements of an action that it be "in a court of justice" and that it be "against another party" are not repeated in section 5; and, indeed, there are special proceedings that may not involve adverse parties,[5] and many special proceedings may be instituted before a judge at chambers

[1] See McMahon, *Summary Procedure: a Comparative Study*, 31 Tul. L. Rev. 573 (1957); Kaplan, von Mehren and Schaefer, *Phases of German Civil Procedure I*, 71 Harv. L. Rev. 1193, 1265–68 (1957).

[2] Except for "some anomalous remedies which antedated the Code and have survived the changes made by it," it is a general rule that a special proceeding cannot be commenced in absence of statutory authority. Matter of Coss, 144 App. Div. 832, 834, 129 N.Y. Supp. 425, 427 (3d Dep't 1911), *appeal dismissed*, 204 N.Y. 662, 97 N.E. 1103 (1912). *But see* Matter of Hardy, 216 N.Y. 132, 110 N.E. 257 (1915) (non-statutory special proceeding). See text at note 14 *infra*.

[3] N.Y. Code Proc. §§1–3.

[4] People *ex rel.* Bendon v. The County Judge of Rensselaer, 13 How. Pr. 398, 400 (N.Y. Sup. Ct. 1854). See N.Y. Code Civ. Proc. §3333, note, §3334, note (Throop ed. 1880); 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 196 (1915).

[5] See, *e.g.*, N.Y. Civ. Prac. Act art. 82 (proceeding for disposition of real property of infant or incompetent).

as opposed to a court.[6] However, the definition of a special proceeding in section 46-a of the General Construction Law repeats the requirements of adverse parties and a court of justice, and the decisions generally state that the standards for defining actions and special proceedings are identical, except that a special proceeding is not an "ordinary" prosecution. In the words of a recent Court of Appeals decision, both involve: "(1) the presence of parties, (2) the trial and determination of issues, and (3) a final order or judgment of rights, duties or liabilities."[7]

Such a definition raises the initial problem of what classification to give to judicial "proceedings" which do not meet these standards. "[T]he courts recognize that resort is frequently had to them in matters which are neither actions nor special proceedings."[8] If the application is connected with an action or proceeding that is already pending or about to be commenced it is considered a motion.[9] But if it is an independent application and does not fall within the definitions of either an action or a special proceeding, it is unclear what procedure should apply. Provisions of the civil practice act that refer in terms to both actions and special proceedings have been held inapplicable in such cases.[10] One court applied a provision referring to a "proceeding",[11] a term which was deemed to convey a broader meaning than either action or special proceeding.[12]

[6] See, *e.g.*, N.Y. Civ. Prac. Act art. 77 (habeas corpus and certiorari to inquire into cause of detention), art. 80 (proceedings for settlement of an infant's claim), art. 83 (summary proceedings to recover real property). See also *The Distinction between Action by a Court and by a Judge in New York* at pp. 595–98 *supra*.

[7] Matter of Klein, 309 N.Y. 474, 481, 131 N.E.2d 888, 891–92 (1956). See also Matter of Burge, 203 Misc. 677, 118 N.Y.S.2d 23 (Sup. Ct. 1952), *rev'd on other grounds*, 282 App. Div. 219, 122 N.Y.S.2d 232 (1st Dep't 1953), *aff'd*, 306 N.Y. 811, 118 N.E.2d 822 (1954). *Cf.* People *ex rel.* Northchester Corporation v. Miller, 288 N.Y. 163, 42 N.E.2d 469 (1942); Matter of Droege, 197 N.Y. 44, 90 N.E. 340 (1909); Matter of Inter-Ocean Mercantile Corp., 204 App. Div. 284, 197 N.Y. Supp. 706 (1st Dep't), *aff'd*, 236 N.Y. 587, 142 N.E. 295 (1923); People *ex rel.* Watt v. Zucca, 160 App. Div. 578, 145 N.Y. Supp. 754 (1st Dep't 1914).

[8] Grimmer v. Warren, Moore & Co., 123 Misc. 737, 738, 206 N.Y. Supp. 63, 64 (Sup. Ct. 1924) (application for order extending lien); Matter of Murtagh, 117 App. Div. 302, 102 N.Y. Supp. 176 (3d Dep't 1907) (application for order for commitment of insane person, now N.Y. Mental Hygiene Law §74).

[9] *Compare* Matter of Callahan, 262 App. Div. 398, 28 N.Y.S.2d 980, *reargument denied*, 262 App. Div. 978, 30 N.Y.S.2d 695 (3d Dep't 1941), *motion for leave to appeal dismissed*, 287 N.Y. 743, 39 N.E.2d 942, *appeal and reargument denied*, 264 App. Div. 812, 35 N.Y.S.2d 288 (3d Dep't 1942), *with* Matter of Attorney General, 155 N.Y. 441, 50 N.E. 57 (1898). *Cf.* Cohen and Karger, Powers of the New York Court of Appeals 137–141, 181–191 (1952).

[10] See Grimmer v. Warren, Moore & Co., 123 Misc. 737, 206 N.Y. Supp. 63 (Sup. Ct. 1924); Matter of Murtagh, 117 App. Div. 302, 102 N.Y. Supp. 176 (3d Dep't 1906). There can be no appeal from an order in such a case to the Court of Appeals. Cohen and Karger, Powers of the New York Court of Appeals 103 (1952).

[11] Matter of B. Lindner and Bro., Inc., 147 Misc. 51, 262 N.Y. Supp. 821 (Sup. Ct. 1933).

[12] See People v. Clarke, 9 N.Y. 349, 368–69 (1853). *But see* N.Y. R. Civ. P. 9 (making "proceeding" synonymous with "special proceeding" in the rules); *cf.* Queens County Water Company v. O'Brien, 131 App. Div. 91, 115 N.Y. Supp. 495 (2d Dep't 1909); Matter of N.Y. Central R.R., 41 N.Y.S.2d 614 (Sup. Ct.), *rev'd*, 266 App. Div. 904, 44 N.Y.S.2d 104 (4th Dep't 1943).

Even when it is determined that a judicial proceeding meets the terms of the definitions of actions and special proceedings, the present act affords no guide to distinguish between the two. The courts have interpreted the act's definition of an action as an "ordinary" prosecution as meaning one which employs the traditional procedure of an action. Thus, if a summons, pleadings and judgment are used it is an action.[13] Moreover, the action is the basic means of obtaining relief, and a court will not grant relief by special proceeding unless specifically authorized by law to do so.[14]

This approach necessarily leaves the distinction at best a "very shadowy" one. [15] The difficulty, however, is inherent in the dichotomy and unless every special proceeding is specifically designated as such by the governing statute, as some are today,[16] no definition will remove it. For this reason, it has been several times suggested that the distinction be abolished leaving as far as possible only one form of judicial proceeding with one set of procedural rules, just as there is today only one form of action.[17]

III. APPLICABILITY OF THE CIVIL PRACTICE ACT

Once it has been decided that the proper mode of obtaining relief is by special proceeding, it is necessary to determine what procedure should be employed. Often the provisions of the civil practice act or Consolidated Laws which authorize the particular special proceeding will prescribe some of the details of its procedure, but the coverage of such provisions is necessarily limited. For the great bulk of procedural questions that may arise, answers must be sought either in the civil practice act and rules or in case law. Accordingly, it become necessary to determine the extent to which general provisions of the civil practice act are applicable to special proceedings.

Although the Field Code contained no general restriction of applicability, it was not applicable in its entirety to both actions and special proceedings. The Throop Code retained this approach, although "following the general plan of converting the most

[13] See People *ex rel.* Bendon v. The County Judge of Rensselaer, 13 How. Pr. 398 (N.Y. Sup. Ct. 1852); Matter of Callahan, 262 App. Div. 398, 28 N.Y.S.2d 980 (3d Dep't 1941); N.Y. Code Civ. Proc. §3333, note, §3334, note (Throop ed. 1880); 2 Carmody-Wait, Cyclopedia of New York Practice 4–6 (1953). For an excellent survey of case law as to the distinction between actions and special proceedings, see Cohen and Karger, Powers of the New York Court of Appeals 105, 126–141, 181–191 (1952).

[14] See People v. American Loan & Trust Co., 150 N.Y. 117, 44 N.E. 949 (1896); Matter of Bruns, 156 Misc. 873, 282 N.Y. Supp. 617 (Sup. Ct. 1935); Matter of Federman, 149 Misc. 4, 267 N.Y. Supp. 126 (Sup. Ct. 1933); Matter of Empire Trust Co., 123 Misc. 673, 206 N.Y. Supp. 136 (Sup. Ct. 1924); see also note 2 *supra*.

[15] N.Y. Code Civ. Proc. §3333, note (Throop ed. 1880).

[16] See, *e.g.*, N.Y. Civ. Prac. Act §§310, 773, 1308, 1459.

[17] 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 7, 168 (1915). To retain a summary procedure in what would formerly have been special proceedings, a "summons to appear" within eight days was provided for. *Id.* at 60, 271–72. See also N.Y. Code Civ. Proc. §3333, note, §3334, note (Throop ed. 1880).

important special proceedings into actions, where that could conveniently be done; and where that course was impracticable, of applying to them, as might be necessary, provisions which now embrace action only."[18] The proposals of the Rodenbeck commission to abolish all special proceedings except those incorporated in the consolidated laws and to "require them to be brought in the same way by a summons and complaint and to be subject to the same rules of procedure as an action"[19] were not adopted.

Many changes along the lines suggested by Throop and Rodenbeck have been made. In a number of instances, particular sections have been made applicable to special proceeding by specific amendment. Unfortunately, however, there is no single standard or guide by which it is possible to determine applicability. It is necessary to examine the wording of each section in its context. Since this wording is often very ambiguous on the point, it is not possible to come to any definite conclusion as to the applicability of a considerable portion of the act to special proceedings.

The table appended to this study analyzes the wording of each section of the civil practice act with a view toward determining its applicability. It indicates whether a section refers to an action only, a special proceeding only, both actions and special proceedings or neither.

As is shown by the table, the act frequently makes applicability clear by expressly referring ot special proceedings. It is an oversimplification, however, to conclude, as did one court, that "[w]herever the Legislature intended provisions of the Civil Practice Act to be applicable to special proceedings as well as to actions it made express provisions to that effect."[20] While the majority of the sections of the act make no mention of a special proceeding, this is no definite indication of their non-applicability to special proceedings; even where a section refers only to an action, its content or subject matter may lead to the conclusion that it is applicable to special proceedings.

A brief article-by-article analysis of the civil practice act will demonstrate the difficulty of determining applicability under the present scheme. Wherever possible, conclusions have been drawn as to whether the article is applicable to special proceedings. It should be emphasized that authority in this area is scanty, and that many of these conclusions are little more than informed guesses, based on the language, context or subject matter of a provision, as to how a court would hold.

Article 1—*Short title; construction; definitions.* This article distinguishes actions from special proceedings.[21] It forms the basis

[18] N.Y. Code Civ. Proc. §3333, note (Throop ed. 1880).

[19] 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 7, 168–70 (1915).

[20] Matter of Field's Trust, 193 Misc. 781, 782, 84 N.Y.S.2d 656, 657 (Sup. Ct. 1948), *modified*, 276 App. Div. 835, 93 N.Y.S.2d 267 (1st Dep't 1949), *modified*, 302 N.Y. 262, 97 N.E.2d 896 (1951); see Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 N.Y. Supp. 495 (2d Dep't 1909); Matter of Reese v. Chappelle, 206 Misc. 887, 135 N.Y.S.2d 200 (Sup. Ct. 1954).

[21] See N.Y. Civ. Prac. Act §§4, 5, 7(1), 7(3), 7(8).

for the dichotomy that, theoretically, is employed throughout the act.

Article 2—*Limitations of time.* Section 10 provides that the article is applicable to both actions and special proceedings and that the word "action" is to be construed "when it is necessary to do so, as including a special proceeding . . ." Certain provisions which are limited by their own terms to particular classes of actions are of course not applicable to special proceedings.

The judges of the Court of Appeals have disagreed on whether this wording was broad enough to cover section 44, governing the presumption of satisfaction of a judgment after twenty years. The majority held the section not applicable to a final order in a special proceeding, stating as a general rule that provisions relating to judgments apply only to a judgment in an action and not to a final order in a special proceeding, unless the Legislature specifically provides otherwise.[22]

Article 2A—*Actions against public policy.* Only section 61-f bars "any proceeding or action." The other sections are phrased in terms of "actions," "cause of action" and "rights of action." It seems clear, however, that if a special proceeding were the proper mode of enforcing any of these causes of action, public policy would require that it too be barred.

Article 3—*Courts, judges and referees.* This article is, by its nature, necessarily of general application. Most sections specifically apply to special proceedings. The remainder do not refer to either actions or special proceedings but appear applicable to both.

Article 4—*Abatement and continuance.* The second sentence of section 82 provides that a special proceeding does not abate if the right to relief survives or continues. The first sentence makes identical provision for a cause of action. The remainder of this article is concerned with particularizations of this general provision. Most sections specifically apply to special proceedings. Those that refer only to actions appear coextensive in their applicability.

Article 5—*Consolidation and severance.* The second sentence of section 96, added by amendment, contains general provisions governing a special proceeding identical to those in the first sentence which apply to an action. Section 96-a is specifically applicable to special proceedings. Section 97 refers only to an action, but probably applies to special proceedings as well, since it is merely a particularization of the two preceding sections. Section 97-a is confined to a particular type of action.

Article 6—*Extensions of time.* Section 98 generally authorizes extensions of time in an action or special proceeding. Section 99 refers only to an action, but is a general limitation on the power to extend time and, accordingly, appears applicable to special proceedings.[23]

[22] Hornblower & Weeks v. Sherwood, 307 N.Y. 204, 120 N.E.2d 790 (1954); Warren v. Garlipp, 217 App. Div. 55, 216 N.Y. Supp. 466 (4th Dep't 1926). *But cf.* Matter of Elm Street in N.Y. City, 239 N.Y. 220, 146 N.E. 342 (1924).

[23] See Grand Central Theatre, Inc. v. Motion Picture Machine Operators Union, 69 N.Y.S.2d 115 (Sup. Ct. 1941), *aff'd*, 263 App. Div. 989, 34 N.Y.S.2d 400 (1st Dep't 1942).

Article 7—Filing of papers. Section 100 is applicable only to an action and section 101 only to a special proceeding.

Article 8—Mandates. Subdivision 5 of section 102 is applicable only to special proceedings. The remainder of the section refers neither to an action nor a special proceeding, but contains general provisions as to the duties of an officer receiving a mandate and appears to be applicable to both.

Article 9—Mistakes, defects and irregularities. Section 105 permits the disregarding of mistakes in actions and special proceeding. Much of the remainder of this article consists of particularizations of this general principle. Although frequently referring neither to actions nor special proceedings, or only to actions, these sections seem applicable to both. Sections 109 and 109-a are concerned with judgments and, accordingly, are probably applicable only to actions. Certain other sections relate only to particular types of actions.

Article 10—Motions. A motion is defined in section 113 as an application for an "order." Subdivision 8 of section 7 and section 127 use the term "order" to refer to a direction of a court or judge made in an action or special proceeding. Accordingly, the entire article appears applicable to motions in both actions and special proceedings, although several sections refer to neither or only to an action.

Article 11—Notice of pendency. This article relates only to "an action brought to recover a judgment affecting . . . real property"[24] and nowhere refers to a special proceeding. Consequently, it appears applicable only to actions. It is, however, permissible, under rule 74 of the rules of civil practice, to index an order founded on petition and affecting title to real property with notices of pendency.[25]

Article 12—Oaths of referees and other officers. Although referring to neither actions nor special proceedings, this article is a good example of one applicable to both by its general nature.

Article 13—Orders. Section 127 defines an order as a direction of a court or judge made in an action or special proceeding. The remainder of the article appears applicable to both actions and special proceedings, although several sections refer to neither.

Article 14—Payment into and out of court. Although only one section specifically refers to special proceedings as well as actions, this article appears to be of such a general nature as to be applicable to both.

Article 15—Preferences. Only one subdivision refers to special proceedings, but this article also seems applicable to both by virtue of its general nature.

Article 16—Publication. Section 144 governs the time for publication in an action or special proceeding. The remainder of the

[24] N.Y. Civ. Prac. Act §120.
[25] See notes to proposed rule 33.13.

article deals with the same subject matter and appears to be of like applicability.

Article 17—Security. The general provisions of this article are expressly applicable to both actions and special proceedings. Several sections refer to neither, but appear to be coextensive in applicability. Sections 155 and 162 provide special rules regarding security for an "action" by the people, but their policy seems equally applicable to special proceedings.

Article 18—Service of papers. This article is, on the whole, phrased in terms of applicability to an action only. However, rule 21 of the rules of civil practice provides that "papers in a proceeding shall be served in a like manner as in an action," thus making this article applicable to special proceedings.

Article 19—Stay. Section 167 provides for stays generally in an action or proceeding. Sections 168 and 169 concern the same subject matter and, although they refer only to actions, appear to be of like applicability. Section 167-a is confined to a divorce or separation action.

Article 20—Stipulation or affidavit in lieu of certification. Section 170, referring to "a judgment or a final order," is applicable to both actions and special proceedings. Section 171, although referring to neither, is apparently coextensive in application.

Article 21—Tender and offer. This article is phrased only in terms of an action. The sections on tender were added in 1949 upon recommendation of the Judicial Council.[26] There is no indication whether they were meant to apply to special proceedings.

Article 22—Want of prosecution. This article is phrased only in terms of an action, including references to summons, complaint and judgment. There is no indication of applicability to special proceedings.

Article 23—Venue. The statutes governing many special proceedings contain their own venue provisions.[27] Where no such provision is made, however, it appears that this article would govern. Although it is on the whole phrased in terms of an action only,[28] the purposes of the article apply equally well to a special proceeding, and those sections which refer to a special proceeding are not separated from the general scheme. Thus, section 182-a, concerning venue in "actions and proceedings against a city," is expressly referred to in section 182 as an exception to the general provision for venue in an "action."[29]

Article 24—Parties. Although the wording is by no means consistent, it appears that the greater part of this article is applicable

[26] See 15 N.Y. Jud. Council Rep. 53, 189 (1949).
[27] See *e.g.*, N.Y. Civ. Prac. Act §1287.
[28] See Thompson v. Murray, 271 App. Div. 306, 64 N.Y.S.2d 840 (3d Dep't 1946); Doyle v. Supreme Court, 286 App. Div. 469, 145 N.Y.S.2d 19 (3d Dep't 1955).
[29] See also N.Y. Civ. Prac. Act §§189, 190 (removal of action or special proceeding by Supreme Court).

to special proceedings. Section 191 provides that wherever provisions applicable in terms to an action are made applicable to a special proceeding, the prosecuting party shall be deemed a plaintiff and the adverse party a defendant. Several other sections are expressly applicable to special proceedings. Sections 193,[30] 193-b[31] and 210[32] have been held applicable to special proceedings although they refer only to actions. Other sections referring only to actions, such as 194 (necessary joinder), 195 (suing for benefit of others), 201–206 (infant and guardian ad litem) and 215 (unknown defendant), also appear to be of such general application as to include special proceedings.

A few sections are apparently applicable only to actions. Thus section 193-a (third-party practice), which is phrased entirely in terms of an action and the procedure of which hinges on the various steps in an action, has been held not applicable in a special proceeding.[33] Section 211-a (actions between tortfeasors) is in terms concerned solely with money judgments in an action. Section 212, controlling permissive joinder of parties, if generally applied, might allow the assertion of rights to relief by special proceeding which should be asserted only by action; moreover, it refers to a "judgment." Section 214 is confined to particular types of actions and section 217 is phrased in terms of "summons" and "judgment."

Article 25—*Summons.* The word "summons" designates the process used in an action only. Consequently, except where the more generic term "process" is employed, this article is not by its terms applicable to special proceedings. However, rule 21 of the rules of civil practice provides that the "provisions of the statutes and rules relating to the mode of personal service of a summons shall apply to the service of any process or paper whereby a proceeding is begun," thus making the provisions for personal service in this article applicable to special proceedings. Statutes governing particular special proceedings frequently contain similar provisions.[34]

Article 26—*Appearance.* This article is phrased entirely in terms of an action and much of the procedure hinges on steps in an action. However, one court interpreted the term "civil action" in section 236 as used "in the broad generic sense as contrasted to a criminal action," not "in the specific sense of action as distinguished from special proceeding."[35]

[30] Stephen Estate, Inc. v. Kaplan, 198 Misc. 948, 100 N.Y.S.2d 455 (N.Y.C. Munic. Ct. 1950) (summary proceeding).

[31] Matter of Petroleum Research Fund, 3 A.D.2d 1, 157 N.Y.S.2d 693 (1st Dep't 1956) (article 79 proceeding); People *ex rel.* N.Y. Central R.R. v. Block, 178 App. Div. 251, 164 N.Y. Supp. 962 (3d Dep't), *appeal dismissed*, 221 N.Y. 652, 117 N.E. 1081 (1917) (tax certiorari); Application of Bernklau, 106 N.Y.S.2d 548 (Sup. Ct. 1951) (summary proceeding); Matter of Iroquois Beverage Corp., 159 N.Y.S.2d 256 (Sup. Ct. 1955) (arbitration).

[32] Catrakis v. Jaris, 280 App. Div. 414, 114 N.Y.S.2d 225 (1st Dep't 1952) (supplementary proceeding).

[33] Edaviel Corp. v. Boykin, 205 Misc. 622, 129 N.Y.S.2d 149 (Sup. Ct. App. T. 1954).

[34] See, *e.g.*, N.Y. Civ. Prac. Act §1289.

[35] Hillside Housing Corp. v. Eisenberger, 173 Misc. 75, 76, 16 N.Y.S.2d 142, 144 (N.Y.C. Munic. Ct. 1939) (summary proceeding).

Article 27—*Pleadings.* This article is applicable only to actions.[36] Some of its provisions may have an indirect application to special proceedings, since a petition and return frequently have the function of a complaint and answer.[37] Statutes often prescribe the use of other pleadings in particular special proceedings in a manner similar to their use in an action.[38]

Article 28—*Interpleader.* Subdivision 1(d) of section 285 provides that for the purposes of sections 285 and 286, "An action shall be deemed to include a special proceeding." This specific provision was included in the new interpleader statute because the former provisions, referring only to an action, had been held inapplicable to a special proceeding.[39]

Article 29—*Testimony by deposition.* Section 308 provides that "Testimony may be taken by deposition, under this article, in a special proceeding, or for use in such a proceeding about to be brought, as though the proceeding were an action." This has the effect of applying the entire article to special proceedings.[40] Some conflict has developed among the courts as to the applicability of this article to "summary special proceedings," such as summary proceedings and habeas corpus.[41] Settlement of this conflict apparently awaits a Court of Appeals decision.

[36] Matter of Vanderbilt's Trust, 279 App. Div. 587, 107 N.Y.S.2d 39 (2d Dep't 1951), *motion for leave to appeal denied*, 279 App. Div. 666, 108 N.Y.S.2d 981, *motion for leave to appeal denied*, 303 N.Y. 1016 (1952); Matter of Field's Trust, 193 Misc. 781, 84 N.Y.S.2d 656 (Sup. Ct. 1948), *modified*, 276 App. Div. 835, 93 N.Y.S.2d 267 (1st Dep't 1949), *modified*, 302 N.Y. 262, 97 N.E.2d 896 (1951); Metropolitan Life Insurance Co. v. Shapiro, 163 Misc. 76, 296 N.Y. Supp. 563 (Sup. Ct. App. T.), *aff'd*, 252 App. Div. 855, 300 N.Y. Supp. 1004 (1st Dep't 1937). *But see* Clark v. Newton, 140 Misc. 510, 250 N.Y. Supp. 745 (Sup. Ct. App. T. 1931) (summary proceeding is an action within §247 requiring a bill of particulars); Smith v. Lichterman, 134 Misc. 150, 234 N.Y. Supp. 676 (Sup. Ct. 1929) (petition in a summary proceeding is equivalent to a pleading in an action).

[37] See People *ex rel.* Buffalo Burial Park Ass'n v. Stilwell, 190 N.Y. 284, 290, 83 N.E. 56, 58 (1907) ("[t]he petition [in a tax certiorari proceeding] is the complaint and the return is the answer, and the general rules of pleading are applicable to such a case"); Matter of Siemer v. Village Board, 286 App. Div. 135, 142 N.Y.S.2d 694 (4th Dep't 1955); People *ex rel.* Citizens' Lighting Co. v. Feitner, 81 App. Div. 118, 81 N.Y. Supp. 73 (1st Dep't 1903); Matter of Levine v. Lending, 176 Misc. 462, 26 N.Y.S.2d 775 (Sup. Ct. 1941). See text at notes 66–69 *infra*.

[38] See, *e.g.*, N.Y. Civ. Prac. Act §§1291, 1292, 1425.

[39] Erkins v. Tucker, 62 Misc. 495, 115 N.Y. Supp. 256 (Sup. Ct. App. T. 1909); see 20 N.Y. Jud. Council Rep. 274 (1954).

[40] See Matter of Huie (Friedman's Lake View Hotel), 208 Misc. 82, 143 N.Y.S.2d 320 (Sup. Ct. 1955).

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

Article 30—*Depositions taken within the state for use without the state. Article* 31—*Perpetuation of testimony in real property actions.* Both articles create a special proceeding[42] and expressly may be used in connection with an action or another special proceeding.

Article 32—*Admissions, discovery and inspection.* This article is phrased in terms of an action only. As in the case of article 29 before the addition of section 308, it appears to be inapplicable to special proceedings,[43] although there seems to be no reason to treat the obtaining of information differently under article 32 and articles 29 to 31.

Article 33—*Evidence.* Most of this article fails to refer either to an action or a special proceeding, but is framed in language applicable to both. Some sections expressly apply to both and a few refer only to an action. It appears, however, that the same rules of evidence govern an actual trial in a special proceeding as in an action.[44]

Article 34—*Trial.* Although most of this article refers only to an action, it appears, as is true of the rules of evidence, that the same rules govern the conduct of an actual trial in a special proceeding as in an action.[45]

Article 35—*Judgment.* This article, with a very few specific exceptions, is applicable only to actions. As has been noted above, in regard to article 2, provisions relating to a "judgment" are not applicable to a final order in a special proceeding unless the legislature specifically so provides.[46] In some instances, specific provisions have been made elsewhere which have the effect of applying parts of this article to a final order. Rule 74 of the rules of civil practice, for example, provides that certain orders directing the payment of money or affecting the title to real property may be enrolled and docketed as a judgment.[47] And the provisions governing some special proceedings specifically declare either that the final order shall be enforceable like a judgment[48] or that a judgment

[42] Matter of Callahan, 262 App. Div. 398, 28 N.Y.S.2d 980, *reargument denied*, 262 App. Div. 978, 30 N.Y.S.2d 696 (3d Dep't 1941), *motion for leave to appeal dismissed*, 287 N.Y. 743, 39 N.E.2d 942, *appeal and reargument denied*, 264 App. Div. 812, 35 N.Y.S.2d 288 (3d Dep't 1942).

[43] Matter of Reese v. Chappelle, 206 Misc. 887, 135 N.Y.S.2d 200 (Sup. Ct. 1954).

[44] *But see*, as to tax certiorari hearings, People *ex rel.* Congress Hall v. Ouderkirk, 120 App. Div. 650, 105 N.Y. Supp. 134 (3d Dep't 1907); People *ex rel.* Batt v. Rushford, 81 App. Div. 298, 80 N.Y. Supp. 891 (3d Dep't 1903).

[45] See, *e.g.*, People v. Guley, 281 App. Div. 927, 119 N.Y.S.2d 825 (3d Dep't 1953); North End Wine & Liquor Store, Inc. v. Miller, 3 M.2d 1022, 146 N.Y.S.2d 403 (N.Y.C. Munic. Ct. 1955).

[46] See text at note 22 *supra*.

[47] See City Bank Farmers Trust Co. v. Medo Photo Supply Corp., 198 Misc. 672, 102 N.Y.S.2d 722 (Sup. Ct. 1950); *The Enforceability of Judgments and Orders by Contempt and Execution* at pp. 713, 719–720 *infra*.

[48] *E.g.*, N.Y. Civ. Prac. Act §§1303 (article 78 proceeding), 1431 (summary proceeding to recover realty; execution for costs "as if the final order was a judgment"); see *The Enforceability of Judgments and Orders by Contempt and Execution* at p. 724 & n. 54 *infra*.

shall be entered on the final order.[49] In the latter case, all the judgment provisions of the civil practice act would presumably apply.

Article 36—*Motions for new trial.* Although it refers only to an action, this article appears to be coextensive in application with article 34 relating to trials.

Articles 37 *to* 41—*Appeals.* A separate article, 41, governs appeals in special proceedings. However, section 634 of that article provides that, except as otherwise provided, proceedings upon an appeal to the Appellate Division from an order in a special proceeding are governed by the provisions of law relating to an appeal in an action. Moreover, the major general provisions of article 38, governing appeals to the Court of Appeals, are expressly applicable to both actions and special proceedings.

Articles 42 *to* 44—*Executions.* These articles are, on the whole, applicable only to executions upon a judgment in an action,[50] except insofar as execution upon a final order is authorized by express provision of law. Section 1520 allows an execution against personal property upon an order directing the payment of a sum of money, and provides that the "execution shall be in the same form, as nearly as may be, as an execution upon a judgment," but there is some question as to whether this section applies to a final order in a special proceeding.[51]

Article 45—*Proceedings supplementary to judgment.* This article creates a special proceeding.[52] Although captioned in terms of a "judgment," it may be used in connection with a special proceeding as well as an action since section 773 expressly provides that "A decree or order awarding the payment of money shall be deemed a judgment for the purposes of this article."

Articles 46 *to* 61—*Provisional remedies.* These articles are phrased entirely in terms of an action and appear applicable only to an action.[53] The only exceptions are articles 60 and 61, which expressly refer to special proceedings. In addition, certain provisional remedies may be expressly authorized by statute in particular special proceedings.[54]

Articles 62 *to* 84A—*Particular actions and special proceedings.* These articles relate to particular actions and special proceedings.

[49] *E.g.*, N.Y. Civ. Prac. Act §1425 (judgment for rent due in summary proceeding); *id.* § 1461 (entry of judgment on arbitrator's award).

[50] See Granville v. Gratzer, 281 App. Div. 514, 120 N.Y.S.2d 797 (1st Dep't 1953).

[51] See *Enforceability of Judgments and Orders by Contempt and Execution*, at pp. 722, 724 *infra*.

[52] N.Y. Civ. Prac. Act §773; see Reeves v. Crownshield, 274 N.Y. 74, 8 N.E.2d 283 (1937).

[53] See Matter of Ohrbach v. Kirkeby, 3 A.D.2d 269, 161 N.Y.S.2d 371 (1st Dep't 1957); Granville v. Gratzer, 281 App. Div. 514, 120 N.Y.S.2d 797 (1st Dep't 1953); Matter of Holle, 160 App. Div. 369, 145 N.Y. Supp. 388 (3d Dep't 1914).

[54] See, *e.g.*, Burgard v. Gunschel, 196 Misc. 868, 94 N.Y.S.2d 603 (Sup. Ct. 1949); N.Y. Civ. Prac. Act §775(3).

Their application is confined to the action or special proceeding provided for. Article 84 sets forth general provisions relating to actions or proceedings brought by the people. The title to the article and section 1207 refer to both actions and special proceedings and the entire article seems applicable to both.

Articles 85 *to* 88—*Costs.* These articles are phrased primarily in terms of an action. However, section 1492 provides that costs in a special proceeding "may be awarded to any party, in the discretion of the court, at the rates allowed for similar services in an action." It has the effect of applying much of articles 85 and 86 to special proceedings. Similarly, section 1531 has the effect of applying the provisions of article 87, governing security for costs, to a special proceeding.

Articles 89—*Fees.* Except for section 1546, this article either refers to both special proceedings and actions or to neither. It appears of such a general nature as to be applicable as a whole to both.

Article 90—*Saving clause; repeal; when to take effect.* This article is applicable to both actions and special proceedings.

IV. PROCEDURE SPECIALLY PRESCRIBED BY STATUTE

The procedure prescribed for particular special proceedings by the civil practice act and special statutes varies considerably in detail and terminology. Much depends on the type of proceeding involved. A good deal of the procedure is very similar to that on a motion, differing primarily in the necessity of obtaining jurisdiction[55] or, if permitted to be commenced *ex parte,* not even differing in that respect. Some proceedings more closely resemble an action, requiring formal pleadings for the purpose of framing issues for trial.[56] Others have characteristics related to their particular nature which are analogous to neither motions nor actions.[57]

Certain generalizations may be made, however, as to procedure which is characteristic of the majority of special proceedings. Thus, a special proceeding is generally adversary[58] and requires the obtaining of original jurisdiction over the adverse party which commences the proceeding.[59] This is done by service of a notice or an order to show cause, generally in the same manner as a summons

[55] See, *e.g.,* N.Y. Civ. Prac. Act §1469-e (proceeding for discovery of names of bondholders): "Proceedings subsequent to the serving of petition and accompanying papers shall be the same as upon a motion in an action." See also Cohen & Karger, Powers of the New York Court of Appeals 181–191 (1952) (motions in an action or special proceeding affecting non-party considered separate special proceeding.)

[56] See, as to article 78, Matter of Crean v. Bruckman, 178 Misc. 231, 33 N.Y.S.2d 570 (Sup. Ct. 1942); Matter of Levine v. Lending, 176 Misc. 462, 26 N.Y.S.2d 775 (Sup. Ct. 1941); see also note 37 *supra.*

[57] See, *e.g.,* N.Y. Civ. Prac. Act art. 45 (supplementary proceedings).

[58] See note 7 *supra.*

[59] See Spila v. Zoning Board, 2 M.2d 1048, 150 N.Y.S.2d 395 (Sup. Ct. 1956); Brown v. New York City, 198 Misc. 147, 97 N.Y.S.2d 560 (Sup. Ct. 1950).

is personally served.[60] The notice to be served is variously designated a "notice of application,"[61] "notice of presentation of petition,"[62] or merely "notice."[63] Whatever it is called, it serves to inform the adverse party of the relief being applied for and the date of the hearing.

The notice is generally required to be served with a "petition," which is the commonly used designation of a written request for relief in a special proceeding,[64] although such other terms as "application," or "motion" are sometimes used. Accordingly, the party requesting relief is often styled the "petitioner."[65]

The petition should contain a statement of facts entitling petitioner to the relief requested.[66] With the exception that it must contain a request for relief, a petition often very closely resembles the affidavit generally used in support of a motion. In fact, section 119 provides that a petition and affidavit may be used interchangeably to institute a special proceeding.[67] In proceedings where it is necessary to frame issues for trial, however, the petition assumes the function of a pleading rather than the primarily evidentiary function of an affidavit.[68] Thus, section 1288 requires the petition in a special proceeding against a body or officer to contain "a plain and concise statement of the material facts," using language almost identical to that used by section 241 as to pleadings. Where the petition takes the form of a complaint, affidavits may accompany the petition to bring evidentiary matter before the court. Some statutes prescribe in detail what the petition is to contain.[69]

[60] N.Y.R. Civ. P. 21; see proposed civil practice law §3.4, N.Y. Temp. Comm'n on the Courts Rep II 42, Leg. Doc. 13 (1958); Matter of Callahan, 262 App. Div. 398, 28 N.Y.S.2d 980, *reargument denied,* 262 App. Div. 978, 30 N.Y.S.2d 695 (3d Dep't 1941), *motion for leave to appeal dismissed,* 287 N.Y. 743, 39 N.E.2d 942, *appeal and reargument denied,* 264 App. Div. 812, 35 N.Y.S.2d 288 (3d Dep't 1942); Matter of Burge, 203 Misc. 677, 118 N.Y.S.2d 23 (Sup. Ct. 1952), *rev'd on other grounds,* 282 App. Div. 219, 122 N.Y.S.2d 232 (1st Dep't 1953), *aff'd,* 306 N.Y. 811, 118 N.E.2d 822 (1954). The court is often authorized to provide for a different manner of service in an order to show cause. See, *e.g.,* N.Y. Civ. Prac. Act §1289.

[61] N.Y. Civ. Prac. Act §§317, 1289; N.Y.R. Civ. P. 296.

[62] N.Y. Civ. Prac. Act §1360.

[63] *Id.* §§1384-g, 1409-d.

[64] See Shaft v. Phoenix Mutual Life Ins. Co., 67 N.Y. 544 (1876).

[65] *But see* N.Y. Civ. Prac. Act §191, providing that where a provision in terms applicable to an action is made applicable to a special proceeding, "the prosecuting party . . . is deemed a plaintiff and the adverse party a defendant."

[66] See Shaft v. Phoenix Mutual Life Ins. Co., 67 N.Y. 544 (1876).

[67] See Gould v. Gould, 108 Misc. 42, 178 N.Y. Supp. 37 (Sup. Ct. 1919), *aff'd,* 203 App. Div. 807, 197 N.Y. Supp. 515 (1st Dep't 1922); N.Y. Civ. Prac. Act §7(3). *But see* Matter of Levine v. Lending, 176 Misc. 462, 26 N.Y.S.2d 775 (Sup. Ct. 1941); *cf.* Gawtry v. Doane, 51 N.Y. 84 (1872).

[68] See note 37 *supra.* For a good example of a decision holding the petition and answer in a special proceeding to the strict pleading standards of a complaint, see Meyer v. New York Hospital, 7 A.D.2d 60, 180 N.Y.S.2d 918 (1st Dep't 1958).

[69] See, *e.g.,* N.Y. Civ. Prac. Act §§1234, 1384-d, 1409-c; Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 N.Y. Supp. 495 (2d Dep't 1909).

Procedure following the service of the petition is generally only sketchily provided for in the provisions of law governing particular special proceedings. This situation often leaves a procedural vacuum, for the civil practice act sections on pleading and related phases of an action are not applicable.[70] Since summary disposition is usually desired, the procedure generally takes on the form of a motion. The notice will specify a return day on which the cause will come before the court. Service of the notice must precede the return day by a minimum period—usually the eight-day period required for motions. Before, or sometimes on, the return day, the adverse party, sometimes called a respondent,[71] must serve any answer, return or opposition he desires to make. The raising of collateral issues by counterclaim or cross-claim is usually not permitted.[72] On the return day, if triable issues are presented, the case is set down for trial.

The proceeding terminates in a final order instead of a judgment.[73] While a final order is the corollary of, and has the same function as a judgment in an action,[74] there are certain procedural distinctions respecting their consequences and enforcement.[75] Appeal from a final order in a special proceeding is governed in part by separate provisions of the civil practice act.[76]

V. POSSIBLE SOLUTIONS OF THE PROBLEM

The major problem concerning special proceedings in New York is the difficulty of determining in each case what procedure is to be followed. This involves deciding whether an action or a special proceeding is involved, how far the civil practice act and rules are applicable, how far a special statute is applicable, and what sources to look to where procedure is not prescribed by statutes or rules.

A good deal of the difficulty is engendered by the schizophrenic approach of the civil practice act, which requires in each doubtful case the type of analysis made in section III of this study. Most states seem to have avoided this difficulty by generally applying their civil practice provisions to all civil proceedings, except as otherwise provided by law. Such a result is often achieved simply

[70] See note 36 *supra*.

[71] See note 65 *supra*.

[72] See Matter of Field's Trust, 193 Misc. 781, 84 N.Y.S.2d 656 (Sup. Ct. 1948), *modified*, 276 App. Div. 835, 93 N.Y.S.2d 267 (1st Dep't 1949), *modified*, 302 N.Y. 262, 97 N.E.2d 896 (1951); Metropolitan Life Ins. Co. v. Shapiro, 163 Misc. 76, 296 N.Y. Supp. 563 (Sup. Ct. App. T.), *aff'd*, 252 App. Div. 855, 300 N.Y. Supp. 1004 (1st Dep't 1937).

[73] See note 22 *supra;* Matter of Lexington Ave., 30 App. Div. 602, 52 N.Y. Supp. 203 (1st Dep't), *aff'd*, 157 N.Y. 678, 51 N.E. 1092 (1898); Matter of Foote, 219 Misc. 2, 221 N.Y. Supp. 302 (Sup. Ct. 1927). *But see* Matter of Byrne v. Padden, 248 N.Y. 243, 162 N.E. 20 (1928). (Summary proceedings under N.Y. Civ. Prac. Act art. 83 are special proceedings although a judgment for rent is authorized.)

[74] See Matter of Eiss v. Summers, 205 App. Div. 691, 199 N.Y. Supp. 544 (4th Dep't), *appeal dismissed*, 236 N.Y. 638, 142 N.E. 316 (1923) (res judicata); 7 Carmody-Wait, Cyclopedia of N.Y. Practice 203 (1953).

[75] See *Enforceability of Judgments and Orders by Contempt and Execution* at pp. 717–725 *infra;* introduction to proposed title 60; notes to proposed rule 27.9.

[76] N.Y. Civ. Prac. Act art. 41. *But cf. id.* art. 38.

by avoiding limiting statements in the general practice provisions and sometimes by direct statements that the act is applicable to special proceedings except as otherwise provided in particular provisions.[77] The Federal rules are made generally applicable to "all suits of a civil nature . . . with the exceptions stated in Rule 81," which provides for nonapplicability in such cases as bankruptcy, copyright, admiralty and where a statute provides for different procedure in certain special proceedings.[78]

As pointed out above, some sort of general applicability has long been suggested by commissions studying the New York civil practice act.[79] Its implementation would initially require merely a general provision such as present section 1—expanded somewhat to make clear that both actions and special proceedings are intended to be covered—and the removal of phraseology from particular sections which could be interpreted as confining their application to actions alone, unless such is actually intended. At the same time the definition of special proceedings could be expanded to include *all* applications to a court for relief which are not now classified as either actions or motions. This would bring under the coverage of the act proceedings to which the act is not applicable at all because they do not fit into any of the standard definitions.[80]

Even though the general practice is made applicable to all judicial proceedings, every state and the federal practice has found it necessary in some manner to provide for a summary mode of procedure to obtain certain relief. The traditional answer to this problem has been to leave such provisions to separate statutes, meeting the need as to each type of relief, which supersede the general practice provisions where there is conflict. As has been observed, this results in a confusing array of procedural provisions scattered among substantive legislation, which are often unnecessarily inconsistent. Thus the Rodenbeck commission concluded that: "It is as confusing to have several kinds of proceedings each adapted to a particular form of relief as it was under common law practice to have so many forms of actions from which the practitioner was bound at his peril to make a selection for his particular case."[81]

Another approach to this problem has been to set up in the general practice provisions a uniform summary mode of procedure available in a specifically enumerated group of cases, or in cases where a separate statute or rule makes such procedure applicable. Whether such cases are designated as special proceedings or actions is not important. The New Jersey rules, for example, provide for an action "on order to show cause in lieu of summons" applicable

[77] See, *e.g.*, Cal. Code Civ. Proc. §1109; Idaho Code Ann. §7-502 (1947); Ill. Ann. Stat., c. 110 §1 (Smith-Hurd 1956); N.M. Stat. Ann. §21-1-1(1) (1953); N.D. Rev. Code §32-3205 (1943).

[78] Fed. R. Civ. P. 1, 81; see also, *e.g.*, 13 Del. Code Ann., Super. Ct. (Civ.) R. 1, 81 (1953); Utah R. Civ. P. 1, 81; N.J.R. Civ. P. 4:1-1 (and notes thereto in 2 Waltzinger, New Jersey Practice 28 (1954)); Ala. R. Civ. P. 1, 81 (1957) (proposed).

[79] See text at note 19 *supra*.

[80] See text at note 10 *supra*.

[81] 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 168 (1915).

"in all actions where the court is permitted by statute to proceed in a summary manner . . . and in all actions where the court is expressly permitted by rule to proceed under Rule 4:85 . . ."[82] Under this rule, the court upon a verified complaint issues an order to defendants to show cause why judgment should not be rendered against them, a copy of which is to be served upon defendants at least ten days before the return day. Not later than two days before the return day, defendants may serve an answer, answering affidavit or motion, but no counterclaim or cross-claim without leave of court. The court may render judgment on the pleadings, try issues of fact or order the action to proceed as in a plenary action wherein a summons has been issued.[83]

Such a single summary mode of procedure has the virtue of both providing a more speedy remedy in certain types of cases and avoiding the diffusion of practice provisions among a wide variety of separate statutes. In addition, it will provide rules to govern the many phases of procedure in special proceedings now covered neither by the civil practice act nor the statutes creating them. It has the added merit of flexibility, *i.e.*, the scope of its applicability can easily be expanded or contracted. Although such lack of conformity should be avoided, it would be possible to provide for variations from standard procedure where it is needed in particular cases. Such an approach would also permit the gradual implementation of the new practice without first amending the many special proceeding provisions in the Consolidated Laws which would continue to apply until they were repealed.

Both of the changes suggested—general applicabiilty of the civil practice act and a uniform summary mode of procedure—would eventually call for a complete review of all special proceedings, including those of the Consolidated Laws. Such a review should determine whether all provisions of the civil practice act should be applicable, and if not should "otherwise provide." At the same time it should so far as possible conform statutes which contain provisions for different procedure with the uniform summary procedure for special proceedings, and perhaps convert some special proceedings into actions.[84]

[82] N.J.R. Civ. P. 4:85.

[83] Compare the motion for judgment procedure in Va. Rules of the Sup. Ct. of Appeals 3.1–3.20 (may be used in all actions). See Denman, *An Analysis of Summary Proceedings Under Special Statutes in Virginia*, 1 Wm. & Mary L. Rev. 58 (1957); Fowler, *Virginia Notice of Motion Procedure*, 24 Va. L. Rev. 711 (1938). See also Ala. Code tit. 7, §§591–623; Millar, *Three American Ventures in Summary Civil Procedure*, 38 Yale L.J. 193 (1928); McMahon, *Summary Procedure: A Comparative Study*, 31 Tul. L. Rev. 573 (1957); Kaplan, von Mehren and Schaefer, *Phases of German Civil Procedure I*, 71 Harv. L. Rev. 1193, 1265–68 (1958).

[84] See Ill. Ann. Stat. c. 110, §1, note (Smith-Hurd 1956), as to passage of such conforming statutes. The practice provisions of some states contain an enumeration of special proceedings. See, *e.g.*, 13 Del. Code Ann., Super. Ct. (Civ.) R. 81 (1953); Denman, *An Analysis of Summary Proceedings Under Special Statutes in Virginia*, 1 Wm. & Mary L. Rev. 58 (1957).

References in the Civil Practice Act to "Actions" and "Special Proceedings."*

Civil Practice Act Section	Refers expressly to "Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 1 — SHORT TITLE; CONSTRUCTION; DEFINITIONS				
1				
2				x
3				x
4	x			x
5		x		
6	x			
7				
8	x		x	
ARTICLE 2 — LIMITATIONS OF TIME				
10				
11			x	
12–61			x	
			(see §10)	
ARTICLE 2-A — ACTIONS AGAINST PUBLIC POLICY				
61-a	x			
61-b	x			
61-d	x			
61-e	x			
61-f				
61-g			x	
61-h				x
61-i				x
				x
ARTICLE 3 — COURTS, JUDGES, AND REFEREES				
62				
63				x
64				x
65				x
66			x	
67				x
68			x	
69			x	
70			x	
71				x
72				x
73			x	
73-a			x	
74			x	
75			x	
76		x		
				x

* This table is based solely on an analysis of language used in the civil practice act. Specific references to an action or special proceeding are indicated by an "x" in the appropriate column. Inferences are indicated in the appropriate column by the language from which the inference is drawn.

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to "Action" Only	Refers expressly to "Special Proceeding" Only	Refers expressly to Both "Actions" and "Special Proceedings"	Refers expressly to Neither Classification
ARTICLE 7 — FILING PAPERS				
77				x
78			x	
79			x	
79-a			x	
80				x
81				x
100	x			
101		x		
ARTICLE 4 — ABATEMENT AND CONTINUANCE				
82			x	
83	x			
84			x	
85	x			
86	x			
87	x			
88	x			
89	x			
90			x	
90-a			x	
91				x
92			x	
93		x		
94		x		
95			x	
ARTICLE 5 — CONSOLIDATION AND SEVERANCE				
96			x	
96-a			x	
97	x			
97-a	x			
ARTICLE 6 — EXTENSION OF TIME				
98			x	
99	x			
ARTICLE 8 — MANDATES				
102(1)-(4)				x
102(5)		x		
ARTICLE 9 — MISTAKES, DEFECTS, AND IRREGULARITIES				
105			x	
106				x
107				x
108				x
109				x
109-a				x
110			x	
110-a			x	
110-b	x			
111			x	
112				x
112-a	x			

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to "Action" Only	Refers expressly to "Special Proceeding" Only	Refers expressly to Both "Actions" and "Special Proceedings"	Refers expressly to Neither Classification
112-b	x			
112-c	x			
112-d	x			
112-e	x			
112-f			x	
112-g			x	
112-h			x	
112-i	x			
ARTICLE 10 — MOTIONS				
113				x
114			x	
115			x	
116				x
117	x			
118				x
119			x "proceeding"	
ARTICLE 11 — NOTICE OF PENDENCY				
120	x			
121	x			
121-a				x
122				x
123				x
124	x			
125				x
ARTICLE 12 — OATH OF REFEREES AND OTHER OFFICERS				
126				x
ARTICLE 13 — ORDERS				
127			x	
128				x
129				x
130			x	
131				x
132			x	
ARTICLE 14 — PAYMENT INTO AND OUT OF COURT				
133				x
134	x			
134-a				x
135	x			
136			x	
137				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 15 — PREFERENCES				
138(1)	x			
138(2)			x	
138(3)-(9)	x			
139	x			
140			x "civil causes"	
ARTICLE 16 — PUBLICATION				
144			x	
145				x
146				x
147				x
ARTICLE 17 — SECURITY				
148			x	
149			x	
150			x	
151			x	
152				x
153				x
154			x	
155	x			
156			x	
157				x
158				x
159			x	
160			x	
161			x	
162	x			
ARTICLE 18 — SERVICE OF PAPERS				
163	x			
163-a				x
164				x
165			x	
166			x	
ARTICLE 19 — STAY				
167			x	
167-a	x			
168	x			
169	x			
ARTICLE 20 — STIPULATION OR AFFIDAVIT IN LIEU OF CERTIFICATION				
170			"judgment or final order"	
170-a			"judgment or final order"	

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action ' Only	"Special Proceeding" Only	Both ' Actions' and "Special Proceedings"	Neither Classification
ARTICLE 21 — TENDER AND OFFER				
174-a	x			
174-b	x			
174-c	x			
175	x			
176				x
177	x "judgment"			
178				x
179				x
ARTICLE 22 — WANT OF PROSECUTION				
180	x			
181	x			
ARTICLE 23 — VENUE				
182	x			
182-a			x	
182-b	x			
183	x			
184	x			
184-a	x			
185	x			
186	x			
187	x			
188	x			
189			x	
190			x	
190-a	x			
ARTICLE 24 — PARTIES				
191			x	
192			x	
193	x			
193-a	x			
193-b	x			
193-c			x	
194	x			
195				x
196			x	
197			x	
198			x	
198-a			x	
199			x	
200				x
201	x			
202	x			

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
	ARTICLE 24 — *Concluded*			
203				x
204				x
205				x
206				x
207			x	
208				x
210	x			
211-a	x			
212	x			
213			x	
214	x			
215	x			
217	x			
	ARTICLE 25 — SUMMONS			
218	x			
218-a	x			
219	"summons"			
220	x			
221	"summons"			
222	x			
222-a			x	
223			x	
224	"summons"			
225	"summons"			
226	"summons"			
227		x	"summons"	
227-a			x	
228	x			
229	x			
229-b	x			
230	x			
231	"summons"			
232	x			
232-a	"cause of action"			
232-b	x			
233	"summons"			
234	x			
235	"summons"			
	ARTICLE 26 — APPEARANCE			
236	x			
237	"summons"			
237-a	x			
238	"summons"			
239	"summons"			
240	x			

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
	ARTICLE 27 — PLEADINGS			
241				x
242	x			
243	x			
244				x
245	x			
245-a	x			
245-b	x			
246				x
247				x
248				x
249				x
250				x
251	x			
252	x			
253	x			
254	"complaint"			
255	x			
255-a	x			
256	x			
257	"complaint" "summons"			
258	"complaint" "cause of action"			
259	x			
260				x
261				x
262	x			
263				x
264	x			
266	"cause of action"			
267	x			
268	x			
269	x			
271	x			
272				x
273				
274				x
275				x
276				x
277				x
278	x			
279				x
280	"complaint" "cause of action"			
281	"cause of action"			
283	"judgment" "cause of action"			

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to "Action" Only	Refers expressly to "Special Proceeding" Only	Refers expressly to Both "Actions" and "Special Proceedings"	Refers expressly to Neither Classification
ARTICLE 28 — INTERPLEADER				
285			x	
286	x		(see §285) "proceeding"	
287				
ARTICLE 29 — TESTIMONY BY DEPOSITION				
288	x		(see §308)	
289	x		"	
290	x		"	
291			"	x
292			"	x
292-a	x		"	
293	x		"	
294			"	x
295	x		"	
296			"	x
296-a	x		"	
297			"	x
298	x		"	
299	x		"	
300	x		"	
301	x		"	
302	x		"	
303	x		"	
304			"	x
305			"	x
306	x		"	
306-a			x	
307				x
308		x		
309			(see §308)	x
309-a			"	x
ARTICLE 30 — DEPOSITIONS TAKEN WITHIN THE STATE FOR USE WITHOUT THE STATE				
310			x	
311			x	
312			x	
ARTICLE 31 — PERPETUATION OF TESTIMONY IN REAL PROPERTY ACTIONS				
313			x	
314				x
315			x	
316				x
317				x
318				x
319				x
320				x
321			x	

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to "Action" Only	Refers expressly to "Special Proceeding" Only	Refers expressly to Both "Actions" and "Special Proceedings"	Refers expressly to Neither Classification
ARTICLE 32 — ADMISSIONS, DISCOVERY, AND INSPECTION				
322	x			
324	x			
325				x
326				x
327	x			
328	x			
ARTICLE 33 — EVIDENCE				
329				x
330				x
331			x	
332				x
333	x			
334			"proceeding or trial"	
335	x			
336			x	
337	x			
337-a				x
338	x			
338-a	x			
339	x			
340				x
341			x	
341-a				x
342				x
343				x
343-a				x
344				x
344-a				x
345	x			
345-a			x	
346			x	
347			x	
348			x	
348-a			x	
349			x	
350			x	
351				x
352			"upon any examination, trial or other proceeding"	
353				x
353-a			x	
354			x	
355			x	
356			"any cause"	
357				x
358				x
359			x	

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
	ARTICLE 33 — *Concluded*			
360				x
361				x
362				x
363				x
364				x
365				x
366				x
367				x
368				x
369				x
370				x
371	x			
372				x
373				x
374	x			
374-a				x
374-b			"any judicial or administrative proceeding"	
375				x
375-a				x
375-b				x
376	x			
377				x
378				x
379			x	
379-a			x	
380				x
380-a				x
381				x
382				x
383				x
383-b				x
384				x
385			x	
386				x
387				x
388				x
389				x
389-a				x
390			"in all courts and proceedings"	
391				x
392				x
393				x
394				x
395				x
396				x
397				x
398				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
398-a				x
398-b				x
398-c				x
398-d				x
399				x
400				x
401				x
402				x
403				x
403-a				x
404				x
405	x			
406				x
407				x
408				x
409				x
410				x
411	x			
412				x
413				x
414				x
415			x	
416		x		
417	x			
418				x
419			x	
420				x
	ARTICLE 34 — TRIAL			
422				x
423				x
424	x			
425	x			
426	x			
426-a	x			
427	x			
428	x			
429	x			
430	x			
431				x
432				x
433	x			
433-a			x	
434	x			
435				x
436			x	
437			x	
438	x			
439				x
440				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
	ARTICLE 34 — *Concluded*			
441			x	
442				x
443	x			
444				x
445				x
446				x
447				x
448				x
449-a	x			
450				x
451	x			
452	x			
453	x			
454	x			
455				x
457-a	x			
458				x
459	x			
460	x			
462	x			
463			x	
463-a			"every civil case"	
464	x			
465	x			
466	x			
467	x			
468				x
469	x			
470	x			
471				x
	ARTICLE 35 — JUDGMENT			
472	x			
473			x	
474	x			
475	x			
476	x			
477	"judgment"			
478	x			
479	"judgment"			
480	x			
481	"judgment"			
482	x			
483	x			
484	x			
485	x			
486	x			
487	"judgment"			
488	x			

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
489	x			
490	"judgment"			
491	"			
492	"			
493	x			
494	"judgment"			
494-a			x	
495	"judgment"			
496	"			
497	"			
498	"			
499	"			
500	x			
501	"judgment"			
502	"			
503	"			
504	x			
505	"judgment"			
506	"adjudged"			
507				x
508	x			
509	"judgment"			
510	"			
511	"			
512	x			
513–523	"judgment"			
524	x			
525–538-a	"judgment"			
539				x
540	x			
541	"judgment"			
542	x			
543	x			
544	x			
545	"judgment"			
546			x	
547			x	
548			x	
	ARTICLE 36 — MOTIONS FOR NEW TRIALS			
549	x			
550	x			
551	x			
552	"judgment"			
553	x			
554	"judgment"			
555				x
556	x			

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 37 — APPEALS: GENERAL PROVISIONS				
557				x
558				x
559				x
560				x
561			x	
562			"judgment or order"	
562-a			x	
563				x
564				x
565				x
566			"judgment or order"	
567			"	
568			"	
568-a	x			
569				x
570			"judgment or order"	
571			"	
572			"	
573			x	
574		x		
575	x			
576				x
578			"judgment or order"	
578-a			x	
579				x
580			x	
581	x			
582				x
583				x
584			"judgment or order"	
584-a	"judgment"			
585	"judgment"			
586	x			
587	"judgment"			
ARTICLE 38 — APPEALS TO THE COURT OF APPEALS				
588			x	
589			x	
590			"judgment or order"	
591			x	
592			x	
593				x
594	"judgment"			
595			"judgment or order"	
596	"judgment"			
597			"judgment or order"	
598–602			"judgment or order"	
603				x
604			"judgment or order"	
605			x	

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
606				x
607				x
607-a			"judgment or order"	
607-b				x
607-d			"judgment or order"	
ARTICLE 39 — APPEALS TO THE APPELLATE DIVISION OF THE SUPREME COURT				
608			(see §634)	x
609	x		"	
610	x		"	
611			"	
612			"	x
613			"	x
614			"	x
615			"	x
616			"	x
617			"	x
618	x		"	
620			"	
621			"	x
ARTICLE 40 — APPEALS FROM COURTS OF INFERIOR JURISDICTION				
622	x			
623				x
624			"judgment or order"	
625				x
626	x			
ARTICLE 41 — APPEALS FROM A DETERMINATION IN A SPECIAL PROCEEDING				
631–634-a		x		
ARTICLE 42 — EXECUTIONS GENERALLY				
635				x
636			x	
636-a	"judgment"			
637				x
638				x
639				x
640	"judgment"			
640-a				x
641–644	"judgment"			
645	x			
646–658	"judgment"			
659				x
660			"judgment or order"	
661	"judgment"			
662				x
663				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
	ARTICLE 43 — EXECUTIONS AGAINST PROPERTY			
664				x
665				x
665-a				x
666				x
667			"any legal proceeding"	
668			"	
669				x
670				x
671	"judgment"			
672				x
673				x
674				x
675				x
676	"judgment"			
677	x			
678				x
679				x
680				x
681				x
682	x			
683				x
684	"judgment"			
685				x
686				x
687				x
687-a				x
688				x
689	"judgment"			
695				x
696				x
697				x
698				x
699	x			
700				x
701				x
702	x			
703				x
704	x			
705	x			
706				x
707				x
708				x
709				x
710	"judgment"			
711	"			
712–756				x
757	x			
758	"judgment"			
759				x
760	x			
761	x			
762				x
763				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
	ARTICLE 44 — EXECUTIONS AGAINST THE PERSON			
764	"judgment"			
765	x			
766	x			
767	x			
768	x			
769				x
770				x
771	"judgment"			
772	"			
	ARTICLE 45 — PROCEEDINGS SUPPLEMENTARY TO JUDGMENT			
773			(see §773)	x
774			"	x
775			"	x
776			"	x
777			"	x
778	x		"	
779–794			"	x
795	x		"	
796–804			"	x
804-a				x
805			x	
806			(see §773)	x
807			"	x
808			"	x
809	x		"	
810			"	x
811			"	x
	ARTICLE 46 — ARREST, INJUNCTION AND ATTACHMENT; GENERAL PROVISIONS			
814				x
815	x			
816				x
817	x			
818	x			
819				x
820	x			
821				x
822				x
823	x			
824	x			
825				x
	ARTICLE 47 — ARREST; WHEN ALLOWED			
826	x			
827	x			
828	x			
829	x			
830				x
831				x
832				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 48 — ARREST; GRANTING, EXECUTING AND VACATING THE ORDER				
833	x			
834	x			
835				x
836				x
837	x			
838				x
839				x
840				x
841	x			
842	x			
843	x			
844				x
845				x
846	x			
ARTICLE 49 — ARREST; DISCHARGING DEFENDANT				
847				x
848	x			
849	x			
850				x
851				x
852				x
853				x
854				x
855				x
856				x
857				x
858				x
859	x			
860				x
861				x
862				x
863				x
864				x
ARTICLE 50 — ARREST; CHARGING AND DISCHARGING BAIL				
865				x
866				x
867				x
868				x
869	x			
870	x			
871	x			
872				x
873	x			
874	x			
875				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 51 — INJUNCTION; GRANTING AND SERVICE OF THE ORDER				
876				x
876-a				x
877	x			
878	x			
879				x
880				x
881				x
882				x
882-a				x
883				x
ARTICLE 52 — INJUNCTION; SECURITY				
884	x			
885	x			
886	"judgment"			
887				x
888	x			
889	x			
890	x			
891				x
892	x			
893				x
894				x
895				x
896				x
ARTICLE 53 — INJUNCTION; VACATING OR MODIFYING THE ORDER				
897				x
898	x			
899	x			
900				x
901				x
ARTICLE 54 — ATTACHMENT; WHEN ALLOWED; OBTAINING WARRANT				
902	x			
903	x			
904	x			
905	"summons"			
906	x			
907	"judgment"			
908	x			
909				x
910	x			
911				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 55 — ATTACHMENT; EXECUTING WARRANT				
912	x			
913	x			
914–922				x
923	x			
924	x			
925–939				x
940	x			
941	x			
942–947				x
ARTICLE 56 — ATTACHMENT; VACATING OR MODIFYING THE WARRANT				
948	x			
949				x
950				x
951	x			
ARTICLE 57 — ATTACHMENT; DISCHARGE				
952	x			
953				x
954	x			
955				x
956				x
957				x
958				x
959				x
ARTICLE 58 — ATTACHMENT; TWO OR MORE WARRANTS				
960–967				x
ARTICLE 59 — ATTACHMENT; PROCEEDINGS AFTER VACATING OF WARRANT OR DISCHARGE OF ATTACHMENT OR AFTER JUDGMENT				
968	x			
969	x			
970				x
971				x
972				x
973				x
ARTICLE 60 — RECEIVERS				
974	"judgment"			
975	x			
976			x	
977	x			
977-a	x			
977-b				x
977-c				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 61 — DISPOSITION OF PROPERTY IN LITIGATION				
978			x	
979				x
979-a	x			
980			x	
980-a	x			
ARTICLE 85 — COSTS, ALLOWANCES AND AWARDING; LIABILITY FOR				
1470	x			
1471	x		(see §1492)	
1472	x		"	
1473	x		"	
1474	x		"	
1475	x			
1476	x			
1477	"judgment"			
1478	"summons"			
1479	x			
1480	x			
1481	x			
1482	x			
1483	x			
1484	x			
1485				x
1486	x			
1487	"judgment"			
1488				x
1489				x
1490	x			
1491	x			
1492		x		
1493			x	
1494			x	
1495	x			
1496			x	
1497	x			
1498	x			
1499	x			
1500	x			
1501	x			
1502	x			
ARTICLE 86 — COSTS; AMOUNT OF; ADDITIONAL ALLOWANCES; DISBURSEMENTS				
1504	x		(see §1492)	
1504-a	x		"	
1505	x		"	
1506				x
1507	x		"	
1508	x		"	
1509	x		"	
1510	x		"	
1511	x		"	

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
ARTICLE 86 — *Concluded*				
1512	x		"	
1512-a	x		"	
1513	x		"	
1514			"	x
1514-a			x	
1515			(see §1492)	x
1516			"	x
1517			x	
1518	x		(see §1492)	
1519	x		"	
1520	x		"	
1521			"	x
ARTICLE 87 — COSTS; SECURITY FOR				
1522	x		(see §1531)	
1523	x		"	
1524	x		"	
1525	x		"	
1526	x		"	
1527			"	x
1528			"	x
1529			"	x
1530			"	x
1531		x		
ARTICLE 88 — COSTS; TAXATION				
1532			x	
1533				x
1534				x
1535				x
1536				x
1537			x	
1538				x
ARTICLE 89 — FEES				
1539			x	
1540				x
1540-a				x
1541			x	
1544			x	
1545			x	
1546	x			
1547				x
1547-a				x
1548				x
1548-a				x
1548-b				x
1549				x
1550				x
1551				x
1552				x

References in the Civil Practice Act to "Actions" and "Special Proceedings."

Civil Practice Act Section	Refers expressly to			
	"Action" Only	"Special Proceeding" Only	Both "Actions" and "Special Proceedings"	Neither Classification
1553				
1554			x	
1554-a			x	
1554-b				x
1554-c			x	
1554-d				x
1554-e				x
1554-f				x
1554-g				x
1554-h				x
1555				x
1556				x
1557				x
1557-a			x	
1557-b			x	
1557-c				x
1557-d			x	
1557-e			x	
1557-f			x	
1557-g				x
1557-h				x
1557-i				x
1557-j				x
1557-k				x
1557-l				x
1557-m				x
1557-n				x
1557-o				x
1557-q				x
1558				x
1558-a			x	
1559				x
1560				x
1561			x	
1562				x
1563				x
1564				x
1565				x
1566			x	
1567				x
			x	
ARTICLE 90 — SAVING CLAUSES; REPEAL; WHEN TO TAKE EFFECT				
1568			x	
1569			x	
1571				
1572-a				x
1573				x
1574				x
1575				x
1576				x

ILLUSTRATIVE CALENDAR PRACTICE PROVISIONS

CALIFORNIA RULES FOR SUPERIOR COURTS

A. Rules in effect prior to 1957

Rule 5. Supervising the setting of civil cases for trial

Civil cases shall be set for trial under the supervision of the Presiding Judge or, if there is no Presiding Judge, under the supervision of the judges.

Rule 6. Memorandum to set civil cases for trial

(a) [Necessity and service of memorandum] No civil case shall be set for trial until it is at issue and unless a party thereto has served and filed a memorandum as provided herein; provided, however, if a case is set on stipulation, the memorandum need not be served but shall be filed with the stipulation.

(b) [Contents of memorandum] The memorandum shall state:

(1) The title and number of the case;

(2) The nature of the case;

(3) That the case is at issue;

(4) Whether or not a jury trial is demanded;

(5) The time estimated for the trial;

(6) The names, addresses and telephone numbers of the attorneys for the parties or of parties appearing in person.

Rule 7. Civil active list

(a) [Preparation] At least once in each calendar month, on a day to be designated by the Presiding Judge or the judges, the clerk shall prepare a list of all civil cases at issue but not yet set for trial wherein a memorandum to set has theretofore been filed. Such list shall be known as the Civil Active List and shall be available for public examination.

(b) [Contents] The cases enumerated on the Civil Active List shall be designated by their number and by the surname of the first-named party on each side and shall be arranged in the order in which the memoranda to set were filed.

Rule 8. Assignment of dates for civil trials

(a) [When assigned] At least once in each calendar month, on a day to be designated by the Presiding Judge or the judges, as many cases shall be assigned dates for trial during the next succeeding calendar month, or during such other period as may be expedient, as can reasonably be tried during such interval. The cases set shall be taken from the Civil Active List as nearly as possible in the order in which they appear thereon.

(b) [Notice to parties] The clerk shall give notice in the form and manner prescribed by the Presiding Judge or the judges of the time and place fixed for the assignment of trial dates by the court to all parties in cases which may then be set for trial, or the clerk shall give notice of the trial date assigned by the court.

(c) [Civil Trial List] The list of cases set for trial and their assigned trial dates shall be known as the Civil Trial List. The Civil Trial List shall be available for public examination.

Rule 9. Special setting of civil cases for trial

(a) [Cases entitled to priority] Cases entitled to priority under the law may, at any time after the service and filing of a memorandum to set, be assigned trial dates and shall be given an early hearing.

(b) [Short causes] At any time after the service and filing of a memorandum to set, cases which can be tried within one hour may be assigned dates for trial in any department. If any case so set shall not be completely tried within one hour, counting only the time in which the court is actually engaged in trial, the judge hearing the case may make an order vacating the setting at the end of the hour, in which event no further proceedings shall be had for the trial thereof except upon a new setting for trial.

(c) [Setting at date beyond normal period] For good cause shown, any cases may be assigned a date for trial beyond the periods designated in these rules.

Rule 10. Master calendars—civil

(a) [Necessity and supervision] In all counties wherein the court is composed of three or more judges, all civil cases assigned trial dates shall be placed on a master calendar composed of all cases set for trial on that day. The master calendar shall be under the supervision of the Presiding Judge or a judge designated by the judges for that purpose.

(b) [Calling of master calendar] The master calendar shall be called prior to 10:00 a. m. at a time fixed by the judge supervising the calendar, and the cases thereon ready for trial shall be transferred to any department of the court that is available. Cases may be transferred at any time before the regular time fixed for adjournment.

(c) [Trialing cases] Cases ready but not transferred on the date set for trial because of lack of an available trial department shall, except for good cause, be continued on the master calendar and take precedence in transfer over other cases of the same class on succeeding master calendars.

(d) [Departments outside of county seat] Where three or more departments have been established in a city other than the county seat, the Presiding Judge or the judges shall designate one of such departments as the master calendar department.

(e) [Failure to appear] If none of the parties appears ready for trial when the case is called for transfer, the case may be continued or the order of setting vacated and the case placed at the foot of, or dropped from the Civil Active List.

Rule 11. Motions and grounds for continuances of civil cases set for trial

Motions for continuances before trial in civil cases shall be made to the judge supervising the master calendar or, if there be no master calendar, to the judge in whose department the case is pending. Except for good cause, such motion shall be made on written notice to all other parties. The notice shall be given and motion made promptly upon the necessity for the continuance being ascertained. No continuance before or during trial in civil cases shall be granted except upon an affirmative showing of good cause therefor. This rule shall not prevent cases from being dropped from the calendar by stipulation or order.

Rule 12. Motions to advance or reset

Motions to advance, reset or specially set cases for trial shall be made on notice to all other parties, and shall be presented to the judge supervising the master calendar or, in counties where there is no master calendar, to the judge in whose department the case is pending.

Rule 13. Duty to notify court of settlements

Whenever a case set for trial has been settled, the attorneys or parties appearing in person shall immediately notify the court thereof. Failure to do so may be deemed an unlawful interference with the proceedings of the court.

Rule 14. Assigned cases to be tried or dismissed—notification to presiding judge

In counties employing the master calendar, each case transferred to a trial department shall thereupon be tried, ordered off the calendar, or dismissed; provided, however, for good cause arising after the commencement of the trial, the judge of the trial department may continue the case for further hearing before himself or he may reassign the case to the judge supervising the master calendar for further disposition. When a judge has finished or continued the trial of a case or any special matter assigned to him, he shall immediately notify the judge supervising the master calendar of that fact. The judge to whose department a case is assigned for trial shall accept such assignment unless he is disqualified therein or for other good cause, stated to the judge supervising the master calendar, deems that in the interest of justice such case should not be tried before him.

Rule 32. Distribution of business—in general

(a) [Where applicable] In all counties wherein the court is composed of two judges, the court shall provide by local rule for the distribution of business between the judges and for the order of business. In all other counties the business of the court shall be distributed by the Presiding Judge according to these rules.

(1) [Assignment on filing] All cases, except those under the Juvenile Court Law and Children's Court of Conciliation Law, shall on filing be assigned automatically to the department of the Presiding Judge; provided, however, that criminal cases, probate, naturalization proceedings, and proceedings for the commitment of the insane and other persons to institutions shall on filing be assigned automatically to such departments as may be designated under these rules for the hearing thereof.

(2) [Disposition in department of Presiding Judge] Cases assigned to the department of the Presiding Judge shall remain therein for transfer or disposition, subject to the provisions of these rules relating to law and motion and other interlocutory matters. The Presiding Judge shall hear all *ex parte* applications, emergency matters, supplemental proceedings and all other matters which he assigns to himself; provided, however, when the condition of his calendar so warrants, the Presiding Judge may assign to any available department matters designated by these rules to be heard by him.

(3) [Reassignment of cases] Cases assigned to any department may be reassigned by the Presiding Judge to any other department as convenience or necessity requires.

(4) [Contested issues in probate proceeding] Whenever in any probate proceeding a contested issue arises which cannot be heard conveniently in the probate department, it shall be transferred, as to such contested issue, to the department of the judge supervising the master calendar and shall be by him assigned to a trial department for the hearing and determination of such issue only.

(5) [Absence or disability of judges] If the Presiding Judge is absent, dead or unable to act, another judge shall be designated to act in his stead. If by law or these rules a matter is required to be presented to or heard by a particular judge and said judge is absent, dead or unable to act, the Presiding Judge shall designate another judge to act in his stead.

(b) [Departments outside of county seat] No provision of this rule shall preclude the distribution of business in accordance with local rules in departments of the court established in cities other than the county seat.

B. Rules as amended by Judicial Council effective January 1, 1957

Rule 5. [Repealed.]

Rule 6. Memorandum to Set Civil Cases

(a) [Service and filing of memorandum; contents] No civil case shall be set for a pre-trial conference or for trial until it is at issue and unless a party thereto has served and filed therein a memorandum to set, stating:

(1) The title and number of the case;

(2) The nature of the case;

(3) That the case is at issue as to all parties served with process or appearing therein;

(4) The time estimated for the pre-trial conference;

(5) Whether or not a jury trial is demanded;

(6) The time estimated for the trial;

(7) The names, addresses and telephone numbers of the attorneys for the parties or of parties appearing in person.

(b) [Memorandum by party not in agreement] Any party not in agreement with the information or estimates given in a memorandum to set shall within five days after the service thereof serve and file a memorandum on his behalf.

Rule 7. [No change.]

Rule 8. Cases in Which a Pre-Trial Conference Shall be Held

A pre-trial conference shall be held in every civil case in which a memorandum to set is filed, except cases set for trial under Rules 9 and 9.5.

Rule 8.1. Setting for Pre-Trial Conference

(a) [Assignment of times and places; calendar; motions] At least once a month as many cases as feasible on the Civil Active List requiring a pre-trial conference shall be assigned times and places for a pre-trial conference during such period as will enable the setting of these cases for trial after this conference within the period provided in Rule 8.12(a). This setting for pre-trial conference shall: (i) be by or under the supervision of the presiding judge, if any; (ii) be in the sequence as nearly as possible in which these cases appear on the Civil Active List; (iii) give priority to those cases entitled thereto under the law; and (iv) insofar as feasible assign the same date for pre-trial conferences to those cases in which the same attorney appears. The presiding judge or, if none, the judge or judges, shall provide for a pre-trial conference calendar or for one or more departments for the hearing of pre-trial conferences. Motions to continue a pre-trial conference shall be made to the pre-trial conference judge or, if not available, before the presiding judge or, if none, before any judge sitting in that court; and motions to advance, reset, or specially set for pre-trial conference shall be made in like manner as such motions are made in respect to the trial of a case.

(b) [Entry on Civil Active List; notice to parties] The clerk shall place on the Civil Active List the time and place of the pre-trial conference assigned to cases on that list. The clerk shall give not less than 14 days notice by mail of the time and place of the pre-trial conference in each case to all parties appearing therein, and no further notice thereof need be given by any party to the case.

Rules 8.2–8.12. [These cover the details of the pre-trial conference.]

Rule 9. Short Causes

As soon as feasible after the filing of a memorandum under Rule 6, every case in which the time estimated for trial is two hours or less shall be assigned a time and place for trial by the clerk under the supervision of the presiding judge, if any. If any such case is not completely tried within two hours, counting only the time in which the court is actually engaged in its trial, the judge may vacate the setting, and a new memorandum under Rule 6 shall be served and filed in which the time estimated for trial is more than two hours, and thereafter the case shall be set for a pre-trial conference under Rule 8.1 in the sequence in which this new memorandum is filed in the case.

Rule 9.5. De Novo Trials

As soon as feasible after the filing of a memorandum under Rule 6, every civil appeal from a justice or small claims court requiring a de novo trial shall be assigned a time and place for trial by the clerk under the supervision of the presiding judge, if any.

Rules 10–14. [No change.]

Rule 32. Distribution of Business—In General

(a) [Where applicable]

* * *

(4) [Contested issues in probate proceeding] Whenever in any probate proceeding a contested issue arises which cannot be heard conveniently in the probate department, it shall be transferred, as to such contested issue, to the department of the judge supervising the master calendar and shall be by him assigned for a pre-trial conference or for trial of such issue only.

* * *

MICHIGAN COURT RULES

Rule 35. Calendars and Pretrial Procedure

Section 1. Previous to each term, the clerk of the circuit court shall prepare a calendar of causes for the term. The same shall be made up in the following order: 1. Criminal cases. 2. Jury civil cases. 3. Nonjury civil cases. 4. Chancery cases. 5. Causes in which no progress has been made for more than 1 year. The latter shall appear under no other heading.

Section 2. Criminal cases shall have precedence. Civil jury cases shall have precedence over other civil cases. Nonjury and chancery cases shall have precedence in the order of the respective dates of joining issue, or, in appeal causes, the respective dates of filing the notice of appeal.

Section 3. Provided, that in counties of this State having a population of 100,000 or more, the foregoing shall not apply, but it shall be the duty of the judges of such circuit courts, by court rules, to classify cases and to make regulations governing the calendar and the calling and setting of cases for trial, and the dismissal of cases in which no progress has been made for more than 1 year. Criminal cases shall always have precedence.

Section 4. In any action or proceeding the court may in its discretion direct the attorneys for the parties to appear before the court for a conference to consider the simplification of the issues, the necessity or desirability of amendments, the possibility of obtaining admissions of fact and admissions as to documents, the limitation of the number of expert witnesses, the advisability of references permitted by Rule 46, §5, and such other matters as may aid in the disposition of the action or proceeding. The court shall file, and cause to be served upon the attorneys who appeared at the conference, a statement or summary of the results of the conference, which statements shall control the subsequent course of the action or proceedings unless modified at or before the trial to prevent manifest injustice. Any holding of the court to which proper objection is made may be reviewed on final appeal.

Section 5. The court may, by rule, establish a pretrial calendar or calendars on which actions or proceedings may be placed for consideration.

* * *

Rule 36. Motions for Continuance

Section 1. No motion for the continuance of a cause made after the first day in term shall be heard, unless a sufficient excuse is shown for the delay and on a second application by a party for the continuance of a cause, if based on inability to procure the attendance or testimony of a witness, the party so applying shall state, in addition to the usual requisites, the facts which he expects to prove by such witness, and shall also state with particularity the diligence he has used to procure his attendance. In case it is admitted by the opposite party in a civil cause that the witness named would, if placed on the stand, testify as stated in such affidavit, the motion for a continuance shall be denied, unless the court, for the furtherance of justice, shall deem a continuance necessary.

Section 2. When a continuance is granted upon payment of costs, such costs may be taxed summarily by the court, and on being taxed, shall be paid on demand of the party, his agent or attorney, and if not so paid, on affidavit of the fact, such continuance may be vacated.

NEW JERSEY SUPERIOR COURT RULES

Rule 4:41-4. Trial Calendar

(a) The county clerk of the county where the action is to be tried shall place the action, when the first answer is filed, upon the trial calendar as hereinafter provided of the Law or Chancery

Division according to the caption appearing on the complaint, unless the court otherwise orders. The actions shall be listed on the calendar in chronological order in accordance with the time of the filing of the complaint. Only the county clerks designated by special rule of the Supreme Court shall prepare the trial calendar of the Chancery Division in their respective vicinages. Matrimonial causes shall not be listed for trial until notice of approval for trial under Rule 4:98-1(c) and (d) has been received. Foreclosure actions shall only be listed for trial when the answer disputes the validity or priority of the plaintiff's mortgage or lien and creates an issue with respect thereto. No civil action which has been pending more than 6 months without reaching issue, shall thereafter be placed upon any trial calendar in the Superior Court or the County Courts, except upon order of the court in which such action is pending.

Rule 4:41-5. Disposition of Cases; Calls

The county clerk shall also keep separate lists of cases undisposed of in the Law and Chancery Divisions. He shall maintain for the use of the judges assigned to the disposition of such cases in his county copies of the list in their respective divisions. Such judges assigned to the Chancery Division shall thereupon be responsible for the expeditious movement and disposition of the cases pending in their respective vicinages and the Assignment Judge shall be responsible for the Law Division list.

Pretrial conferences shall be held on Fridays or such other days as the court shall order. Thereupon the cases shall be assigned for trial within, so far as practicable, 2 weeks after the pretrial conference. Call lists shall be made by the court and rules relative to the calendar may be promulgated by the Assignment Judge of the county as he deems expedient.

Rule 4:41-6. Failure to Appear; Application for Adjournment; Expenses

Where without just excuse or because of a failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, the return of a motion or the day of trial, or an application is made for an adjournment, the court may order the party or parties in default or, if an adjournment is granted, those applying for the adjournment to pay an aggrieved party the reasonable expenses to which the latter and his attorney have been put in attending the court, including a reasonable attorney's fee for the attendance, and also or in lieu thereof, it may order them to pay the clerk a sum not exceeding $50.

SOUTH CAROLINA PROPOSED RULES OF CIVIL PROCEDURE (prepared by the Judicial Council of South Carolina, January, 1958)

Rule 40. Assignment of cases for trial

(a). Roster Meeting for Term of Court. At a reasonable time, not less than ten (10) days prior to the comencement of a term of court, attorneys having actions pending therein shall hold a meeting to set the roster of cases to be tried at the term. In event said meeting is not set by said attorneys or by the local bar association, then the clerk of court shall set the time of the meeting and shall notify said attorneys. The clerk of the court or his deputy shall be responsible for preparing the preliminary and final trial rosters of the court. As soon as the clerk of court learns that the local bar will request that a term of court or any part thereof be not held, he shall immediately notify the Clerk of the Supreme Court.

(b). Arrangement of Rosters. At the time of arranging a roster for a term of court a list of actions, as shown by the calendar or file book provided under Rule 79, shall be called in numerical order only and placed on the roster without reference to days of the week for hearing upon request of any party. Precedence shall be given to actions entitled thereto by any statute. There shall be a roster of actions for jury trial and a roster of actions for non-jury trial; and no action shall be placed upon the jury trial roster unless a demand therefor has been timely made in accordance with Rule 38(b). Actions in which motions are pending shall be placed upon the non-jury roster in their proper order; except that actions for jury trial in which motions are pending may be placed on both rosters. Any objection to placing of an action on the trial rosters shall be heard and determined by the court at the commencement of the term.

(c). No Case Heard Until Entered on Calendar. No action shall be placed upon a roster unless the case has been entered on the calendar of the court as provided by Rule 79, and all pleadings filed as provided by Rule 5(d). In event of failure to file any pleading or paper a copy thereof may be filed by any party. No action shall be placed upon a trial roster unless at least fourteen (14) days shall elapse between the time of filing of the answer, or last responsive pleading provided by these rules, and the first day of the court term.

(d). Order Upon Settlement. Upon the calling of the calendar at the roster meeting attorneys shall advise the clerk of any action that has been settled or disposed of and counsel shall prepare and submit an order of dismissal as provided by Rule 41(a).

(e). Disposition of Matters Pending. The roster shall be made up and actions heard in the following order unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct: (1) non-jury trials and motions; (2) jury trials. A period of time, not to exceed 2 days, may be set aside at the beginning of a term for the disposition of non-jury matters, in which event jurors shall not be summoned to appear before the first day of jury trials. Upon motion of any party the court may set a trial for a day certain.

(f). Continuance.

(1). The trial judge shall be responsible for expeditious disposition of the business of the court, and shall examine the calendar and enforce compliance with the provisions of Rule

40, including the assignment of actions for trial. When an action is reached on the trial roster and is called for trial, it shall not be continued by consent, and if counsel are not ready to go forward with the case it shall lose its priority on the calendar to all other actions filed prior to the date of such default, unless it is continued by the court for good cause arising after the trial roster was made up.

(2). No motion for the continuance of trial beyond the term shall be granted, on account of the absence of a witness, without the oath of the party, his counsel or agent, to the following effect, to wit: that the testimony of the witness is material to the support of the action, or defense of the party moving; that the motion is not intended for delay; but is made solely because he cannot go safely to trial without such testimony; that he has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay. In all such cases where a subpoena has been issued, the original shall be produced, with proof of service, or the reasons why not served, endorsed thereon, or attached thereto; or, if lost, the same proof shall be offered, with additional proof of the loss of the original subpoena. A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the forgoing matter what fact or facts he believes the witness if present would testify to, and the grounds of such belief.

(g). Failure to Try Action. The court may upon its own motion or upon the motion of any party dismiss an action under Rule 41 (b) when same has remained upon the calendar through six terms without being tried.

THE ENFORCEABILITY OF JUDGMENTS AND ORDERS BY CONTEMPT AND EXECUTION

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I. INTRODUCTION: THE PRESENT PROVISIONS*

The law in New York governing the enforceability of judgments and orders by contempt and by execution has always been subject to much uncertainty. Some of the present provisions on this subject are the product of piecemeal enactment and frequent revisions. They are difficult to find, being scattered among different portions of the civil practice act and rules and the Judiciary Law; they are incomplete in some respects and overlapping in others; and they leave a number of questions unresolved.

Sections 504 and 505 of the civil practice act govern the enforceability of judgments. They allow execution upon a final judgment for or directing the payment of a sum of money, or in an action for ejectment or dower or to recover a chattel (section 504); all other final judgments (section 505, subdivisions 1, 2) and interlocutory judgments requiring performance of an act (section 505, subdivision 3) may be enforced by contempt; and specified kinds of judgments directing payment of money into court or payment by a fiduciary for a dereliction of duty may be enforced in either manner (section 505, subdivisions 4, 5).

The only provision in the civil practice act concerning the enforceability of orders is section 1520. Although appearing in an article governing costs and entitled "Collection of costs of motion," it provides, *inter alia,* that when "costs of a motion, or any other sum of money, directed by an order to be paid," are not paid within the time fixed in the order or, if no time is fixed, within ten days of service of a copy of the order, an execution against "personal property only" may be issued. The section also provides for a stay of proceedings by the defaulting party until payment is made, and the last sentence states that "Nothing herein contained shall be so constructed as to relieve a party or person from punishment as for contempt of court for disobedience to an order in any case when the remedy of enforcement by such proceedings exists."

Rule 74 of the rules of civil practice states:

> An order directing the payment of money, other than motion costs, may direct that the same be docketed as a judgment. An order affecting the title to real property, if founded on petition, where no complaint is filed, may be enrolled and docketed as a judgment and indexed with notices of pendency of action, if the court so directs.

It should be noted that neither section 1520 nor rule 74, in referring to orders, differentiates between orders determining a motion in an action or special proceeding and the final order that terminates a special proceeding.

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* This study is concerned only with the New York law governing the availability of execution and contempt to enforce judgments and orders generally. It does not treat any of the provisions governing the enforcement of particular kinds of orders or judgments. See, *e.g.*, N.Y. Civ. Prac. Act §§979, 1172. Nor does it cover enforcement procedures or such matters as the lien and priority consequences of different methods of enforcement. See proposed article 13; proposed title 61; *Liens and Priorities Affecting Personal Property in New York Procedures for the Enforcement of Money Judgments* at pp. 727–795 *infra.*

All of these provisions must be read in conjunction with the provisions of the Judiciary Law governing civil contempts. Thus, part (A) of section 753 of the Judiciary Law, enumerating the cases in which a court of record may punish for civil contempt, lists, *inter alia:*

> 3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.
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> 8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

Further, section 756 of the Judiciary Law, entitled "Issue of warrant without notice," provides:

> Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

The earliest in origin of the present provisions are the Judiciary Law sections. They appeared originally in the Revised Statutes of 1828,[1] whence they were transposed to sections 14 and 2268 of the Throop code and then to sections 753 and 756 of the Judiciary Law.

Subdivision (3) of part (A) of section 753 of the Judiciary Law is also the broadest of the provisions. It authorizes contempt for any order or judgment requiring the payment of money "in a case where by law execution cannot be awarded," and for any other "lawful mandate" of a court without qualification. A "mandate" is any written direction of a court commanding a person to do or refrain from doing an act therein specified.[2] Between directions requiring payment of money and those requiring performance of an act, then, the provision seems to cover every possible kind of order or judgment. Consequently, it is questionable whether anything is added, with respect to the enforcement of judgment and orders, by subdivision A(8) of the same section, which authorizes

[1] N.Y. Rev. Stat. pt. 3, c. 8, tit. 13, §§1, 4 (1828).

[2] Jacquin v. Jacquin, 36 Hun 378, 381 (N.Y. Sup. Ct. 1st Dep't 1885); see N.Y. Gen. Constr. Law §28-a.

a contempt proceeding where it "has been usually adopted and practiced in a court of record." And it is also difficult to determine the precise effect of section 756 of the Judiciary Law, which deals with contempt for orders "requiring the payment of costs, or of a specified sum of money," but makes no mention of the qualification that execution must not be available. Both of these provisions, it will be seen, have produced some confusion in the decisions.

II. ENFORCEMENT OF JUDGMENTS

Sections 504 and 505 of the civil practice act deal only with judgments. They were derived without change from sections 1240 and 1241 of the Throop code, which had in turn been substituted for section 285 of the Field code.

Prior to the Field code, the Revised Statutes of 1828 had codified the practice of enforcing common law judgments awarding money by execution either against real or personal property (*fieri facias*) or against the body (*capias ad satisfaciendum*).[3] Chancery decrees, prior to legislation on the subject, had traditionally been enforced by attachment as for a contempt and sequestration.[4] An early statute, however, authorized the chancellor to enforce his decrees by a common law execution against property or the body[5] and this provision was continued in the Revised Statutes of 1828.[6]

By the terms of the Revised Statutes forerunner of Judiciary Law section 753(A)(3), the availability of execution was to preclude punishment for contempt for non-payment of a sum of money. Chancery, however, was reluctant to relinquish its traditional power to punish disobedience to decrees for the payment of money as for a contempt. Relying on subdivision 8 of the forerunner of section 753(A)—which authorized contempt where it "has been usually adopted and practiced"—the Chancellor held in an 1831 decision that both contempt and execution were available in such cases.[7]

After the enactment of the Field code, the vestiges of the old chancery powers continued to work changes in the law. Section 285 of the Field code provided simply that

> Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by

[3] N.Y. Rev. Stat. pt. 3, c. 6, tit. 5, §1 (1828); see 1 Burrill, Supreme Court Practice 285–316 (2d ed. 1846).

[4] See Geery v. Geery, 63 N.Y. 252, 254–55 (1875); Brockway v. Copp, 2 Paige 578, 580 (N.Y. Ch. 1831).

[5] N.Y. Rev. Laws p. 487, §4 (1813); N.Y. Laws 1802, p. 28, §9.

[6] N.Y. Rev. Stat. pt. 3, c. 1, tit. 2, §104 (1828).

[7] Brockway v. Copp, 2 Paige 578 (N.Y. Ch. 1831); Hosack v. Rogers, 11 Paige 603 (N.Y. Ch. 1845); see also Strobridge v. Strobridge, 21 Hun 288 (N.Y. Sup. Ct. 4th Dep't 1880); 1 Barbour, Chancery Practice 443–44 (2d ed. 1874).

law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for a contempt.

Under this provision it was held in *Gray* v. *Cook*[8] that a judgment directing an administrator to pay money into court "to await the further order of the court, and to be distributed according to law" must be enforced by execution, as it "requires the payment of money." The authors of the Throop code, with this case in mind and desirous that execution should not supersede the remedy of contempt "in equitable cases of fraud and trust," accordingly substituted for section 285 the two sections, 1240 and 1241, that appear today as sections 504 and 505 (except for subdivision 5 of the latter section, which was added in 1947) of the civil practice act.[9] Subdivision 4 of section 1241, designed to overcome the rule of *Gray* v. *Cook*, allowed both contempt and execution where the judgment requires payment of money into court or to an officer of the court.[10]

Still there was dissatisfaction with the unavailability of contempt in cases requiring fiduciaries to pay money, but not into court, and which therefore did not come within the new subdivision 4. The rule that availability of execution precluded contempt was sometimes applied with reluctance;[11] in one case it was ignored and a trustee who had misappropriated the proceeds of insurance policies was fined for contempt in disobeying a judgment that he pay the proceeds to a receiver.[12] In 1947, the Judicial Council proposed that both contempt and execution be allowed to enforce payment of money for the willful default or dereliction of a fiduciary[13] and this was enacted as subdivision 5 of section 505. Both subdivisions 4 and 5, it should be noted, are in apparent conflict with Judiciary Law section 753(A)(3) in allowing contempt as an alternative

[8] 24 How. Pr. 432 (N.Y. Super Ct. 1863).

[9] See N.Y. Code Civ. Proc. §1241, note (Throop ed. 1881).

[10] The reference to a "receiver appointed by" the court was added in 1947 upon recommendation of the Judicial Council to resolve confusion in the decisions as to whether such a receiver was an "officer of the court" within the purview of the subdivision. See 13 N.Y. Jud. Council Rep. 241 (1947). The exception for money due upon a contract or as damages for non-performance of a contract is required by Civil Rights Law section 21, which prohibits imprisonment in such cases.

[11] See Walters v. Reinhoudt, 130 Misc. 745, 747, 225 N. Y. Supp. 123, 126 (Sup. Ct. 1927), *aff'd*, 224 App. Div. 695, 228 N.Y. Supp. 917 (4th Dep't 1928).

[12] Mendelsohn v. Rosenberg, 248 App. Div. 743, 288 N.Y. Supp. 792 (2d Dep't 1936), *appeal dismissed*, 273 N.Y. 385, 7 N.E.2d 274 (1937). In the *Mendelsohn* case the court relied on the fact that the money directed to be paid was "earmarked as a specific or particular fund" in the hands of the person required to pay it. *Id.* at 743, 288 N.Y. Supp. at 793. This distinction has appeared in opinions of the Court of Appeals (see Watson v. Nelson, 69 N.Y. 536, 545 (1877); Nelson v. Hirsch, 264 N.Y. 316, 318, 190 N.E. 653, 654 (1934)) but only in reasoning toward the denial of contempt. See also Matter of Hess, 48 Hun 586, 588–89, 1 N.Y. Supp. 811, 812–13 (Gen. T. 1st Dep't 1888); Leslie v. Saratoga Brewing Co., 33 Misc. 118, 122, 67 N.Y. Supp. 222, 225 (Sup. Ct. 1900). *But see* Newell v. Hall, 74 App. Div. 278, 281, 77 N.Y. Supp. 610, 613 (1st Dep't 1902). There is no basis for such a distinction in any of the provisions governing the availability of contempt. See 13 N.Y. Jud. Council Rep. 245 (1947).

[13] 13 N.Y. Jud. Council Rep. 242–46 (1947).

method of enforcing the payment of a sum of money where the remedy by execution exists.

Sections 504 and 505 cover between them every possible kind of final judgment, section 504 listing those final judgments enforceable by execution and subdivisions 1 and 2 of section 505 authorizing contempt for all other final judgments. Since final judgments for or directing the payment of a sum of money are included in section 504, the execution section, this much of these provisions does not conflict with Judiciary Law section 753; it amounts rather to a more particularized delineation between final judgments enforceable by contempt and those enforceable by execution.

However, sections 504 and 505 are incomplete in their coverage of interlocutory judgments. Section 504 refers only to final judgments. Subdivision 3 of section 505 allows contempt upon an interlocutory judgment requiring a party to do or refrain from doing an act, and subdivisions 4 and 5, allowing either contempt or execution upon specified kinds of judgments requiring payment of money, probably apply to interlocutory as well as final judgments since they refer only to a "judgment."[14] But neither section covers interlocutory judgments requiring the payment of money generally; and it has consequently been held that such a judgment is simply not enforceable, either by execution or contempt, until the final judgment is rendered.[15] This result conflicts with Judiciary Law section 753, which in terms contemplates the enforceability of every kind of order or judgment by one or the other method. It is also difficult to reconcile with the decisions allowing execution upon non-final orders directing the payment of money.[16] There is frequently no practical difference between a non-final order that determines a party's right to some money and an interlocutory judgment, and the difference in label should not produce a different result.

III. ENFORCEMENT OF ORDERS

A. Introduction

The only provisions in the civil practice act and rules governing orders are section 1520 and rule 74, both of which refer only to orders directing the payment of a sum of money. The authority to enforce other kinds of orders, in the absence of specific provision, derives from section 753(A)(3) of the Judiciary Law, in the language authorizing contempt for disobedience to a "lawful mandate of the court."[17]

[14] See Devlin v. Hinman, 40 App. Div. 101, 106–107, 57 N.Y. Supp. 663, 667–68 (2d Dep't 1899), *aff'd*, 161 N.Y. 115, 55 N.E. 386 (1899).

[15] Potter v. Rossiter No. 2, 109 App. Div. 35, 95 N.Y. Supp. 1036 (1st Dep't 1905); see Robins v. Robins, 175 Misc. 669, 670, 24 N.Y.S.2d 582, 583 (Sup. Ct. 1941); 21 Carmody-Wait, Cyclopedia of New York Practice 213 (1956).

[16] See, *e.g.*, Kane v. Rose, 87 App. Div. 101, 84 N.Y. Supp. 111 (2d Dep't 1903), *aff'd*, 177 N.Y. 557, 69 N.E. 1125 (1904); Halsted v. Halsted, 21 App. Div. 466, 47 N.Y. Supp. 649 (1st Dep't 1897); Leslie v. Saratoga Brewing Co., 33 Misc. 118, 67 N.Y. Supp. 222 (Sup. Ct. 1900).

[17] See 21 Carmody-Wait, Cyclopedia of New York Practice 211 (1956).

It is in the area of enforcement of orders directing the payment of money that the greatest difficulties arise. These derive from a number of circumstances.

First, the line between judgments and orders is not clearly drawn, and an initial problem concerns whether a judicial direction will be labelled an order or a judgment for enforcement purposes. Second, assuming the direction is considered an order, questions arise concerning the effect of section 1520 and rule 74 and the relationship between the two provisions. Both of them in terms apply to all orders directing the payment of money; neither distinguishes between orders determining a motion and the final order in a special proceeding. Under section 1520, execution on the order is specifically limited to personal property. Under rule 74, however, the order may be "docketed as a judgment" and the question arises whether it is then to be treated as a judgment in other respects—particularly, with respect to enforceability against both real and personal property.

Finally, it is unclear from the present provisions whether contempt is still available as an alternative method of enforcing orders directing the payment of money, and there has been considerable confusion in the decisions on this matter.

The cases have not supplied adequate answers to these problems.

B. Treatment as Order or Judgment

The most obvious situation for treating an order directing the payment of money as a judgment is where the order finally determines that a particular sum should be paid by one person to another. In *Meyers* v. *Becker*[18] it was sought to punish by contempt an assignee who failed to comply with an order directing him to repay money after the assignment had been set aside as fraudulent. The Court of Appeals held that after the order in question was made a money judgment should have been entered and docketed against the assignee, that such a judgment would be enforceable only by execution and that the plaintiffs "could acquire no right to a precept for the arrest of the assignee by omitting to enter their final judgment."[19] In *Gray* v. *Cook*,[20] the case that prompted the authors of the Throop code to add subdivision 4 of section 1241 (present section 505), an order requiring an administrator to pay money into court *to await the further order of the court* and to be distributed according to law, was held to be a judgment and enforceable solely by execution.[21] A direction for the restitution of money paid upon a judgment which was later set aside upon motion has

[18] 95 N.Y. 486 (1884).

[19] *Id.* at 493; see also Matter of Hess, 48 Hun 586, 589, 1 N.Y. Supp. 811, 812–13 (1st Dep't 1888); Leslie v. Saratoga Brewing Co., 33 Misc. 118, 122, 123, 67 N.Y. Supp. 222, 225, 226 (Sup. Ct. 1900) (order requiring purchaser who defaulted upon his bid at a foreclosure sale to pay difference between his bid and price secured at a resale).

[20] 24 How. Pr. 432 (N.Y. Super. Ct. 1863).

[21] See also Harris v. Elliott, 163 N.Y. 269, 57 N.E. 406 (1900).

also been termed a final judgment enforceable solely by execution under section 1240 of the Throop code.[22]

Although these cases were concerned with the propriety of contempt proceedings to enforce the directions involved, it seems quite clear from their reliance on the forerunners of section 504 that another result of considering these directions judgments is to allow an ordinary execution against real and personal property, while as orders they would be enforceable only against personal property under section 1520 and its forerunners.

This difference in result is also illustrated by cases involving the costs of an appeal. Ordinarily, the costs of an appeal from a nonfinal order are enforceable only against personal property as motion costs under section 1520; the appeal is considered simply a continuation of the motion.[23] On the other hand, in *Foley* v. *Carter*,[24] the costs awarded upon dismissal of an appeal from a final judgment were held to be properly includible in the judgment and enforceable against real property; and the court stated that whenever "a motion is made which finally determines the action an award of costs on granting the motion is taxable and properly includible in the judgment."[25] It is difficult, however, to reconcile with this reasoning cases holding within section 1520 the costs awarded upon a successful motion for a discontinuance[26] and upon denial of a motion for leave to appeal.[27]

C. Rule of Civil Practice 74

If a judicial direction requiring the payment of money is deemed an order, its enforcement must be governed by either rule 74 or section 1520 or both.

Rule 74 was derived from the second sentence of rule 27 of the old general rules of practice, which in turn had been derived from earlier court rules. The second sentence of rule 27 stated that

> Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.

[22] O'Gara v. Kearney, 77 N.Y. 423 (1879); *cf.* Devlin v. Hinman, 40 App. Div. 101, 57 N.Y. Supp. 663 (2d Dep't), *aff'd*, 161 N.Y. 115, 55 N.E. 386 (1899). In the *Devlin* case, a fund which had been deposited in court to abide the determination of the action was paid to the defendant under the judgment. The judgment was reversed on appeal and defendant ordered to make restitution by repaying the money into court. The court held disobedience of this order punishable by contempt on the grounds that (1) the order was not final because the right of the parties to the fund still had to be determined, and (2) the case fell within section 1241(4) of the code since the money was required to be paid into court.

[23] See, *e.g.*, McIntyre v. German Savings Bank, 59 Hun 536, 13 N.Y. Supp. 674 (Gen. T. 1st Dep't 1891) (appeal from order denying motion for new trial on case and exceptions); Matter of Elmore Milling Co. v. Burgher, 147 Misc. 370, 264 N.Y. Supp. 360 (County Ct. 1933) (order holding person in civil contempt for failure to appear in supplementary proceedings).

[24] 214 App. Div. 292, 212 N.Y. Supp. 381 (2d Dep't 1925).

[25] *Id.* at 294, 212 N.Y. Supp. at 384.

[26] Hyde v. Anderson, 112 App. Div. 76, 98 N.Y. Supp. 62 (2d Dep't 1906).

[27] Shaffer v. Welkely, 141 Misc. 672, 253 N.Y. Supp. 27 (Sup. Ct. 1931).

Under that formulation it had been held, in *Myer* v. *Abbett*,[28] that the rule did not apply to orders determining an ordinary motion in an action or special proceeding since it referred only to orders granted "on petition, where no complaint is filed"—*i.e.*, to final orders in special proceedings.

The changes made in transposing it to rule 74, however, seem to evidence an intention to have it apply to all kinds of orders, including orders determining a motion. The phrase "if founded on petition, where no complaint is filed" now appears only in the second sentence of rule 74, which deals only with orders affecting title to real property. The first sentence states broadly that "An order directing the payment of money, other than motion costs, may direct that the same be docketed as a judgment." However, no case has squarely considered the question whether the rule now applies to ordinary motions.[29]

There is a dearth of authority as to the import of docketing "as a judgment" under rule 74. In old rule 27, the term used was "docketed, as other judgments," which would more strongly support an interpretation that the order was to be treated in every respect as a judgment. Of the few cases that have considered this rule, none discusses the question whether the docketed order is *enforceable* as a judgment, against both real and personal property, or is limited to execution against personal property by section 1520; however, the fact that the cases allowing docketing do not mention section 1520 could be taken to mean that there was no intention of so limiting enforceability.[30]

Apart from the question of enforcement, it has been stated that the rule "does not authorize the entry of a formal judgment in a special proceeding" but merely allows the order "to be enrolled and docketed as if it were a judgment."[31] And it has also been held that docketing under rule 74 does not make a final order a "judgment" within the meaning of the provision allowing interest on a judgment from the time when entered.[32]

[28] 20 App. Div. 390, 46 N.Y. Supp. 822 (1st Dep't 1897).

[29] In Title G. & T. Co. v. Adlake Corp., 161 Misc. 27, 290 N.Y. Supp. 1007 (Sup. Ct. 1936), rule 74 was in fact applied to allow docketing of an order in a foreclosure action surcharging a receiver of rents for attorney's fees, but the court did not discuss whether this was an order determining a motion or the import of that fact on the rule's applicability.

[30] See Matter of Katz, 184 Misc. 554, 56 N.Y.S.2d 430 (Sup. Ct. 1944), *modified*, 269 App. Div. 778, 55 N.Y.S.2d 37 (2d Dep't 1945); Title G. & T. Co. v. Adlake Corp., *supra* note 29; *cf.* City Bank Farmers Trust Co. v. Medo Photo Supply Corp., 198 Misc. 672, 102 N.Y.S.2d 722 (Sup. Ct. 1950).

[31] *See* Matter of Lexington Ave., 30 App. Div. 609, 52 N.Y. Supp. 342 (1st Dep't), *aff'd*, 157 N.Y. 678, 51 N.E. 1092 (1898) (dictum); see also City Bank Farmers Trust Co. v. Medo Photo Supply Corp., *supra* note 30. *But see* Matter of Katz, *supra* note 30.

[32] Matter of Com'rs of Palisade Interstate Park, 172 App. Div. 643, 158 N.Y. Supp. 932 (2d Dep't 1916). *But cf.* Matter of East River Land Co., 206 N.Y. 545, 100 N.E. 421 (1912). *Compare* Donnelly v. City of Brooklyn, 121 N.Y. 9, 24 N.E. 17 (1890) (holding condemnation award a judgment within the meaning of the statute of limitations), *with* Hornblower & Weeks v. Sherwood, 307 N.Y. 204, 120 N.E.2d 790 (1954).

D. Civil Practice Act Section 1520

Section 1520 is the product of a long history of piecemeal legislation, repeal, re-enactment and amendment, which leaves its precise meaning today unclear. The Revised Statutes of 1828, in the provision which remains today as section 756 of the Judiciary Law, provided that the court could issue a precept to commit to prison, after demand and refusal, a person who disobeys "any rule or order of a court . . . for the payment of costs, or any other sum of money."[33] In 1840, it was provided that in Supreme Court cases such a precept could be issued "without any demand or application to the court" but this act applied only to an "order for the payment of costs, or any sum of money *upon a special motion*."[34] In 1847, an act was passed which in section 2 prohibited imprisonment, with certain exceptions, "for the non-payment of interlocutory costs, or for contempt of court in not paying costs."[35] Section 3 of the same act substituted "Process in the nature of a fieri facias, against personal property . . . for the collection of such costs founded on such order of the court."[36] This act, it was held, "merely exempted parties from imprisonment for non-payment of interlocutory costs, leaving the provision concerning the payment of money, other than costs, untouched."[37]

The Field code left these provisions untouched. With the adoption of the Throop code, section 2 of the act of 1847, prohibiting imprisonment for non-payment of interlocutory costs, was moved to section 15 of the new code, whence it was transposed to its present place as section 20 of the Civil Rights Law. Section 3 of the act of 1847, substituting execution against personal property as the means of enforcing the collection of motion costs, was placed in section 779 of the Throop code as originally enacted in 1876. However, in the same year the Legislature independently enacted a statute providing for the sanction of a stay of proceedings upon the non-payment of motion costs.[38] As a result of this statute, the execution provision was dropped from section 779 of the code and the stay provision substituted;[39] according to Throop's notes to the code, this was done because "it could not be supposed that [the 1876 statute providing for a stay] was intended to be cumulative."[40]

Apparently the feeling on this matter soon changed, for in 1882 section 779 was amended to add the remedy of execution against personal property for non-payment of motion costs, in addition to

[33] N.Y. Rev. Stat. pt. 3, c.8, tit. 13, §4 (1828); see text at note 1 *supra*.

[34] N.Y. Laws 1840, c.386, §15 (emphasis supplied). See 1 Burrill, Practice of the Supreme Court 339 (1846).

[35] N.Y. Laws 1847, c.390, §2.

[36] *Id.* §3.

[37] Strobridge v. Strobridge, 21 Hun 288, 290 (N.Y. 4th Dep't 1880); Ford v. Ford, 41 How. Pr. 169, 171 (N.Y. Super. Ct. 1871); see also Mitchell v. Westervelt, 6 How. Pr. 265 (N.Y. Sup. Ct. 1851).

[38] N.Y. Laws 1876, c.431, §12.

[39] N.Y. Laws 1877, c.416, §1. At the same time sections 2 and 3 of the 1847 statute were repealed. *Id.* c.417, §1.

[40] N.Y. Code Civ. Proc. §779, note (Throop ed. 1881).

the stay of proceedings.[41] This statute, it was held, "re-enact[ed] in substance the provision of the laws of 1847."[42] Finally, the evolution of section 779 of the code (present section 1520) was concluded in 1884 with its extension to "any other sum of money, directed by an order to be paid."[43] In the same 1884 enactment the last sentence of the section was added, providing that "[n]othing herein contained shall be so construed as to relieve a party or person from punishment as for contempt of court for disobedience to an order in any case when the remedy of enforcement by such proceedings now exists."

There is nothing in this history that indicates whether the orders covered were meant to include only orders determining a motion or final orders in a special proceeding as well, except that the act of 1840 was limited to orders "upon a special motion." However, it may be significant that the personal property limitation upon execution was originally, and by the authors of the Throop code, intended to apply only to costs, and that the present reference to other orders directing the payment of money was inserted separately at a later date.

Be that as it may, a group of cases involving special proceedings to determine and enforce an attorney's lien under Judiciary Law sections 474 and 475 has held that enforcement of the final order is governed by section 1520.[44] One court in which the question was raised whether section 1520 applies to final orders in special proceedings refused to rule on that matter, deciding the case on other grounds.[45] On the other hand, one case has held that an award of counsel fees in a habeas corpus proceeding was enforceable by "execution after the entry of judgment on the final order,"[46] which probably means enforceable against both real and personal property.

Another ambiguity in section 1520 centers about its last sentence, providing that it shall not preclude punishment as for contempt where "the remedy of enforcement by such proceedings exists." This provision, as earlier noted, was added in 1884 when the section's coverage was extended to orders directing the payment of money other than motion costs. The apparent conflict between this sentence and the general provision of Judiciary Law section 753(A)(3), allowing contempt only where execution is not available, has produced some uncertainty in the decisions.

In *Newell* v. *Hall*,[47] the Appellate Division, First Department, gave effect to this sentence to allow enforcement by contempt of an order directing a judgment creditor to make restitution of money

[41] N.Y. Laws 1882, c.397, §1.
[42] Valiente v. Bryan, 65 How. Pr. 203, 204 (N.Y. Marine Ct. 1883).
[43] N.Y. Laws 1884, c.181, §1.
[44] Sullivan v. McCann, 124 App. Div. 126, 108 N.Y. Supp. 909 (1st Dep't 1908); Oesterreicher v. Oesterreicher, 64 N.Y.S.2d 849 (Sup. Ct. 1946); Matter of Finkelstein v. Evangelides, 176 Misc. 402, 27 N.Y.S.2d 266 (Sup. Ct. 1941).
[45] State Bank v. Wilchinsky, 65 Misc. 162, 119 N.Y. Supp. 131 (Sup. Ct. 1909).
[46] People *ex rel.* Sabbeth v. Sabbeth, 2 M.2d 593, 596, 152 N.Y.S.2d 828, 832 (Sup. Ct. 1956); *cf.* Valiente v. Bryan, 65 How. Pr. 203 (N.Y. Marine Ct. 1883).
[47] 74 App. Div. 278, 77 N.Y. Supp. 610 (1st Dep't 1902).

paid him under an order which was subsequently vacated. In answer to the argument that execution was available under section 779 and precluded contempt under the forerunner of Judiciary Law section 753(A)(3), the court relied upon the combined weight of the last sentence of section 779, the forerunner of subdivision 8 of Judiciary Law section 753(A) (allowing contempt " in any other case where [it] has usually been adopted and practiced") and the forerunner of Judiciary Law section 756 (allowing a warrant to commit to prison without notice for disobedience of an order requiring the payment of money). The last sentence of section 779 had earlier been relied upon as an alternative holding to support enforcement by contempt of a similar restitution order by the Appellate Division, Second Department.[48] This decision was affirmed by the Court of Appeals on the opinion of the court below.[49] No other cases have been found giving effect to this sentence.

On the other hand, in *Leslie* v. *Saratoga Brewing Co.*,[50] enforcement of an order by contempt was denied on the ground that execution was available. As to the last sentence of section 779, the court declared that the remedy of contempt for an order directing payment of money did not "exist" when the sentence was enacted in 1884. And the forerunner of Judiciary Law section 756 (relied upon in *Newell* v. *Hall*[51]), the court reasoned, was simply a procedural provision governing when a precept could be issued without notice but subject to the general rule of section 753(A) that availability of execution precluded contempt.[52]

Whatever the correct view, the policy of section 753(A)(3) seems to have prevailed in more recent cases, which hold that orders directing the payment of money are enforceable solely by execution.[53]

IV. CONCLUSION

It has been demonstrated that the present provisions governing the enforcement of interlocutory judgments, orders determining a motion and final orders in a special proceeding are either incomplete or uncertain in a number of respects. Whether an order directing payment of money will be enforceable by an ordinary execution or only against personal property may vary depending upon whether it is treated as a judgment or docketed under rule 74 or held within the coverage of section 1520.

[48] Devlin v. Hinman, 40 App. Div. 101, 103–106, 57 N.Y. Supp. 663, 666–67 (2d Dep't 1899). The court also reasoned that the order could be considered an interlocutory judgment directing payment into court within section 1241(4) of the code. See text at note 14 *supra*.
[49] Devlin v. Hinman, 161 N.Y. 115, 55 N.E. 386 (1899).
[50] 33 Misc. 118, 67 N.Y. Supp. 222 (Sup. Ct. 1900).
[51] See text at note 47 *supra*.
[52] See, supporting this construction of Judiciary Law section 756, Myers v. Becker, 95 N.Y. 486, 493 (1884); Matter of Hess, 48 Hun 586 (N.Y. Gen. T. 1st Dep't 1888).
[53] *E.g.*, Matter of Finkelstein v. Evangelides, 176 Misc. 402, 27 N.Y.S.2d 266 (Sup. Ct. 1941); People *ex rel.* Sabbeth v. Sabbeth, 2 M.2d 593, 152 N.Y.S.2d 828 (Sup. Ct. 1956); *cf.* Kane v. Rose, 87 App. Div. 101, 84 N.Y. Supp. 111 (2d Dep't 1903) ("doubtful" if contempt available).

The personal property limitation as originally enacted applied only to motion costs, and in the light of the incredibly complicated history of section 1520 and its predecessors its extension to all orders directing the payment of money seems somewhat accidental. The application of section 1520 to final orders in a special proceeding is particularly anomalous, since there is no practical difference between such orders and final judgments, and the provisions governing many special proceedings specifically declare that the final order shall be enforceable like a judgment in an action. For example, in an article 78 proceeding, so much of the order as awards primary relief may be enforced by contempt and any incidental award of costs, damages or restitution may be "entered and docketed, and enforced as a final judgment in an action."[54]

There is no reason why all orders directing the payment of money, including motion costs, should not be enforced equally stringently by execution against both real and personal property in the same way as judgments. This was the approach taken in the recommendations of the New York Board of Statutory Consolidation[55] and appearing in other modern provisions on the subject. The New Jersey rule, for example, provides that except where the court orders or law provides otherwise, "Process to enforce a judgment or order for the payment of money, other than alimony or maintenance awarded in a matrimonial action, and process to collect costs allowed by a judgment or order, shall be a writ of execution."[56] And the English rule states that "Every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."[57]

The present formulation of rule 74, that orders directing the payment of money may be "docketed as a judgment," is unsatisfactory because it leaves open the question whether an order so docketed has any or all of the consequences of a judgment. Final orders in a special proceeding should have all the consequences of judgments; by calling them judgments their treatment could be assimilated completely with that of judgments. Other orders and interlocutory judgments directing the payment of money should expressly be made docketable and enforceable in the same way as judgments directing the payment of money.

Such provisions would also avoid an incidental problem raised by present section 1520. Although the latter states that the execution under it "shall be in the same form, as nearly as may be, as an execution on a judgment," it has been held that, apart from form, the provisions of the civil practice act governing executions generally do not apply to an execution under section 1520[58] and the execution consequently exists in a procedural vacuum.

Finally, omission of the last sentence of section 1520 would remove any ambiguity about the basic policy expressed in Judiciary Law section 753(A)(3), that contempt proceedings should not lie to enforce any money judgment or order where the remedy of execution is available.

[54] N.Y. Civ. Prac. Act §1303. See also *id.* §1425 (summary proceedings to recover realty; upon rendering final order, court may give judgment for rent due); *id.* §1431 (summary proceedings to recover realty; execution for costs "as if the final order was a judgment"); *id.* §1461 (arbitration; entry of judgment upon order confirming, modifying or correcting arbitrator's award); *id.* §1466 (arbitration; such judgment enforceable like judgment in an action).

[55] 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 152 (1915).

[56] N.J. R. Civ. P. 4:74–1.

[57] Eng. Rules of the Sup. Ct. O. 42, r.24 (The Annual Practice 1958). *Cf.* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies").

[58] Matter of Lamont v. Fitzgerald, 176 Misc. 534, 26 N.Y.S.2d 888 (Sup. Ct. 1941) (holding five-year limitation of N.Y. Civ. Prac. Act §651 inapplicable).

LIENS AND PRIORITIES AFFECTING PERSONAL PROPERTY IN NEW YORK PROCEDURES FOR THE ENFORCEMENT OF MONEY JUDGMENTS

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I. INTRODUCTION

It is doubtful whether any area of the law is as complex, confused, uncertain and devoid of rational justification as that which relates to liens and priorities in procedures to enforce money judgments. The civil practice act provides four distinct enforcement systems—execution,[1] judgment creditor's action for discovery and satisfaction,[2] receivership in supplementary proceedings,[3] and proceedings supplementary to judgment[4]—each of which has been given, either by the Legislature or, more frequently, solely by the courts, their own different lien and priority consequences. Unfortunately, these separate rules seldom recognize the existence of the other enforcement procedures and their lien and priority consequences. This study endeavors to describe and analyze this basically chaotic situation and to propose criteria for its modification and clarification.[5]

While the present unfortunate situation is, of course, the product of numerous factors, principal among them is the inadequacy of legal terminology in this area. For example, the single term "lien" is regularly used by the courts to define vastly varying rights. In certain circumstances it means only that one creditor's claim to a particular asset is superior to that of another judgment creditor who has followed the same enforcement procedure, while in other situations the same term is used to mean that the creditor's claim to all of the debtor's assets, whether or not he knows of their existence, is superior to anyone else's including that of a bona fide purchaser. Unfortunately, this multiplicity of meaning has been recognized only rarely and the scattered attempts to qualify the term "lien" have proven only more confusing. Thus, while most courts continue to refer to the mass of rights which a creditor who commences supplementary proceedings obtains with regard to other creditors and assignees or purchasers of the debtor's assets simply in terms of a "lien,"[6] one commentator has noted that it is "not

[1] N.Y. Civ. Prac. Act §§635–772.
[2] *Id.* §§1189–96.
[3] *Id.* §§804–10. Although these sections are contained in the proceedings supplementary to judgment article and although the commencement of a proceeding is a prerequisite to the appointment of a receiver, the receivership procedure is treated here as a separate enforcement system since it provides a different method for obtaining such matters as examinations, restraint of transfers, collection of debts, sale of personal property and determination of adverse claims.
[4] N.Y. Civ. Prac. Act §§773–803, 811.
[5] While the relation of these lien and priority consequences to those of bankruptcy, assignments for the benefit of creditors, non-statutory creditor's actions in equity and fraudulent conveyance actions, are important, they are beyond the scope of this study because they are not covered by the civil practice act and are not confined to situations involving judgment creditors. The study also will not deal with the liens obtained by special creditors such as attorneys and mechanics and will not cover the manner of obtaining liens and priorities upon certain special classes of personal property such as negotiable instruments, corporate stock and trust funds, which are covered by express provisions in the consolidated laws.
[6] See, *e.g.*, City of New York v. Bedford Bar & Grill, 2 N.Y.2d 429, 141 N.E.2d 575 (1957); Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 54 N.E.2d 336 (1944).

in all respects the same as an ordinary lien,''[7] some courts have referred to it as an ''inchoate lien,'' an ''imperfect lien,'' or an ''incomplete lien,'' one court has termed it ''a sort of inchoate lien''[8] and a bar association committee explicitly denied that it was a lien and termed it ''priority rights.''[9]

Curiously, while the courts and commentators generally speak in terms of ''lien,'' the word is not used in the civil practice act enforcement provisions to refer to the rights obtained by a creditor with regard to the judgment debtor's personal property.[10] Instead, in the few instances in which such rights are mentioned, the civil practice act speaks of property being ''bound by the execution'';[11] of an execution having ''preference'';[12] of the title consequences of a levy;[13] of a levy being ''a seizure of all the rights of the judgment debtor'';[14] of a judgment creditor continuing to have ''such rights and remedies'' after a transfer of restrained property as he ''would have had if such transfer had not been made'';[15] of the property of a judgment debtor being ''vested in a receiver'',[16] and of the ''title'' extending ''back by relation.''[17] Whatever the intent of the legislature was in using this assortment of phrases, the courts have generally viewed them as mere euphemisms for the term ''lien.''

This semantic confusion would be of only minor concern if the different meanings of ''lien'' were clear in their particular contexts. Unfortunately, this has not been the case. The courts have frequently failed to distinguish the different contexts in which the term is used and have applied the ''lien'' consequences of one context to other situations where it is inappropriate.

Any attempt to describe present law in this area must therefore commence with a delineation of the varying contexts in which ''lien'' questions arise. It is helpful in this regard to consider enforcement ''liens'' not only in terms of the property covered but also in terms of the claimants. The two basic situations are those in which the judgment creditor's right to property is disputed by another creditor, the priority situation; and those in which it is disputed by a non-creditor, generally an assignee or purchaser of the judgment debtor's assets, the traditional ''lien'' situation. In the first, results will vary depending upon, *inter alia,* whether all creditors pursued the same or different enforcement procedures and

[7] Wait, Manual of Supplementary Proceedings 623 (Warren ed. 1936).
[8] Voorhees v. Seymour, 26 Barb. 569, 582 (N.Y. Sup. Ct. 1857).
[9] Committee on Law Reform, Report on Collection of Money Judgments 19 (Association of the Bar of the City of New York 1937).
[10] The phrase "lien and continuing levy" is used in section 684(1) of the civil practice act, which deals with garnishment. As there used, however, the phrase does not give the creditor a "lien" upon any property. If the employer pays the money to his employee, title is passed but the employer is liable to the creditor. N.Y. Civ. Prac. Act §684(3).
[11] N.Y. Civ. Prac. Act, §679.
[12] *Id.* §§680, 681, 682.
[13] *Id.* §683.
[14] *Id.* §687-a(2).
[15] *Id.* §799-a.
[16] *Id.* §807.
[17] *Id.* §808.

upon the type of procedure followed by each of them. In the non-creditor situation, they will vary depending upon *inter alia,* whether the transferee is a purchaser for value and upon his having a certain type of notice. While there is a great deal of overlap—the same act may have both priority and ''lien'' consequences—it is important to preserve the distinction since different rationales underlie the judgment creditor's rights in each area.

The justification of the enforcement procedure priority rules—which, unlike those in the bankruptcy and assignment for the benefit of creditors situations, do not provide for the pro rata distribution of assets among all creditors but rather for distribution in the order in which certain events are performed by the creditor or on his behalf—is based upon the equitable concept of ''diligence.''[18] Although many courts also explain results in the cases where the person opposing the judgment creditor's claim is a non-creditor in terms of ''diligence,'' the concept is not applicable to that situation. The claimants are not in the same ''race.'' The rationale there is generally based upon the purchaser or assignee either having some form of notice, actual or constructive, or upon the theory that the judgment debtor is under some sort of disability and cannot pass title. Unfortunately, even in the priority area, ''diligence'' in practice would seem to mean no more than diligence in selecting an enforcement procedure which affords the most favorable priority rules, whether or not that procedure is best designed to secure the inexpensive and expeditious application of the debtor's assets to the satisfaction of the judgment.

The courts' use of the slippery term ''lien'' and the somewhat elusive theoretical justifications which purportedly underlie the lien and priority rules are only partially responsible for the extremely difficult task which prediction in this area presents. Uncertainty is a natural concomitant of any system which permits different creditors to pursue different enforcement procedures, and which accords to each of these procedures different lien and priority consequences. Uncertainty is converted into virtually total confusion in a system in which these consequences are determined by the courts on a case by case basis, and occasionally by the legislature on an equally *ad hoc* basis. Thus, a distinction is still made between ''equitable'' assets, such as debts and choses in action, and ''legal'' assets, such as tangible personalty. Although the basis for this distinction rested upon the separation of law and equity, its significance for lien and priority purposes has only gradually been abolished as to some of the enforcement procedures, and then only in varying degrees and at different times.

As a result of these factors, there are vast areas in which it is impossible to state what present law is with any degree of certainty.

[18] In Edmeston v. Lyde, 1 Paige 637, 640 (N.Y. Ch. 1829), the Chancellor held that "[t]he creditor whose legal diligence has pursued the property into this court is entitled to a preference as the reward of his vigilance." The rationale is that he should not "be obliged to divide the avails thereof with those who have slept upon their rights." *Id.* at 639. In other similar situations, however, the equity maxim has been "equality among all creditors is equity." See Libman-Spanjer Corp. v. Royal Hall, Inc., 146 Misc. 351, 352, 263 N.Y. Supp. 101, 103 (Sup. Ct. 1932).

II. PRIORITY AMONG JUDGMENT CREDITORS

The Columbia Law Review noted three decades ago that "[a]s a practical matter, it is difficult to determine from the decided cases just what fact or facts are operative in giving one creditor rather than another the first claim to the assets of the debtor."[19]

If anything, the situation has become vastly more complicated since then. The article of the civil practice act on execution is the only one which contains an explicit statutory provision recognizing the fact that there may be more than one judgment creditor of a debtor and providing for priority among creditors. Even there, however, the priority provisions only cover the situation where all creditors pursue the execution remedy or execution and attachment.[20] Priority under the other three enforcement systems and between judgment creditors who pursue execution and those pursuing other remedies, continues to be solely the product of judicial creation.

A. Execution Priorities

Section 680 of the civil practice act provides that the execution "first delivered to an officer to be executed has preference, notwithstanding that a levy is first made by virtue of an execution subsequently delivered." Priority, thus acquired, probably relates only to the personal property subject to execution which is "situated within the jurisdiction of the officer."[21]

1. Loss of Priority to Other Creditors Pursuing Execution Remedy

a. Return of Execution; Levy by Different Executing Officer

While the rule of section 680 is based upon strict temporal diligence—the first in time prevails whether or not he knows of any property of the judgment debtor—priority obtained by mere delivery may be lost in numerous ways which are beyond the control of the diligent execution creditor. Thus, if the sheriff returns the execution unsatisfied, priority is lost.[22] Section 682 provides that priority of an execution issued out of a court of record is also lost if a levy is first made upon an execution issued

[19] Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 Colum. L. Rev. 504, 505 (1929).

[20] N.Y. Civ. Prac. Act §§680-82. The "lien" provisions, sections 679 and 683, however, have some bearing upon priority between executing and other creditors. See text at notes 37 through 40 *infra*.

[21] N.Y. Civ. Prac. Act §679. Although section 680 contains no restriction to property within the officer's jurisdiction, the limitation in section 679 should probably be read into section 680. Otherwise there would be numerous difficulties, possibly including a requirement that every sheriff, to avoid liability for executing upon a junior execution, check whether an earlier execution has been delivered to any other sheriff in the state, before distributing the proceeds of a sale.

from a court not of record.[23] The difficulty of determining whether a levy has actually been made aggravates this situation and is responsible for occasional disputes between sheriffs and marshals.

The only apparent justification for treating executions issued from a court not of record differently from those issued from a court of record is that the executing officers may be different (for example, marshals and constables rather than a sheriff) and an executing officer is saved the trouble of checking whether a previous execution is outstanding with another executing officer. Even this rationale—based upon the different class of enforcement officers used in courts not of record—has doubtful validity because many courts of record also utilize officers other than sheriffs for execution purposes. And if this were the rationale of section 682, it should have been phrased in terms of the class of enforcing officer rather than in terms of courts not of record.

The use of officers other than sheriffs raises problems as to the meaning of sections 680 and 682. The former provides that the execution "first delivered to an officer" has preference though a levy is made first on a junior execution, while the latter states that such a prior levy will give the junior execution priority if it was issued out of a court not of record. In *Garro* v. *Republic Metal Works, Inc.*,[24] the Appellate Division, Fourth Department, stated in dictum that section 680 must be read with and applied only to the officers mentioned in section 636—*i.e.*, sheriffs—and not to marshals or constables; and that consequently a prior levy *by a marshall* would give a junior execution priority, contrary to the rule of section 680.[25] In this case the junior execution was

[22] In Garro v. Republic Sheet Metal Works, Inc., 205 Misc. 889, 893, 129 N.Y.S.2d 568, 571 (Sup. Ct. 1954), the Supreme Court took the position that "[t]he sheriff should not be permitted to interfere with the statutory preference by an intentional or mistaken return of the senior execution." Later, the Appellate Division rejected this position, reversing the case. 284 App. Div. 660, 134 N.Y.S.2d 151 (4th Dep't 1954). See also Feller v. Duncan Stewart Industries, 138 N.Y.L.J. no. 69, p. 6, col. 5 (Sup. Ct. 1957). Unless the return date is extended or a levy is made, the sheriff may not retain an execution for more than sixty days (N.Y. Civ. Prac. Act §640) and he may conceivably return it on the same day in which it was delivered. If two executions are delivered to the same officer and he makes a levy pursuant to the junior execution before returning the senior, however, the senior execution creditor may have an action against the sheriff based upon his negligence.

[23] "An execution issued out of a court not of record, or a warrant of attachment granted in an action pending in a court not of record, if actually levied, has preference over another execution issued out of any court of record or not of record which has not been previously levied." N.Y. Civ. Prac. Act §682.

[24] 284 App. Div. 660, 134 N.Y.S.2d 151 (4th Dep't 1954).

[25] "If we are correct in the conclusion reached, it may be unnecessary to determine whether Section 680 of the Civil Practice Act governs the rights of these two judgment creditors as between themselves. However, our views thereon may not be amiss. Said section is a part of Article 43. Section 636 is part of Article 42. Those sections must be read together. It is urged by the respondent that the words 'to an officer to be executed' in Section 680, refer to and are intended to include a city marshal or constable or any officer who has, by law, authority to make levy and sale upon execution issued out of any court of record. We doubt if that is so. Section 636 of Article 42 is entitled 'Officer or person to whom execution directed' and provides that an execution 'must be directed to the sheriff' except in certain cases where it

issued out of the City Court of Utica, which is a court of record although its judgments are enforceable by marshals. Although the court did not mention section 682, the result of its reasoning would be the same as if the Utica City Court were treated as a court not of record and the rule of section 682 applied. In *Feller* v. *Duncan Stewart Industries,*[26] however, the Supreme Court in the First Department declined to follow the reasoning of the *Garro* case. The court in *Feller* stayed a city marshal from enforcing the execution of a City Court, which was a court of record, although a levy had been made on it prior to a Supreme Court execution which had been delivered previously. The court expressly found that section 680 governed priority in this situation and distinguished the *Garro* case on other grounds.[27]

The last phrase of section 680 provides: "but if a levy upon and sale of personal property has been made by virtue of the junior execution, before an actual levy by virtue of the senior execution, the same property shall not be levied upon or sold by virtue of the latter." This might be read as an exception to the priority provision in the first clause and as giving preference to the junior execution once a sale by virtue of his execution has been made. The import of the phrase however, is apparently only that the sale is valid and that the senior execution creditor cannot levy upon the property in the hands of a bona fide purchaser.[28] The sheriff continues to be under a duty to give the proceeds to the senior execution creditor.[29]

Where one creditor was the first to deliver an execution but the sheriff levied upon a subsequent execution and delivered the proceeds to the second creditor, what rights does the first have? While it is not clear whether he may recover the proceeds from the second creditor if both executions were delivered to the same

may be directed to the coroner or a person designated by the court and given the authority of a coroner. We think the 'officer' mentioned in Section 680 clearly refers to the Sheriff or the coroner or the person acting as an officer as provided in Section 636.

"Although the City Court of Utica is a court of record, judgments in that court may not be enforced by the Sheriff but executions must be directed to the marshal of that court unless, of course, the judgment has been made a judgment of the County Court by the filing of a transcript. If, therefore, as we think, the provisions of Section 680 of the Civil Practice Act are applicable only to executions issued to sheriffs or coroners under Section 636, it seems that the plaintiff Garro obtained no preference by a mere delivery of an execution to the Sheriff.

"It may be questioned whether the Supreme Court at Special Term may, peremptorily, on a show cause order, direct an officer of the City Court of Utica to thus turn over proceeds of a sale in his hands to a person other than the judgment creditor in the City Court or his attorney. The marshal was not an officer of and thus subject, peremptorily, to orders of the Supreme Court. His duties enjoined by law, are those set forth in the statutes relating to the City Court of Utica." Garro v. Republic Sheet Metal Works, Inc., *supra* note 24 at 662–63, 134 N.Y.S.2d at 154–55.

[26] 138 N.Y.L.J. no. 59, p. 6, col. 5 (Sup. Ct. 1957).

[27] *Cf.* Matter of Heights Promenade, Inc., 198 Misc. 788, 101 N.Y.S.2d 65 (Sup. Ct. 1950) (section 679 applies to marshals).

[28] Peck v. Tiffany, 2 N.Y. 451, 457 (1849).

[29] Pach v. Gilbert, 124 N.Y. 612 (1891); 3 Bender, New York Practice 959 (Warren ed. 1954).

executing officer, the officer would be liable to the senior execution creditor.[30] Assuming that section 680 governs priority whenever executions are issued from courts of record regardless of whether they are delivered to the same executing officer, would an officer who is not expressly stayed from delivering the proceeds to one execution creditor be liable to another execution creditor who is senior by virtue of delivery of execution to another officer? To find such liability, it would probably be necessary to hold that the officer is under a duty to discover whether earlier outstanding executions had been delivered to other executing officers. While it might not be too difficult for a marshal to check with the sheriff, it would be totally impractical to require the New York City sheriff to check with the more than eighty city marshals.

Because of the emphasis upon temporal diligence,[31] the truly vigilant creditor who discovers hidden assets of the debtor might be well advised to wait until all senior executions have been returned unsatisfied before informing the sheriff of the existence of the assets. This situation occasionally places the sheriff who returns one creditor's execution claiming that he was unable to locate any assets of the debtor, in an awkward position when he levies upon such assets pursuant to another execution shortly thereafter.

b. Delay in Concluding Execution Procedure

The uncertainty of execution priorities is further aggravated by the concept of an execution becoming "dormant." The classic definition of this concept was made in *Excelsior Needle Co.* v. *Globe Cycle Works,* in which the court stated:[32]

> The law is quite clear that the object of the execution is to enforce payment of the judgment debt, and not to convert such execution into a security upon the property and still allow the judgment debtor to prosecute his business regardless of the lien of the execution. As was said in Freeman on Executions (§206): "In other words it is not the mere issuing or delivery of the writ which creates a lien; but an issuing and delivery for the purpose of execution. The execution of a writ for the purpose of making or keeping it effective as a lien cannot stop with a mere levy upon the property. If the officer is instructed by the plaintiff not to sell till further orders, the lien of the execution and levy becomes subordinate to that of any subsequent writ placed in the officer's hands for service." . . . .
>
> The law, therefore, seems to be settled that any direction by the execution creditor to the sheriff, which suspends the lien or delays the enforcement of the levy, renders the execution dormant against subsequent creditors or *bona fide* purchasers. However veiled may be the direction; however much it may

[30] Pach v. Gilbert, *supra* note 29.

[31] The rule basing priority upon delivery was developed at a time when the sheriff might have been expected to know of the existence of any assets of the debtor by himself and when there were few other procedures that the creditor could follow.

[32] 48 App. Div. 304, 309–10, 62 N.Y. Supp. 538, 540–41 (4th Dep't 1900).

be founded on a humane desire to protect the debtor; if it is tantamount to a mandate or instruction to the sheriff to withhold the execution of his process during the interim that he accedes to this demand, the levy ceases to be effective. That doctrine rests on public policy and is necessary to prevent fraud and it should receive a fairly rigorous enforcement.

While this language would seem to indicate that any instruction to postpone final enforcement of the execution is fatal to priority, the cases in which the rule has been applied have involved extreme instances of delay.[33] It is not clear, therefore, whether a single postponement of a sheriff's sale would result in a loss of priority. The uncertainty regarding the bounds of the rule, however, forces judgment creditors to be wary of any request for postponement, regardless of the harshness of result to the judgment debtor of a denial.

The attitude toward delay in execution should be contrasted with that toward delay under the other enforcement systems. In supplementary proceedings, even when a restraining notice has expired and more than two years have elapsed since the service of a third-party subpoena, the judgment creditor has been held to retain priority.[34] In one case although a creditor did not pursue an examination of the debtor for six years, it was held that he retained priority as of the time of the service of the original subpoena when a receiver was appointed.[35]

2. *Loss of Priority to Creditors Pursuing Other Enforcement Remedies*

Priority obtained by delivery of an execution may be lost to a judgment creditor who subsequently pursues another enforcement procedure.[36] Where the assets involved are intangibles, this is fairly clear. Thus, if after an execution has been delivered to the sheriff, a second creditor commences supplementary proceedings and obtains an order under section 794 of the civil practice act directing that a debt due the debtor from a garnishee be paid to him, the second creditor would have priority over the debt. Section 680 governs priority only between executing creditors and section 679(2) provides that debts are not "bound" until they are levied upon pursuant to section 687-a.[37]

[33] Matter of Gerardi, 138 N.Y.S.2d 162 (Surr. Ct. 1954); Warren Co. v. Lukor Retail Stores, 139 N.Y.L.J. no. 67, p. 5, col. 7 (N.Y. City Ct. 1958) (creditor instructed sheriff to postpone sale for two years while collecting payments from judgment debtor).

[34] Matter of Welcome Wagon, Inc., 137 N.Y.L.J. no. 105, p. 13, col. 5 (Sup. Ct. 1957).

[35] Herlihy v. Watkins, 252 App. Div. 605, 300 N.Y. Supp. 242 (1st Dep't 1937). See also Palen v. Bushnell, 13 N.Y. Supp. 785 (Sup. Ct. 1889) (supplementary proceeding receivership in existence for more than 26 years.)

[36] Priority rules where other enforcement procedures are commenced before execution will be discussed subsequently in the sections dealing with the other enforcement procedures.

[37] *Cf.* Truebner Voelbel Co. v. A. Melides & Fils, 138 N.Y.S.2d 391, 393 (Sup. Ct. 1954), *aff'd without opinion*, 285 App. Div. 928, 139 N.Y.S.2d 884 (1st Dep't), *motion for leave to appeal denied*, 285 App. Div. 1128, 141 N.Y.S.2d 820 (1st Dep't 1955).

Where tangible assets are involved, the result is not as clear. While section 680, covering successive executions, would not be applicable, section 679 provides that tangible property is "bound" from the time of delivery of an execution to the sheriff. As already noted, however, being "bound" does not prevent such property from subsequently being taken by a levy on an execution issued from a court not of record and probably from a court of record where the executing officer is not a sheriff. While this fact might have been the basis for concluding that the "binding" effect of a delivery relates solely to the non-creditor situation—*i.e.*, to purchasers or assignees of the debtor's assets—the "lien" has not been so limited. Thus, the execution creditor's claim has been held to be superior to that of a subsequent assignee for the benefit of creditors,[38] to that of other creditors after the debtor's death[39] and to that of other creditors in bankruptcy where more than four months have elapsed between delivery of the execution and bankruptcy.[40] It is not clear, however, whether the "binding" effect would also extend to other creditors who obtain turnover orders or the appointment of a receiver, before levy. It may be contended that these remedies are more closely analogous to the levy by a different executing officer situation than to the assignment, post-death or bankruptcy situation.[41] In any event, if diligence is the crucial factor in determining priority, quaere whether the creditor who conducts an examination in supplementary proceedings, discovers property, and obtains a turnover order is not more diligent than the creditor who, without knowledge of the debtor's assets, merely delivers an execution to the sheriff.

3. *Personal Property Subject to Priority*

a. Location of Tangible Property; After-Acquired Property

Execution priorities also differ from priorities under the other enforcement systems in that they do not run throughout the state but seem to be limited to personal property "situated within the jurisdiction" of the executing officer.[42]

[38] *In re* Miss Coquette, Inc., 133 N.Y.L.J. no. 17, p. 7, col. 2 (Sup. Ct. 1955); Saligman v. Ginsburg, 102 N.Y.S.2d 142 (Sup. Ct. 1950).

[39] Section 212 of the Surrogate's Court Act provides that "[d]ebts entitled to a preference under the laws of . . . the state of New York" should be satisfied ahead of other obligations of the deceased. While this should probably apply to the priority obtained by delivery of an execution, there is some indication that the execution priority is only recognized after an actual levy has been made and then only with regard to the specific assets levied upon. See *In re* Henke's Estate, 193 Misc. 52, 81 N.Y.S.2d 79 (Surr. Ct. 1948); *cf.* Wood v. Morehouse, 45 N.Y. 368 (1871).

[40] 11 U.S.C.A. §107.

[41] *Cf.* Lynch v. Johnson, 48 N.Y. 27, 33 (1871); Porter v. Williams, 5 How. Pr. 441, 443 (N.Y. Sup. Ct. 1850), *aff'd*, 9 N.Y. 142 (1853); Matter of Clover, 8 App. Div. 556, 559, 40 N.Y. Supp. 886, 888 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897) (describing the effect of such procedures in terms of an execution levy).

[42] N.Y. Civ. Prac. Act §679. See note 21 *supra*.

Where a judgment debtor removes personal property from the county after an execution has been delivered to the sheriff, what are the creditor's rights? Apparently, the sheriff may bring an action against the debtor for removing the property,[43] but having another judgment is of dubious value to the creditor. If an execution is later issued by another creditor in the second county and the property is levied upon and sold pursuant to that execution, it has been held that the first creditor may obtain an order directing the second sheriff to give the proceeds to him.[44] If the proceeds have been distributed to the second creditor, however, it is doubtful whether the first creditor has any rights against the second sheriff[45] because it is unreasonable to expect a sheriff to know what executions are outstanding in other counties and the circumstances surrounding the arrival of the property in his jurisdiction. It is clear that he would have no rights against the purchaser at the sheriff's sale.[46]

If the execution in the county to which the property was removed was delivered prior to the execution in the first county, it is not even clear whether the creditor in the first county could obtain an order directing payment of the proceeds of the sale to him before they are turned over by the sheriff, despite the fact that his execution "bound" the property first. This may depend upon the rule relating to after-acquired property. It is not clear whether priority over personal property relates back to the date of delivery of the execution or attaches only as of the time when the property is acquired. If priority relates back, then the creditor in the second county might claim that when property came into his county, it was "bound" as of the time he delivered his execution to the sheriff. In the case of judgment liens upon real property there is no relation back and the successive creditors would share equally, but in the case of supplementary proceeding liens, there seems to be a relation back.[47]

b. Location of Intangible Property

There is some authority indicating that the delivery of a general execution gives a creditor priority with regard to debts and choses in action levied upon pursuant to a later section 687-a execution.[48] But since priority is limited to personal property "situated within the jurisdiction" of the executing officer, such a rule would make it necessary to determine where the debt or chose in action was "situated" before the levy. If the debt or liability follows the third party and if he travels through a county where a general execution is outstanding and is later served with a section

[43] See Lambert v. Paulding, 18 Johns. R. 311, 315 (N.Y. Sup. Ct. 1820).
[44] *Ibid.*
[45] See text following note 23 *supra.*
[46] See notes 28 and 29 *supra.*
[47] See text at notes 89–90 and 139–141 *infra.*
[48] Truebner Voelbel Co. v. A. Melides & Fils, 138 N.Y.S.2d 391, 393 (Sup. Ct. 1954), *aff'd without opinion*, 285 App. Div. 928, 139 N.Y.S.2d 884 (1st Dep't), *motion for leave to appeal denied*, 285 App. Div. 1128, 141 N.Y.S.2d 820 (1st Dep't 1955).

687-a execution in another county, the creditor in the first county might have priority with regard to funds in the possession of the sheriff of the second county after a levy. Similarly, if the garnishee is a corporation which may be served in many counties throughout the state, it could be argued that delivery of a general execution in one of these counties would give a creditor priority over another creditor who later delivers a section 687-a execution to the sheriff in another county.

4. Conclusion

While most states have basically the same execution priority rules as New York, the California rule presents an interesting variation.[49] Section 688 of the California Code of Civil Procedure provides that "[u]ntil a levy, the property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution." The adoption of a rule basing priority upon levy rather than delivery would eliminate the court of record—court not of record distinction and the difficulties presented by the use of officers other than sheriffs by lower courts of record. It would also largely eliminate the after-acquired property problem and the location of property difficulties. By expressly specifying a definite period during which a levy remains effective, the California provision also eliminates the uncertainty inherent in the New York concept of an execution becoming "dormant." The difficulty with the California rule, however, would arise where a levy is made first upon a junior execution. If the reason for the junior execution's prior levy is that the junior execution creditor instructed the sheriff regarding the location of the debtor's assets and the senior did not, the result may be justified. Where the reason is merely inadvertence on the part of the sheriff, however, why should a creditor who does everything within his control before another creditor, lose priority to the latter? This problem could be minimized by providing for sheriff's liability in such a case.

While a revision of the New York execution priority provisions might remove many of their defects, the basic need, it will be seen later, is for a consolidation of the priority rules applied under the different enforcement procedures into a rule which would apply regardless of the method chosen for securing satisfaction of the judgment.

[49] See 1 Glenn, Fraudulent Conveyances and Preferences 46–47 (rev. ed. 1940), for discussion of execution priorities in other states. Although the Illinois rule with regard to priority of executions upon personal property, Ill. Ann. Stat. c. 77, §9 (Smith-Hurd 1935), is virtually identical to the New York rule, the Illinois priority rule regarding real property executions presents a noteworthy modification:

> "When the lien of several judgments is concurrent by reason of the same having been rendered during the same calendar month and execution issued upon any one of such judgments is levied upon property subject to such lien, the property so levied upon shall be sold for the benefit of all executions issued upon such judgments, and delivered to the same officer or any of his deputies before sale; and the proceeds of such sale shall be divided upon the several executions, pro rata, according to their several amounts." [Ill. Ann. Stat. c. 77, §13 (Smith-Hurd 1935)].

B. Judgment Creditor's Action Priorities

The judgment creditor's action set forth in sections 1189 through 1196 of the civil practice act constitutes a virtually complete preservation of the ancient creditor's bill in chancery. While the Field Code Commissioners intended supplementary proceedings to be a substitute for the creditor's bill,[50] they secured its addition as an alternative procedure.[51] The creditor's action is now seldom utilized and the reasons for its continuation have largely disappeared.[52] Nevertheless, an analysis of its priority rules[53] is essential to an understanding of the rules in its modern counterpart, supplementary proceedings.

A creditor was permitted to go into equity in two basic situations: first, where the property involved might be reached by execution but where execution was rendered impossible by some obstruction, for example, where the property was concealed or fraudulently transferred; and second, where the property could not be reached by execution, that is, where it consisted of "equitable" assets.[54] Although both of these functions could be combined in one omnibus creditor's bill,[55] different rules of priority were applied to "legal" and "equitable" assets.

1. Distinction Between "Legal" and "Equitable" Assets

It was the rule in chancery, based upon the maxim that "equity favors the vigilant," that the judgment creditor who first commenced the equitable proceeding against the judgment debtor was to have priority over all other creditors with regard to payment from the debtor's equitable assets.[56] This was true of equitable assets even if another creditor subsequently brought another proceeding in which a receiver was appointed.[57]

With regard to tangible property, however, the rules were more uncertain and may have depended upon whether a receiver was

[50] First Report of Commissioners on Practice and Pleadings 201 (1848).

[51] N.Y. Code Civ. Proc. §§1871–79, preliminary note (Throop ed. 1880).

[52] See Note, *Present Status of the Creditor's Bill in New York*, 6 Syracuse L. Rev. 334 (1955).

[53] See generally, Comment, *Priorities of Creditors under Judgment Creditor's Bills*, 42 Yale L.J. 919 (1933).

[54] See Beck v. Burdett, 1 Paige 305, 308 (N.Y. Ch. 1829).

[55] See Wait, Fraudulent Conveyances 130 (3d ed. 1897).

[56] First Nat. Bank v. Shuler, 153 N.Y. 163, 172, 47 N.E. 262, 264–65 (1897); Corning v. White, 2 Paige 567 (N.Y. Ch. 1831); Edmeston v. Lyde, 1 Paige 637 (N.Y. Ch. 1829). "Commencement" for purposes of priority probably did not occur until service was effected upon the debtor, although there were some dicta indicating that the filing of the bill was sufficient to give preference over another creditor who filed his bill later but served the debtor first. See discussion in Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 Colum. L. Rev. 504, 505–06 (1929).

[57] *Id.* at 506 ("if this were not the rule the debtor could in nearly all cases defeat the creditor by procuring a friendly creditor to take proceedings and have a receiver appointed on the spot.") *Cf.* Youngs v. Klunder, 7 N.Y. Supp. 498 (N.Y. City Ct. 1889).

appointed.[58] If two creditors both proceeded by way of a judgment creditor's action and neither secured the appointment of a receiver, there is no reason to believe that the creditor who first commenced the proceeding would not have priority with regard to tangible as well as intangible assets. However, since a receiver in a judgment creditor's action takes title to all of the debtor's assets, legal and equitable, it has been suggested that the creditor first securing the appointment of a receiver obtains priority with regard to tangible assets even though he commenced his proceedings after the other creditor.[59]

2. Basis of Distinction

a. Priority Rationale

Two explanations for the distinction between "legal" and "equitable" assets have been given: one is founded upon a priority theory and the other upon a "lien" theory. The priority rationale is based upon the requirement that all legal remedies must be exhausted before entering equity and upon the view that another creditor who is able to reach the assets by a legal procedure is more "vigilant" than the creditor who believed it necessary to enter equity.[60] Thus, where assets which could not be reached by any legal procedure were involved, the creditor who commenced a creditor's action would be secure in his priority. But where the assets could be reached by a procedure at law, priority would be subject to divestment by a creditor following the legal procedure.

b. Lien Rationale

Under the lien theory[61] explanation for the legal—equitable dichotomy, it is stated that a "lien" probably attaches equally

[58] "A receiver was a convenient and important, but not indispensable, part of the proceeding." Matter of Clover, 8 App. Div. 556, 558, 40 N.Y. Supp. 886, 887 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897). See Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Colum. L. Rev. 1007, 1013–14 (1935).

[59] "It would seem that as between creditors pursuing the creditor's action under section 1189 *et seq.* of the Civil Practice Act, that as to leviable personal property, priority goes according to the date of the appointment of the receiver." Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 Colum. L. Rev. 504, 507 (1929). While no cases have been found on point, there have been dicta, which, although ambiguous, would tend to indicate that this view is correct. See First Nat. Bank v. Shuler, 153 N.Y. 163, 172, 47 N.E. 262, 264–65 (1897).

[60] Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 Colum. L. Rev. 504, 506–07 (1929) ("The basis for the distinction between property which could be reached by execution at law and that which could not be so reached seems to rest on a conception of vigilance, distinctly non-temporal. Thus if judgment creditor *A* first secures judgment and first files his bill, judgment creditor *B* may nevertheless by an actual levy on the debtor's property secure the right to be first paid.")

[61] Where the person contesting a creditor's claim to assets is another creditor who has pursued a different enforcement procedure, the courts generally utilize "lien" theory reasoning rather than priority reasoning. The priority concept is generally reserved for the situation where both creditors pursue the same procedure.

upon all of the debtor's assets when the debtor is served with a subpoena. The lien, however, does no more than prevent the debtor from *voluntarily* transferring his property to anyone, creditor or bona fide purchaser, but has no effect upon "other creditors, proceeding *in invitum* to enforce their legal remedies."[62] The existence of the lien is based upon an injunction which is served upon the debtor together with the subpoena and upon common law *lis pendens*. Even if another creditor had actual notice of the proceedings and of the injunction, however, he would not be prevented from pursuing other enforcement procedures. Since other creditors could not reach "equitable" assets by any "involuntary" procedure other than the creditor's bill, the lien of the first creditor entering equity was secure with regard to those assets. As to those assets that could be reached through other enforcement procedures, however, the lien could be divested. If no creditor attempted to secure the assets, tangible or intangible, by another enforcement procedure, the appointment of a receiver, being merely a different phase of the same procedure, would probably have no lien consequences.

Although the courts, in discussing the type of enforcement procedure which would enable other creditors to divest the plaintiff in a judgment creditor's action of his claim to the assets of the the debtor under the lien rationale, referred only to execution, apparently any other enforcement procedure would serve equally well to "divest" the lien. The theory did not recognize any priority rights between creditors pursuing different enforcement procedures—the first to have the property reduced to his own actual or constructive custody or that of an officer or receiver, had its benefit.[63]

3. *Effect of Developments in Supplementary Proceedings and Execution upon Legal-Equitable Dichotomy*

Supplementary proceedings afforded an additional remedy for reaching equitable assets. According to the lien theory, the priority obtained by the commencement of a judgment creditor's action should have become subject to divestment to the extent that a second creditor was able to secure those assets through the new procedure. The priority rationale presents a more difficult problem.

Before 1935—when the requirement that an execution be returned unsatisfied before supplementary proceedings could be commenced was eliminated[64]—there was reason to treat the proceedings as equitable or, at least, to treat execution as the primary enforcement procedure and a judgment creditor's action and supplementary proceedings as being in an equal secondary position for diligence, *i.e.*, priority, purposes.[65] Under this view, the creditor who first commenced either of the equitable or secondary remedies would have priority over a creditor who later commenced the other secondary remedy but his priority would be subect to loss to a creditor who recovered the assets through execution. With the elimination of the requirement that the legal remedy of execution be exhausted, supplementary proceedings could now be considered a primary remedy of a legal rather than equitable nature.[66] Nevertheless, although it is still necessary to have an execution returned unsatisfied in order to commence a judgment creditor's action because of the exhaustion of legal remedies rule,[67] section 1189 has not been amended to make completion of supplementary proceedings a necessary prerequisite. It would, therefore, be difficult to contend that a creditor who secures assets through supplementary proceedings is any more "diligent" than a creditor who secures them through a judgment creditor's action and the primary or secondary status of supplementary proceedings vis-a-vis judgment creditor's actions would be irrelevant.[68] This would be true whether the assets are equitable or legal.

If the priority theory is followed, the addition of section 687-a of the civil practice act[69] rendering debts and choses in action subject to execution would perhaps still not affect the priority with regard to such assets obtained by the commencement of a judgment creditor's action. Section 687-a requires a certain type of execution—*i.e.*, one in which the debt is "specified"—and the return of such an execution is not a prerequisite to the commencement of a judgment creditor's action since section 1189 requires only the unsatisfied return of "an" execution issued out of a court of record. As already noted, under the lien theory, a creditor who actually secures equitable assets under section 687-a would be able to defeat the lien of an earlier judgment creditor's action.

4. *Conclusion*

The equitable-legal asset distinction tends to be applied today without regard to either the lien or priority theories but as a simple

[62] Becker v. Torrance, 31 N.Y. 631, 640 (1864); Matter of Clover, 8 App. Div. 556, 559, 40 N.Y. Supp. 886, 887–88 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897) ("In regard to movable property liable to execution at law, *although it is subject to the lien of the creditor*, it may be seized on execution by any other creditor. . . .") (emphasis supplied).

[63] "But no right is acquired, as against other creditors pursuing different remedies, until the appointment of the receiver." *Id.* at 641.

[64] N.Y. Laws 1935, c. 630. The title of the article was changed from "Proceedings Supplementary to Execution" to "Proceedings Supplementary to Judgment."

[65] See text at note 60 *supra*.

[66] *But see* Pertzon v. Lewis, 45 N.Y.S.2d 395 (Buffalo City Ct. 1943) (holding amendment to section 777 of the civil practice act, N.Y. Laws 1943, c. 508, giving Buffalo City Court jurisdiction over supplementary proceedings, unconstitutional, on grounds that it conferred equity jurisdiction upon inferior court).

[67] N.Y. Civ. Prac. Act §§1189, 1190.

[68] The change in the status of supplementary proceedings, however, may have modified priorities between execution and supplementary proceedings. See Reliant Realty Co. v. New Friends of Music, Inc., 129 N.Y.L.J. 1230, cols. 3–4 (N.Y. City Ct. 1953). See discussion in text at note 125 *infra*.

[69] N.Y. Laws 1952, c. 835.

matter of precedent.[70] To the extent that results can be predicted in this area, the present priority situation can probably be summarized as follows: The commencement of a creditor's action gives the creditor a priority with regard to equitable assets which cannot be divested by other creditors subsequently pursuing different enforcement procedures; priority with regard to tangible assets, however, can probably be divested not only by execution but by supplementary proceedings as well.

The priority consequences of a receivership in a judgment creditor's action are similar to those in the supplementary proceeding receivership situation and will be treated in the next section.

C. Supplementary Proceeding Receivership Priorities

1. Where Receiver Appointed Before Other Creditors Commence Enforcement Procedures

If a creditor secures the appointment of a receiver in supplementary proceedings before any other judgment creditor commences enforcement procedures, the creditor's priority with regard to any type of personal property of the judgment debtor is secure. The property of the judgment debtor, then held or thereafter acquired, "is vested" in the receiver from the time of filing the order appointing him.[71] The creditor need have no fear that other creditors, by the utilization of different enforcement remedies, will deprive him of the debtor's assets. Subsequent executions anywhere in the state, are ineffective—they cannot pass title to any of the debtor's personal property. If another creditor subsequently secures a turnover order in supplementary proceedings, the money or property must be turned over to the receiver rather than to that creditor.[72] Even if a creditor secures an order for installment payments pursuant to section 793 of the civil practice act, the receiver is entitled to those payments.[73] While no case has been found on the point, the receiver may even be entitled to payments obtained by another creditor under a garnishment order pursuant to section 684 of the civil practice act, if the order was obtained after the appointment of the receiver. Thus, except for the possibility that priority may be lost if the receiver or the creditor who secured his appointment fails to take measures to satisfy the judgment,[74] where a receiver is appointed before other creditors commence any type of enforcement procedure, priority is relatively clear.

[70] See, *e.g.*, Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 142, 54 N.E.2d 336, 337 (1944); Franklyn Auto Supply Co. v. Bellrose Motors, Inc., 193 Misc. 667, 84 N.Y.S.2d 540 (Sup. Ct. 1948); *cf.* First Nat. Bank v. Shuler, 153 N.Y. 163, 172, 47 N.E. 262, 264–65 (1897).

[71] N.Y. Civ. Prac. Act §807. Real property vests from the time the order is filed with the clerk of the county where it is situated. If the judgment debtor resides in a county other than the one in which the order is issued, title to his personal property vests from the time the order is filed with the clerk of the county in which he resides.

[72] *Id.* §§794, 795.

[73] Herlihy v. Watkins, 256 App. Div. 339, 10 N.Y.S.2d 7 (1st Dep't 1939).

[74] See text at notes 91–102 *infra*.

2. Where Receiver Appointed After Other Creditors Commence Enforcement Procedures

Where other creditors have instituted other procedures, the effect of a subsequent appointment of a receiver in supplementary proceedings is not clear. The rule generally stated is that priority in the proceeds of a receivership is based upon priority of process in supplementary proceedings.[75] Since the Field Code contained no provision with regard to priority, the courts likened the situation to that of the creditor's bill in chancery and treated the commencement of supplementary proceedings in the same manner as the commencement of a creditor's suit. While there is basically only one method for instituting a creditor's action, however, and the judgment debtor is always a necessary party,[76] supplementary proceedings may be instituted in many ways, against persons other than the judgment debtor, and even without the judgment debtor's knowledge. Section 774 of the civil practice act provides that a supplementary proceeding may be instituted by service of a subpoena or order requiring attendance upon the judgment debtor, garnishees or witnesses, by service of a warrant upon the judgment debtor and by service of an information subpoena upon a financial institution. The witness subpoena and order and the information subpoena do not contain restraining provisions. Should they nevertheless be considered "commencement" for purposes of priority? If so, would priority relate to all of the judgment debtor's assets or only to those in possession of the financial institution or witness at the time of service, if any?

Section 808 of the civil practice act, dealing with the extension back by relation of a receiver's title to personal property, is the principal source of law on receivership priorities. That section provides:

> *Extension of receiver's title to personal property.* Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted, as follows:
>
> 1. Where an order or subpoena requiring the judgment debtor to attend and be examined, or a warrant requiring the sheriff to arrest him and bring him before the judge, has been served before the appointment of the receiver or the extension of the receivership, the receiver's title extends back, so as to include the personal property of the judgment debtor at the time of the service of the order, subpoena or warrant.
>
> 2. Where an order, subpoena or warrant has not been served, as specified in the foregoing subdivision, but an order has been made or subpoena issued requiring a person to attend and be examined concerning property belonging, or a debt

[75] See Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Colum. L. Rev. 1007, 1026–28 (1935).

[76] See First Nat. Bank v. Shuler, 153 N.Y. 163, 166, 263 N.E. 262, 263 (1897).

due, to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands or under the control of the person or corporation thus required to attend, at the time of the service of the order or subpoena, and to a debt then due to him from that person or corporation.

3. In every other case where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor at the time when the notice was served either personally or by complying with the requirements of an order prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

But this section does not affect the title of a purchaser in good faith without notice and for a valuable consideration, or the payment of a bona fide debt in good faith and without notice, in either of which cases the burden of proving the bona fides shall be on such purchaser or payee.

Although section 808 appears to deal primarily with the "lien" problem—*i.e.*, claims between creditors and assignees of the judgment debtor—its author, Montgomery H. Throop, indicated that it was also intended to govern priorities.[77]

Under section 808, even if all creditors utilized the supplementary proceeding enforcement procedure only, and if they all extended the receivership to their proceedings, nevertheless, different creditors might have different priorities with regard to different personal property of the judgment debtor. Thus, it is fairly clear that if the judgment debtor transferred certain assets to a non-bona fide purchaser after one creditor commenced supplementary proceedings but before another did so, if both creditors subsequently join in a receivership and the receiver recovers the assets, only the first creditor would be entitled to satisfy his judgment from the proceeds.[78] If there is a surplus, the remainder must be returned to the debtor's transferee.

Where one creditor commenced supplementary proceedings first by serving the judgment debtor and later joined in a receivership, he is apparently entitled to priority over all of the debtor's assets

[77] "The section has been prepared upon the theory, that, in all cases where these proceedings are taken, the judgment creditor's lien should relate back of the receiver's appointment, only to the time when some paper is actually served upon the judgment debtor, or his bailee or debtor. This rule is not only the most just, as respects the race of diligence between creditors; but it is believed to be most in accordance with the weight of authority. It corresponds also to the rule in equity, as modified by the modern practice; for the relation of the creditor's lien back to the filing of the bill, rested upon the ground that the action was commenced thereby; whereas now an action is commenced only by the service of a summons." N.Y. Code Civ. Proc. §2469, note (Throop ed. 1881).

[78] Hubbard v. J. P. Lewis Co., 128 App. Div. 416, 112 N.Y. Supp. 1050 (4th Dep't 1908).

whether they are in the debtor's possession or that of a garnishee and whether or not the property was in existence at the time of the service.[79] Where one creditor commenced supplementary proceedings first by serving a garnishee, however, and another creditor subsequently served the judgment debtor, if both later join in a receivership, the receiver's title under section 808 would relate back to property of the debtor other than that held by the garnishee only because of the second creditor's service; and the second creditor is therefore probably entitled to priority over that property. Under this view, where a number of creditors serve different garnishees before the debtor is served and a receiver appointed, the order of priority may be extremely complex. Thus, if one creditor served garnishee *A*, a second creditor subsequently served the judgment debtor and a third creditor subsequently served garnishee *B*, although the second creditor would have priority over the third with regard to the assets held by garnishee *B*, the third creditor may have priority over the first with regard to those assets. Where the receiver recovers funds from yet another garnishee who was not previously served by anyone, priority among creditors who only served other garnishees may be based upon the order in which they secured or extended a receivership to their proceedings.[80]

Since section 808 makes no reference to restraining provisions, it is not clear whether the service of an information subpoena[81] or a witness subpoena,[82] neither of which may contain a restraining provision, would give a creditor any priority over the property of the debtor in the possession of the financial institution or witness.[83] There is some indication that a restraining provision may be a crucial factor in giving a creditor priority in supplementary proceedings where no receiver is appointed.[84] If this is true here also, a creditor who commences supplementary proceedings by the service of a witness subpoena pursuant to section 782 would obtain no priority with regard to any of the assets of the judgment debtor. If, upon examination, the creditor discovered that the witness had assets of the debtor and procured an injunction pursuant to section 799, it is not clear whether he would thereby

[79] Berger v. Waddell, 122 N.Y.L.J. 326, cols. 5–6 (N.Y. City Ct. 1949); Frederick Wachter, Inc. v. Rogers, 165 Misc. 880, 2 N.Y.S.2d 657 (N.Y. City Ct. 1936); *cf.* Ward v. Baker, 186 App. Div. 652, 175 N.Y. Supp. 66 (2d Dep't 1919); First Nat. Bank & Trust Co. v. Lovell, 139 Misc. 891, 249 N.Y. Supp. 493 (Sup. Ct. 1931). *But see* text at notes 129–132 *infra*.

[80] See N.Y. Civ. Prac. Act §§806, 808(3).

[81] *Id.* §782-a.

[82] *Id.* §782.

[83] Section 782-a(6) provides: "The service of a subpoena under this section shall not be deemed to be notice to the financial institution that the judgment debtor has been enjoined from the transfer of any of his property, and the financial institution shall not be liable for any transfer made pursuant to his direction after the service of such subpoena, unless and until an order or subpoena enjoining it from such transfer has been served upon it."

[84] See, *e.g.*, Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 143, 54 N.E.2d 336, 338 (1944); Mariano v. Cathay House Chinese Restaurant, Inc., 199 Misc. 410, 411, 106 N.Y.S.2d 325, 326 (Sup. Ct. 1951). See text at notes 133–37 *infra*.

obtain priority[85] and if so, whether it would relate back to the initial examination subpoena or solely to the service of the injunction order.[86] If the restraining notice is not a significant factor for priority purposes, the creditor's priority under section 808 would probably relate only to the assets of the judgment debtor in the witness' or financial institution's possession at the time of service. If those assets are later transferred to the judgment debtor or a third person, the priority consequences are unclear.

Even where a subpoena containing a restraining provision is served upon a garnishee, it is not clear whether the creditor obtains any priority over assets of the debtor deposited with the garnishee after service but before the creditor secures the appointment of a receiver. Section 808(2), which presumably governs priority once a receiver has been appointed, provides that where a third party has been served with a subpoena, "the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands or under the control of the person or corporation thus required to attend, *at the time of the service of the order or subpoena,* and to a debt *then due* to him from that person or corporation." Since a third party subpoena may now restrain the transfer of after-acquired property,[87] and since the scope of the restraining provision may govern priority in supplementary proceedings where no receiver is appointed,[88] it would seem that section 808(2) should not be read as depriving the creditor of that priority.

Where a creditor commenced supplementary proceedings against the debtor rather than a garnishee, it is fairly clear that his priority, under section 808(1), would extend to after-acquired property.[89] This should be contrasted with the real property situation where after-acquired property is shared pro rata by all creditors who previously docketed judgments rather than being distributed in the order in which the judgments were docketed.[90]

[85] Section 808(2) refers solely to examination subpoenas. The creditor may absolve doubts by serving the third party with another examination order (for an examination he does not need) containing a restraining provision pursuant to section 779(1).

[86] In the warrant situation, no restraint upon transfer of assets is imposed until after service of the warrant (N.Y. Civ. Prac. Act §776) and yet priority relates from service of the warrant. *Id.* §808(1).

[87] *Id.* §781.

[88] See discussion at notes 138–41 *infra*.

[89] See Frederick Wachter, Inc. v. Rogers, 165 Misc. 880, 2 N.Y.S.2d 657 (N.Y. City Ct. 1936). Section 808(1) provides that the receiver's title extends back "to *include* the personal property of the judgment debtor" at the time of the initial service (emphasis supplied).

[90] Real property liens and priorities, created by docketing of a judgment do not relate to after-acquired property. If the proceeds of a sale of after-acquired property are not sufficient to satisfy all prior judgments, they are applied pro rata. 7 Carmody-Wait, Cyclopedia of New York Practice 357 (1953). The rationale of this rule was expressed in Matter of Hazard's Estate, 73 Hun 22, 24–25, 25 N.Y. Supp. 928, 930–31 (Gen. T. 1st Dep't 1893), *aff'd*, 141 N.Y. 586, 36 N.E. 739 (1894):

> The words of the statute are "binds, and is a charge upon;" that is, upon filing the judgment roll and docketing the judgment, such judgment **at once binds, and is a charge upon the debtor's real estate.** But it cannot at once bind and be a charge upon what he does not own, and the binding and charging can only take place when the debtor acquires the property, and then the binding and charging of all the judgments must occur simultaneously, because it is the one act of acquisition which then enables the judgments to bind and charge, and not the several acts of filing the judgment rolls and docketing the judgments. It is difficult to see how it is possible for a lien to attach to a thing which does not exist. . . .
>
> . . . Bind when? Clearly when acquired, and not before. . . . [I]t is the acquisition of the title which enables the lien to attach; and the liens of all prior judgments necessarily attach at one time, and there can be no priority between them.

Priority rules where a creditor commences an enforcement procedure other than supplementary proceedings after another creditor has commenced supplementary proceedings but before the appointment of a receiver, will be discussed in a subsequent section.

3. *Duration of Receivership Priorities*

There is no provision expressly specifying the duration of a receivership and the courts have assumed that it is effective even for periods longer than twenty years.[91] It may reasonably be contended, however, that the duration is limited to two years since the receivership provisions are part of the proceedings supplementary to judgment article which contains a section providing:

> A proceeding under this article shall continue until closed or discontinued by consent or discontinued, dismissed or closed by order of the court; but a proceeding shall be deemed closed two years from the service of the order, subpoena or warrant whereby the proceeding is instituted unless the court shall make an order extending the proceeding for a definite period.[92]

This provision would seem to indicate that unless the receivership is given further life by court order, its duration varies depending on how soon after institution of supplementary proceedings it is commenced and that in no event would it continue for more than two years unless expressly extended by the court. If the receivership is considered a separate "proceeding,"[93] however, the duration would always be two years unless extended. While there is no indication that "proceeding" should be read in this manner,[94] it would make more sense to do so, particularly since receivers are frequently appointed after the expiration of two years from the commencement of supplementary proceedings,[95] and it seems that appointment orders seldom specify the duration

[91] Arizona Fire Ins. Co. v. King, 172 Misc. 165, 14 N.Y.S.2d 783 (Sup. Ct. 1939) (20 years); Palen v. Bushnell, 13 N.Y. Supp. 785 (Sup. Ct. 1889) (26 years).

[92] N.Y. Civ. Prac. Act §802(1).

[93] See Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Colum. L. Rev. 1007, 1028–29 (1935); *cf.* Karger, Titles of Actions and Special Proceedings 29–30 (1957).

[94] See N.Y. Civ. Prac. Act §774.

[95] See Herlihy v. Watkins, 252 App. Div. 605, 300 N.Y. Supp. 242 (1st Dep't 1937).

of the receivership.[96] Even this view, however, presents difficulties. For example, it is not clear what effect a subsequent extension of the receivership to another creditor's proceeding would have on duration.

In practice, as already noted,[97] there is apparently no set duration and the receivership continues until the receiver renders his accounts and the receivership is terminated by the court.[98] There are no cases applying section 802(1) to the receivership situation.

Since section 804-a of the civil practice act provides that the receiver "is not obligated to take any action to reduce property of the judgment debtor to possession, unless the judgment creditor or his attorney requests such action to be taken and indemnifies the receiver . . . ," if the duration of a receivership is unlimited, can a creditor who secures the appointment of a receiver before other creditors have commenced enforcement procedures retain priority indefinitely?

There is no provision regarding loss of priority because of lack of diligence in applying the debtor's assets to the satisfaction of the judgment. Section 802(3), dealing with supplementary proceedings generally, however, provides that:

> A proceeding under this article may be closed by order of the court where the judgment creditor unreasonably neglects or delays to proceed, upon the application of the judgment debtor or third person, or of the plaintiff in a judgment creditor's action against the debtor.

This provision was added in 1941[99] on the recommendation of the Judicial Council.[100] The comment by the Judicial Council does not indicate whether the section was intended to have any applicability to the receivership situation. The enumeration of persons who may move for the order would seem to indicate that it was not. The term "third person" probably refers only to garnishees or witnesses who have been brought into the supplementary proceeding rather than to any interested person. It is not clear why a plaintiff in a judgment creditor's action is expressly mentioned and all other judgment creditors who may be affected by unreasonable delay, apparently excluded. If the provision does apply to delay after the appointment of a receiver, the failure to cover any creditors who have not begun a judgment creditor's action renders its effectiveness virtually nugatory.

Section 806 provides that a creditor who has an existing receivership extended to cover his judgment has the right to move to "subordinate the proceedings in or by which the receiver was appointed to those taken under his judgment." The grounds for subordination, however, are probably not unreasonable delay nor

[96] See 8 Carmody-Wait, Cyclopedia of New York Practice 290–91 (1954).
[97] See note 91 *supra*.
[98] Section 804(3) provides that "[t]he receiver shall render his accounts voluntarily or upon order of the court." It is not clear who may move for such an order.
[99] N.Y. Laws 1941, c. 694.
[100] 7 N.Y. Jud. Council Rep. 321, 352 (1941).

neglect to proceed but merely priority on the basis of earlier institution of supplementary proceedings.[101]

While another creditor who had not instituted enforcement procedures by the time a receiver was appointed may find it extremely difficult to obtain priority over the appointing creditor even though the latter fails or refuses to take any further measures to satisfy his judgment, he may be able to compel the taking of such measures. If he has the receivership extended to his judgment, he has the "right to apply to the court to control, direct or remove the receiver."[102]

D. Supplementary Proceeding Priorities Where No Receiver Appointed

1. Whether Priority May Be Obtained Without Receiver

While the preceding section indicated that the commencement of supplementary proceedings gives a creditor some priority if a receiver is subsequently appointed, is this priority recognized if a receiver is not appointed but the debtor's assets are sought to be applied to the judgment by turnover order or by execution? This question presents perhaps the most difficult problem in the priority area.

Although supplementary proceedings had been in existence for almost a hundred years by 1944, it was still almost impossible to assert with any degree of assurance whether any lien or priority consequences flowed the commencement of supplementary proceedings where no receiver was appointed. One commentator, after extensive analysis of the cases since the enactment of the Field Code, and consideration of the 1935 Buckley-Holley revision, concluded:

> The final result, therefore, is to deny to the supplementary proceedings examination order any lien [used in context to include priority] except on the subsequent appointment of a receiver.[103]

In 1944, however, the Court of Appeals in *Wickwire Spencer Steel Co.* v. *Kemkit Scientific Corp.*,[104] found that the service of a third party subpoena created a "lien" and gave the creditor priority over a trustee in bankruptcy if the subpoena was served more than four months prior to the filing of the petition in bankruptcy or, if within four months, before the debtor became insolvent. The Court stated:

> The commencement of an action in the nature of a creditor's bill gives rise to a lien upon indebtedness owing by the defendant to the judgment debtor. Similarly, the service of the third

[101] *Cf.* Herlihy v. Watkins, 252 App. Div. 605, 300 N.Y. Supp. 242 (1st Dep't 1937).
[102] N.Y. Civ. Prac. Act §806.
[103] Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Colum. L. Rev. 1007, 1017 (1935).
[104] 292 N.Y. 139, 54 N.E.2d 336 (1944), *reversing* 266 App. Div. 843, 43 N.Y.S.2d 518 (1st Dep't 1943), *reversing by divided court* 38 N.Y.S.2d 816 (Sup. Ct. App. T. 1942), reversing unreported decision of the City Court of New York.

> party subpoena in proceedings supplementary to execution [changed to "Proceedings Supplementary to Judgment" in 1935] takes the place of the commencement of a suit under the old system and gives the judgment creditor the priority of a vigilant creditor and a lien upon the equitable assets of the debtor.[105]

Despite the existence of what one would suppose to be a controlling Court of Appeals decision, developments since the *Wickwire* case have been almost as unpredictable as before. The field is replete with cases which defy synthesis. Thus, four years after the *Wickwire* case, the Supreme Court at special term held alternatively that service of a supplementary proceedings subpoena with a restraining notice had no lien or priority effect and that its only function "is to operate as an injunction until the further order of the court."[106] Although "equitable" assets were involved in this case, there was no mention of the *Wickwire* decision. The court seemed to believe that the only method by which priority could be obtained was by delivery of an execution to the sheriff.

In 1950, the City Court of New York recognized that priority may be obtained by the earlier commencement of supplementary proceedings and denied a motion for a turnover order under section 794(2) made by a creditor who had commenced his proceedings after another creditor.[107] It indicated, however, that it would also deny such a motion by the creditor with priority unless a receiver was appointed, noting: "the judgment creditor who first instituted supplementary proceedings of any kind has priority. . . . However, to effectuate this priority the appointment of a receiver seems to be necessary."[108] A few years later this same court granted a turnover order to the creditor with priority without the appointment of a receiver although multiple creditors were involved.[109] The Westchester County Court in a similar situation also gave no indication that a receiver would be necessary to "effectuate" priority.[110]

Where no creditor has secured the appointment of a receiver the rule would now appear to be that liens and priority may be determined and "effectuated" on motion for a turnover order.[111] If a

[105] *Id.* at 142, 54 N.E.2d at 337.

[106] Matter of Diaz, 192 Misc. 212, 214, 80 N.Y.S.2d 504, 506 (Sup. Ct. 1948).

[107] Caccavale v. Maged, 123 N.Y.L.J. 1646, col. 3 (N.Y. City Ct. 1950).

[108] *Ibid.* See also Voorhees v. Seymour, 26 Barb. 569, 582 (N.Y. Sup. Ct. 1857) ("It may be, indeed, that as between two or more creditors who are upon the chase—'*pedibus manibusque*'—after the equitable assets of their debtor, the one who procures the first order may acquire a sort of inchoate lien entitling him to an ultimate preference, provided he pursues his remedy diligently, and consummates the proceeding by an order for a receivership, and an appointment following thereon.")

[109] Reliant Realty Co. v. New Friends of Music, Inc., 129 N.Y.L.J. 1230, cols. 3, 4 (N. Y. City Ct. 1953).

[110] Wayne Pump Co. v. Home Owners Bldg. Corp., 133 N.Y.L.J. no. 108, p. 14, col. 6 (County Ct. 1955).

[111] City of New York v. Bedford Bar & Grill, 2 N.Y.2d 429, 141 N.E.2d 575 (1957); Degenstein v. China Lantern, Inc., 200 Misc. 338, 109 N.Y.S.2d 221 (Sup. Ct. 1941); Franklyn Auto Supply Co. v. Bellerose Motors, Inc., 193 Misc. 667, 84 N.Y.S.2d 540 (Sup. Ct. 1948); Klinghoffer v. Peter's Ridgewood, Inc., 111 N.Y.S.2d 290 (N.Y. City Ct. 1950).

receiver has been appointed by a creditor without priority, however, the creditor with priority will not be able to obtain a turnover order unless he first has the receivership extended to his proceeding.[112]

2. *Scope of Supplementary Proceeding Priorities*

While the existence of priority is now recognized, it is still not clear how it is determined or what is its full scope. Neither in *Wickwire* nor in the cases cited above is there any reference to the priority structure in section 808. If section 808 is not applicable to the pure supplementary proceeding situation, it is not clear whether some different rules would apply and, if so, just what they are.

a. Distinction Between Legal and Equitable Assets

It is not clear whether the priority obtained in supplementary proceedings relates solely to equitable assets or applies to tangible assets as well. While the Field Code Commissioners intended to substitute supplementary proceedings for the creditor's bill in chancery, they made no reference to the existence of any lien or priority consequences in the new procedure. The courts, however, recognizing that supplementary proceedings are the analogue of the old procedure, have stated that the same lien and priority rules apply.[113] It was seen earlier that in the creditor's bill procedure a distinction was made between equitable and legal assets and priority based on institution of the suit was said to relate only to equitable assets.[114]

(i) Elimination of Distinction in Receivership Situation

Before Throop introduced the concept of "relation back" of a receiver's title,[115] it was apparently felt that the dichotomy between equitable and legal assets was also applicable in the supplementary proceeding situation.[116] In *McCorkle* v. *Herrman*,[117] however, the Court of Appeals indicated that the "relation back" provision changed this rule in the situation where a receiver was appointed[118]

[112] H. Alperstein, Inc. v. Luxor Modes, Inc., 133 N.Y.L.J. no. 17, p. 8, col. 1 (N.Y. City Ct. 1955).

[113] See, *e.g.*, Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 142, 54 N.E.2d 336, 337 (1944); Franklyn Auto Supply Co. v. Bellerose Motors, Inc., 193 Misc. 667, 84 N.Y.S.2d 540 (Sup. Ct. 1948).

[114] See text at notes 56–59 *supra*.

[115] N.Y. Code Civ. Proc. §2469, presently N.Y. Civ. Prac. Act §808.

[116] Becker v. Torrance, 31 N.Y. 631 (1864); Van Alstyne v. Cook, 25 N.Y. 489 (1862).

[117] 117 N.Y. 297, 22 N.E. 948 (1889).

[118] "Section 2469 is a new provision, not found in the former Code, and appears to have been inserted to change the rule declared in *Becker* v. *Torrance* (31 N.Y. 631) to the effect that no equitable lien was acquired by a creditor on the property of his debtor by the commencement of supplementary proceedings, and that when a receiver is appointed his title relates to the date of his appointment, and is subject to any lien on the debtor's property acquired by third persons intermediate the commencement of the proceedings and the appointment of the receiver." *Id.* at 302, 22 N.E. at 949.

and that a receiver's title would relate back to the commencement of supplementary proceedings with regard to all of the debtor's assets, leviable or not. Although serious doubts about this interpretation were expressed by the Appellate Division, First Department in *Droege* v. *Baxter*,[119] the Court of Appeals has never altered its position. The *Droege* case, however, carved out an important exception which for a time restored the equitable—legal dichotomy. While assuming without deciding that under section 808 a receiver's title extended back to include all of the debtor's personalty as of the service of the order for the debtor's examination, the court held that another creditor who levied upon the assets of the debtor after supplementary proceedings had been commenced, was entitled to priority as to those assets on the ground that an execution fell within the exception of section 808 that "this section does not affect . . . the payment of a debt in good faith and without notice."[120] Since only tangible assets were subject to execution at the time, the supplementary proceeding creditor's priority was secure against subsequent divestment by an executing creditor only as to intangible assets. However, if an execution could be considered "payment" it would seem that payment of a debt pursuant to a turnover order is also a "payment" within the exception to section 808. In any event, since debts are now subject to execution,[121] even under *Droege* there is probably no longer any distinction between equitable and legal assets in the receivership situation.

(ii) Status of Distinction Where No Receiver Appointed

Since section 808 of the civil practice act does not directly control priorities in supplementary proceedings where no receiver is appointed, it is not clear whether the legal-equitable dichotomy still has vitality in that situation. Although it would not have been difficult for the courts to view section 808 in the light of the *McCorkle* interpretation as indicating a legislative policy which should be at least persuasive in the non-receiver situation, this has

[119] 69 App. Div. 58, 74 N.Y. Supp. 585 (1st Dep't), *aff'd without opinion*, 171 N.Y. 654, 63 N.E. 1116 (1902).

[120] Even this view represented a modification of the judgment creditor's action rule under which the execution creditor took even if he had "notice" of the pending creditor's action. Becker v. Torrance, 31 N.Y. 631, 638 (1864). The *Droege* decision leaves open the possibility that "payment" would be deemed not to have occurred until the proceeds of the execution sale were distributed to the execution creditor and that the qualification of a receiver or notice to the execution creditor between levy and distribution would give the supplementary proceeding creditor priority. In Lawyer's Cooperative Pub. Co. v. Axelrod, 92 N.Y.L.J. 622, col. 5 (N.Y. City Ct. 1934), where a receiver qualified after levy but prior to sale, the court held that the receiver had better title to the property since "a seizure under a levy prior to the sheriff's sale is not tantamount to a purchase in good faith." While the court in *Axelrod* was probably mistaken in applying the "purchase in good faith" test rather than the "payment of a bona fide debt in good faith" test used in *Droege*, it is doubtful whether this would have altered its reasoning. If a subsequent levying creditor is to be considered a "purchaser in good faith," under section 808, it may be contended that he should be so considered under section 683. If he is a "purchaser" under section 683, however, the priority structure in section 680 would be destroyed.

[121] N.Y. Civ. Prac. Act §687-a.

not been done. In fact, there are relatively recent dicta, including some from the Court of Appeals, indicating that the distinction between legal and equitable assets still has validity and that priority obtained through supplementary proceedings applies, where there is no receiver, only to equitable assets.[122]

If these dicta mean that where tangible property is involved, the creditor who first moves for or first obtains a turnover order is entitled to priority over a creditor who served his supplementary proceeding subpoena first, they may lead to strange results. If the creditor who first commenced supplementary proceedings merely notifies the other creditor thereof before the turnover is granted, or perhaps even after the order is granted but before the proceeds of the sale are given to the second creditor, and the first creditor subsequently secures the appointment of a receiver, under the receivership priority rules the second creditor would be required to return the proceeds to the receiver for distribution to the first creditor. Clearly, the first creditor should not be required to secure the appointment of a receiver merely to shift priorities.

If the references to equitable assets in the *Wickwire* and other dicta mean only that priority over tangible—and not equitable—assets is subject to divestment by a creditor who seizes the assets pursuant to an execution, it might still lead to the shifting of priorities if a receiver is subsequently appointed. Thus, under the "payment of a debt" theory of the *Droege* case, an execution creditor may take ahead of an earlier supplementary proceeding creditor only if he did not have notice of that proceeding.[123] If, as in the creditor's bill situation, however, "notice" is of no significance before a receiver is appointed, the final status of the proceeds of an execution sale might be dependent upon the first creditor subsequently securing the appointment of a receiver. Similarly, while under receivership priorities, even if one creditor has commenced supplementary proceedings, it is apparently possible for a debtor to transfer his "equitable" assets in "payment of a bona fide debt"[124] to another creditor without notice, quaere whether this would be permitted if a receiver is never appointed. Such a transfer would not have been valid under the creditor's bill priority rules. If future earnings are considered "equitable" assets, where after one creditor has commenced supplementary proceedings another creditor, without notice, commences such proceedings and obtains an installment order pursuant to section 793, or has an execution returned unsatisfied and obtains a garnishment order pursuant to section 684, would the first creditor be able to assert a prior right to past payments if he does not appoint a receiver but not be able to do so if he does? Would the fact that the garnishment section is in the execution article make any difference? There is no clear answer to any of these questions.

[122] See, *e.g.*, Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 142, 54 N.E.2d 336, 337 (1944); Becker v. Ramanzo, 245 App. Div. 185, 281 N.Y. Supp. 317 (3d Dep't 1935); Franklyn Auto Supply Co. v. Bellerose Motors, Inc., 193 Misc. 667, 84 N.Y.S.2d 540 (Sup. Ct. 1948).

[123] See note 120 *supra*.

[124] N.Y. Civ. Prac. Act §808.

Under the *Wickwire* dicta, it would seem that, in contrast to the tangible asset situation, a subsequent execution upon "equitable" assets could not deprive an earlier supplementary proceedings creditor of his priority over such assets. While this result was achieved by the City Court of New York in *Reliant Realty Co.* v. *New Friends of Music, Inc.*,[125] the reasoning was not based upon an analogy to the creditor's bill situation as in *Wickwire*, but upon the peculiar nature of an execution upon debts. In the *Reliant* case, one creditor served a third party subpoena upon a garnishee who was indebted to the judgment debtor and a second creditor subsequently delivered a section 687-a execution to the sheriff who levied upon the debt. The court granted a motion by the first creditor to compel the sheriff to turn over the proceeds to him rather than to the executing creditor. It reasoned as follows:

> Moreover, section 687-a does not permit of a seizure, sale or other disposition by the levying officer without the cooperation of the person served with the levy. Notwithstanding the many provisions contained in the lengthy statute, there is nothing in it which gives a sheriff or marshal the same right that he has in the case of a levy upon a tangible asset to seize and sell it. If the person upon whom the execution under section 687-a was levied will not voluntarily make payment, the judgment creditor must apply to the court for leave "to maintain an action against such person for the recovery of the debt or the enforcement of the cause of action." Thus, the judgment creditor must prosecute a plenary action against the garnishee to recover the debt. Also, as stipulated in the same section, if "the levy has not been discharged by payment" to the levying officer "within one hundred twenty days after the receipt of the execution by the officer" the levy "shall thereafter be void (except as to payments theretofore made to the officer as herein provided) unless the time to commence such action shall be extended beyond the period of one hundred twenty days by order of the court for good cause shown."
>
> It seems to me that the remedy provided in section 687-a is thus no better than the remedy of a plenary action which is made available by section 795 of the Civil Practice Act to a judgment creditor who has served a third party order or subpoena. Indeed, it is not as good as the summary remedy of which such a judgment creditor may avail himself under section 794 of the act. Therefore I do no conceive that it was intended that one who issues an execution under section 687-a may usurp the place of priority which a more vigilant judgment creditor has achieved by the earlier service of a third-party order or subpoena in accordance with sections 779 and 781.[126]

[125] 129 N.Y.L.J. 1230, cols. 3–4 (N.Y. City Ct. 1953).

[126] *Ibid.* It is not clear whether the decision would have been the same if the first creditor's subpoena had been directed to the judgment debtor rather than the garnishee. The court found it significant that "[t]he injunction effected by service of the third-party order or subpoena, therefore, prevents the third party from making any payment or disposition in purported compliance with a subsequent levy under section 687-a."

If the levy had been upon tangible assets, however, it would seem that under this reasoning the subsequent execution creditor would have been entitled to priority.

If the sheriff had turned over the proceeds to the executing creditor before the supplementary proceeding creditor became aware of the execution and brought his motion, it is not clear whether the latter would be able to assert his priority against the other creditor. If the executing creditor had no notice of the supplementary proceeding, and if a receiver was subsequently appointed, the execution would come within the "payment of a bona fide debt" exception to section 808 and the first creditor would, under *Droege*, not be able to recover from the second. If no receiver was appointed and if the *Wickwire* dicta mean that the priority obtained over equitable assets is not subject to divestment, the first creditor might be able to recover from the other creditor.[127]

It is probable that supplementary proceeding priorities extend further than merely giving a creditor priority as to equitable assets over other creditors who subsequently only pursue supplementary proceedings, if he serves the right person with the right subpoena and moves for a turnover order or has a receiver appointed before the other creditors secure the debtor's assets. However, further than this no other prediction can be made with certainty. It should be remembered that apart from the receivership sections, the article on supplementary proceedings in the civil practice act contains no reference to priority and makes no distinction between "legal" and "equitable" assets.[128] When the return of an execution unsatisfied was a prerequisite to the commencement of supplementary proceedings there may have been some theoretical justification, as in the creditor's bill situation, for viewing a creditor who was able to secure the assets by execution as more "diligent" than a creditor whose execution was less successful. With the elimination of that requirement, however, even this justification must fall.

b. Distinction Based upon Whether Proceeding is Commenced Against Debtor or Garnishee

While under section 808 a subpoena served upon the judgment debtor in the receivership situation gives a creditor priority over creditors who subsequently serve a garnishee as to property in the hands of the garnishee, it is not clear whether this rule applies where no receiver is appointed.[129] In virtually every non-receiver case priority among creditors has been determined on the basis of

[127] No case has been found in which a creditor attempted to assert a priority obtained solely through supplementary proceedings after another creditor had obtained the judgment debtor's assets through an enforcement procedure other than an assignment for the benefit of creditors. Priority in all of the cases cited in note 111 *supra* was asserted by cross-motion for a turnover order.

[128] The restraining provisions in section 775(1), 779(1) and 781 would prohibit the transfer of tangible and intangible assets equally.

[129] See Wait, Manual of Supplementary Proceedings 623 (Warren ed. 1936). See also note 126 *supra*.

which creditor first served the garnishee.[130] It may be that all of these creditors commenced supplementary proceedings by serving the garnishee rather than the debtor, but this does not appear from the decisions.[131] Although in the few instances in which the issue has been presented directly the courts have held that an earlier judgment debtor subpoena has priority.[132] The question cannot be considered free from doubt.

c. Distinction Based upon Whether Subpoena Contains Restraining Provision

It is not clear whether a restraining provision is crucial to the acquisition of priority. If the test is simply the commencement of supplementary proceedings, apparently the service of a witness subpoena pursuant to section 782 or an information subpoena pursuant to section 782-a would give a creditor priority with regard to the assets of the debtor in the witness' or financial institution's possession. In *Caccavale* v. *Maged,*[133] the City Court of New York stated that "the judgment creditor who first instituted supplementary proceedings of *any kind* has priority (emphasis supplied)." While this view may be in accordance with the creditor's bill rationale—*i.e.,* the creditor who first invokes equity obtains priority because of his diligence—in the creditor's bill situation an injunction was generally served upon the judgment debtor with the "subpoena."[134]

The significance of restraining provisions has been raised directly only in cases concerned with whether the duration of priority is limited to the duration of the restraining provision. These cases held that it was not.[135] In *Welcome Wagon,* although more than two years had expired since any creditor had served a garnishee with a subpoena, the court held, on motion for a turnover order pursuant to section 794, that priority would continue to be in the order in which third party subpoenas were served.
The court explained this result as follows:

> In my opinion, the priority of lien remains the same whether or not the restraining provisions against the third party are no longer in effect. Those restraining provisions effect only the third party and their expiration does not change the theory on which the priority of liens has heretofore been established: viz., diligence to be rewarded.

The court apparently felt that diligence ends with the initial service and does not apply to the application of the property to the satisfaction of the judgment. The court's position might also support the view that priority may be obtained independently of a restraining provision. Nevertheless, there is dictum indicating that a restraining provision is a significant factor in acquiring the "lien,"[136] and this is probably the case.[137]

d. Priority Over After-Acquired Property

Where a creditor has commenced supplementary proceedings against the judgment debtor, it is fairly clear, at least where a receiver is subsequently appointed, that his priority extends to after-acquired property and relates back to the date of service.[138] Where proceedings were commenced only against a garnishee, however, if a receiver is appointed, section 808(2) of the civil practice act would seem to indicate that priority does not attach to property of the debtor which subsequently comes into the possession of the garnishee. Since, however, the restraining provision contained in a subpoena or order for a garnishee's examination prohibits him from transferring after, acquired property of the debtor,[139] it may be contended that priority should also extend to such property. In view of the fact that the courts have not considered the restraining provision significant with regard to the type of asset to which priority attaches or to the duration of priority, however, there is no reason for believing that they would find it significant with regard to after-acquired property.[140]

To avoid compelling creditors to continually seek reexamination of garnishees for the sole purpose of obtaining priority over the have it relate not from the time of original service but from the date of the acquisition of the property by the garnishee. Thus, after-acquired assets whose transfer they have already restrained, the courts might adopt a rule similar to that in the real property

[130] See *e.g.,* City of New York v. Bedford Bar & Grill, 2 N.Y.2d 429, 141 N.E.2d 575 (1957); Glen Cove Trust Co. v. Trypuc, 110 N.Y.S.2d 368 (Sup. Ct. 1952), *aff'd without opinion,* 281 App. Div. 1034, 121 N.Y.S.2d 278 (2d Dep't 1953); Degenstein v. China Lantern, Inc., 200 Misc. 338, 109 N.Y.S.2d 221 (Sup. Ct. 1951); Mariano v. Cathay House Chinese Restaurant, Inc., 199 Misc. 410, 106 N.Y.S.2d 325 (Sup. Ct. 1951); Franklyn Auto Supply Co. v. Bellerose Motors, Inc., 193 Misc. 667, 84 N.Y.S.2d 540 (Sup. Ct. 1948); Brenner v. Patrician Restaurant, Inc., 92 N.Y.S.2d 246 (N.Y. City Ct. 1949).

[131] *Cf.* Matter of Welcome Wagon, Inc., 137 N.Y.L.J. no. 105, p. 13, col. 5 (Sup. Ct. 1957).

[132] Wayne Pump Co. v. Home Owners Bldg. Corp., 133 N.Y.L.J. no. 108, p. 14, col. 6 (County Ct. 1955); Caccavale v. Maged, 123 N.Y.L.J. 1646, col. 3 (N.Y. City Ct. 1950) (relying on Berger v. Waddell, 122 N.Y.L.J. 326, col. 5 (N.Y. City Ct. 1949), a receivership case).

[133] 123 N.Y.L.J. 1646, col. 3 (N.Y. City Ct. 1950).

[134] See Matter of Clover, 8 App. Div. 556, 558, 40 N.Y. Supp. 886, 887 (4th Dep't 1896), *aff'd,* 154 N.Y. 443, 48 N.E. 892 (1897).

[135] Franklyn Auto Supply Co. v. Bellerose Motors, Inc., 193 Misc. 667, 84 N.Y.S.2d 540 (Sup. Ct. 1948); Matter of Welcome Wagon, Inc., 137 N.Y.L.J. no. 105, p. 13, col. 5 (Sup. Ct. 1957).

[136] Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 142–43, 54 N.E.2d 336, 337–38 (1944); Mariano v. Cathay House Chinese Restaurant, Inc., 199 Misc. 410, 106 N.Y.S.2d 325 (Sup. Ct. 1951).

[137] But see Wait, *op. cit. supra* note 129, at 623: "The service upon a judgment debtor of an order for his examination in supplementary proceedings gives to the judgment creditor an equitable lien on any property of the judgment debtor found to be in his possession or under his control. This rule seemingly applies whether there is an injunction contained in the examination order or not."

[138] See note 89 *supra.*

[139] N.Y. Civ. Prac. Act §§779, 781.

[140] Where property is subsequently acquired pursuant to a contractual relationship which was in existence at the time of the original service of the subpoena, the courts, for some purposes, treat the property as though it belonged to the judgment debtor at that time. See **Dannenberg v. L. Leopold & Co.,** 188 Misc. 250, 65 N.Y.S.2d 549 (N.Y. City Ct. 1946); *cf.* Strand v. Piser, 291 N.Y. 236, 52 N.E.2d 111 (1943).

area,[141] which would give a creditor priority over such assets but if more than one creditor has served the garnishee before the acquisition, they would share on a pro rata basis. This would avoid a difficult problem which may arise if priority relates back to the date of the original service Thus, where one creditor serves the debtor's bank and another creditor subsequently serves the judgment debtor, if the debtor later acquires additional assets and deposits them in the bank, a rule which bases priority upon the initial service might divest the priority first obtained over the assets by the creditor who served the debtor.

III. CLAIMS BETWEEN JUDGMENT CREDITORS AND TRANSFEREES

The rights acquired against a subsequent assignee or purchaser of the judgment debtor's assets by the commencement of enforcement procedures are as complex and uncertain as those relating to priority. These rights should be considered in the context of the Fraudulent Conveyance Act,[142] which provides *inter alia* for the setting aside of conveyances made either with intent to defraud creditors or, under certain circumstances, without "fair consideration."[143] The Fraudulent Conveyance Act, however, defines "fair consideration" as including an "antecedent debt,"[144] thereby permitting a debtor to grant a preference. Even if a conveyance is considered fraudulent under the act and it is set aside, the act itself does not recognize any priority between judgment creditors and general creditors in the distribution of proceeds.[145] As in the case of assignments for the benefit of creditors and bankruptcy proceedings, the policy of the Fraudulent Conveyance Act is not to accord any special "rewards" for the diligence involved in converting a claim into a judgment. All three procedures, however, recognize liens established by enforcement of judgment procedures. Thus, as pointed out below, where a judgment creditor takes the seemingly slight additional step of delivering an execution or serving an examination subpoena, his status is drastically changed and he is accorded a great variety of additional rights.[146]

[141] See note 90 *supra*.

[142] N.Y. Debt. & Cred. Law art. 10, The New York Fraudulent Conveyance Act, is identical to the Uniform Fraudulent Conveyance Act except for one provision relating to attorneys' fees. N.Y. Debt. & Cred. Law §276-a.

[143] *Id.* §§273, 274, 275, 277(b).

[144] *Id.* §272. See *In re* Ewald's Estate, 174 Misc. 939, 22 N.Y.S.2d 299 (Surr. Ct. 1940).

[145] The action to set aside a fraudulent conveyance is an equitable action, and the maxim "equality among all creditors is equity" is applied in this situation. Libman-Spanjer Corp. v. Royal Hall, Inc., 146 Misc. 351, 263 N.Y. Supp. 101 (Sup. Ct. 1932).

[146] See *In re* Miss Coquette, Inc., 133 N.Y.L.J. no. 17, p. 7, col. 2 (Sup. Ct. 1955); Weinstein v. Jerry Allen, Inc., 126 N.Y.L.J. 1010, cols. 3–4 (N.Y. City Ct. 1951) (assignment for benefit of creditors); Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 54 N.E.2d 336 (1944) (bankruptcy). The status of enforcement "liens" in fraudulent conveyance actions was set forth by Chancellor Kent in McDermutt v. Strong, 4 Johns. Ch. 687, 691 (N.Y. 1820): "Though it be the favorite policy of this Court to distribute assets equally among creditors, *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this Court."

A. Execution Liens

As in the case of priority, the article on execution contains specific provisions dealing with liens. It provides that the "goods and chattels of a judgment debtor . . . are *bound* by the execution, when situated within the jurisdiction of the officer to whom an execution against property is delivered, from the time of the delivery thereof to the proper officer to be executed, but not before."[147]

The "binding" effect of a delivery is qualified by section 683 of the civil practice act, which provides an exception for purchasers in good faith before levy. It reads:

> The title to personal property acquired before the actual levy of an execution, by a purchaser in good faith, and without notice that the execution has been issued, is not affected by an execution delivered, before the purchase was made, to an officer, to be executed.[148]

If a bona fide purchaser does not acquire title until after levy, however, the execution creditor's claim is superior.[149] In short, the pre-levy execution lien only relates to gratuitous transfers, trans-

[147] N.Y. Civ. Prac. Act §679(1) (emphasis supplied). Although this provision dates back to the earliest period of the law of this state, it represents a modification of the common law rule under which "goods were bound from the award or teste of the execution, and the sheriff could take the goods out of the hands of even a bona fide purchaser. (*Anonymous, Cro. Eliz.* 174; *Burcher* agt. *Wiremand, Id.* 440.) As a judgment when entered during term had relation back to the first day of the term, the execution could be tested as of the first day of the term, so it might well happen that the title of the sheriff was superior to that of a bona fide purchaser, even though he had become such purchaser before the entry of the judgment." Bond v. Willet, 29 How. Pr. 47, 50 (N.Y. Ct. App. 1864).

[148] One commentator, in discussing the lien obtained by delivery, stated that, "It would seem, however, that that lien might be defeated by a conveyance of the property to an innocent purchaser for value in good faith and without notice of the execution. There may be doubt about this, however, under the present statute and the decisions of the courts." 3 Bender, New York Practice 958 (Warren ed. 1954). It is not clear what statute or decisions were the basis for this doubt. Section 683 appears to be clear and no decisions construing it as not permitting a bona fide purchaser before levy to defeat the lien have been found.

[149] Sage v. Woodin, 66 N.Y. 578 (1876). Where a levy is made pursuant to an attachment, however, a subsequent "payee or transferee in good faith" would continue to have a superior claim. N.Y. Civ. Prac. Act §917(2) (third paragraph). This provision was added to the attachment section in 1941, N.Y. Laws 1941, c. 253, on the recommendation of the Judicial Council, which stated that the amendment "is in general accord with the statutory provision governing the rights of a judgment creditor after the issuance of a property execution." 7 N.Y. Jud. Council Rep. 387, 437 (1941).

fers to purchasers with notice of the execution[150] and transfers to certain other creditors.[151]

1. *Duration of Lien*

The duration of the lien obtained by delivery is, at the most, sixty days unless the execution is extended[152] and, at the least, until the sheriff returns the execution which may conceivably be the same day that it was delivered. If after an execution was delivered to the sheriff, the judgment debtor transfered his assets to a non-bona fide purchaser and the sheriff, finding no assets, returned the execution, the lien would be lost.[153]

Even after a levy, if the judgment creditor instructs the sheriff to delay sale, the lien may become ineffective against subsequent creditors and bona fide purchasers.[154]

Where tangible property is involved, a fairly prompt seizure and sale is contemplated and the function of the lien is actually less as a security device than as a manner of aiding the execution process in achieving its primary function.[155] This accounts not

[150] The rationale for this rule is unclear. It apparently would permit a creditor to obtain twice the value of the property—the amount paid by the purchaser to the debtor and the amount received at a sheriff's sale when the property is recovered from the purchaser. If the rationale is that the creditor may be unable to recover the funds from the debtor, the lien could be made contingent on that event or the test could be phrased in terms of an intent to defraud as in the Fraudulent Conveyance Act. N.Y. Debt. & Cred. Law §276. The present rule might discourage good faith efforts on the part of the debtor to satisfy the judgment on his own initiative by selling his assets. While he should probably warn purchasers that they may be buying a law suit, if he does so he insures their losing the suit.

[151] "Purchaser" in section 683 has been defined as requiring fresh consideration (Osborn v. Alexander, 40 Hun 323 (N.Y. Gen. T. 4th Dep't 1886)), and a subsequent assignment for the benefit of creditors has been held subject to the rights of a prior execution lien. In re Miss Coquette, Inc., 133 N.Y.L.J. no. 17, p. 7, col. 2 (Sup. Ct. 1955). The lien, however, does not affect other creditors who issue executions from courts not of record, N.Y. Civ. Prac. Act §682, nor probably those who issue executions from courts of record where the executing officer is not a sheriff. Garro v. Republic Sheet Metal Works, Inc., 284 App. Div. 660, 134 N.Y.S.2d 151 (4th Dep't 1954). *Contra*: Feller v. Duncan Stewart Industries, 138 N.Y.L.J. no. 69, p. 6, col. 5 (Sup. Ct. 1957). The effect upon a creditor who subsequently commences supplementary proceedings and obtains a turnover order or has a receiver appointed is unclear. See text at note 41 *supra*.

[152] N.Y. Civ. Prac. Act §640.

[153] *Cf.* Rich v. New York White Line Tours, Inc., 266 App. Div. 752, 41 N.Y.S.2d 283 (2d Dep't 1943); Feller v. Duncan Stewart Industries, 138 N.Y.L.J. no. 69, p. 6, col. 5 (Sup. Ct. 1957).

[154] See text at notes 32 and 33 *supra*. It is not clear whether the lien would become ineffective only against subsequent execution creditors or all creditors. Where a levy is made upon assets that are insufficient to satisfy the judgment *quaere* whether the delivery lien would continue past the sixty day period until after sale when the execution is returned.

[155] See text at note 32 *supra*. "The simple idea here involved was that the sheriff would act promptly upon receiving the writ, and the 'lien' would thus operate only during the interval required for the officer to get to the place where the goods were and take them into his custody. Wilful delay was unpardonable; and hence the rule that a judgment creditor who, although

only for the rule regarding an execution becoming dormant but also for the rule that whatever claim is acquired during the existence of the execution lien is lost if the execution is returned.

2. *Enforcing Lien After Transfer*

Where a judgment creditor discovers that the debtor's assets have been transferred after an execution was delivered to the sheriff, he should immediately request that the sheriff not return the execution. The sheriff, however, is probably under no obligation to retain it. If the property remains in the sheriff's jurisdiction after the transfer, the creditor may have the sheriff levy upon it and have title determined in the manner prescribed by section 696 of the civil practice act. If it is determined that the transferee is a bona fide purchaser, however, the creditor may be liable for damages if he follows this procedure.[156]

One of the principal functions of the creditor's bill in chancery was to permit a creditor to preserve his lien and have title determined without risking anything more than possible court costs.[157] Although the present statutory judgment creditor's action is supposed to have the same functions as the ancient creditor's bill,[158] section 1189 of the civil practice act provides that the return of an execution, either wholly or partly unsatisfied, is a prerequisite to the commencement of the action. If a creditor seeks to utilize the judgment creditor's action "in aid of execution," and complies with the requirement of a returned execution, however, he may well lose his lien.[159] It may be possible to avoid the requirement by proceeding under the Fraudulent Conveyance Act if the transfer was "fraudulent" within the meaning of that act.[160] Since the area of overlap between conveyances that are "fraudulent" and those that are covered by an execution lien is relatively small, however, the principal manner in which the execu-

delivering the writ to the sheriff, instructs the latter not to execute it until further orders, or to make a 'paper levy' but leave the debtor in possession, will lose the benefit of his lien as against other creditors despite the fact that their execution came later." 1 Glenn, Fraudulent Conveyances and Preferences 46 (rev. ed. 1940).

[156] See Dyett v. Hyman, 129 N.Y. 351, 29 N.E. 261 (1891); Winchell v. Union Nat. Bank, 279 App. Div. 827, 109 N.Y.S.2d 410 (3d Dep't 1952). "The execution creditor ordinarily is not liable where the sheriff seizes property belonging to a third party, for the issuance of the execution implies only an authority to do a lawful act pursuant to its command. He may be held liable, however, if he authorizes the levy or subsequently ratifies it." 7 Carmody-Wait, Cyclopedia of New York Practice 655 (1953).

[157] See Beck v. Burdett, 1 Paige 305, 308 (N.Y. Ch. 1829).

[158] See Note, *Present Status of the Creditor's Bill in New York*, 6 Syracuse L. Rev. 334, 335 (1955).

[159] See Stewart v. Beale, 7 Hun 405 (N.Y. Gen. T. 3d Dep't 1876), *aff'd without opinion*, 68 N.Y. 629 (1877). See also note 153 *supra*. *But cf.* American Surety Co. v. Conner, 251 N.Y. 1, 5, 166 N.E. 783, 784 (1929).

[160] N.Y. Debt. & Cred. Law §§270-281. While an action may be brought under this act even if the execution is returned, the creditor may forfeit his priority in distribution if he has no lien. See Libman-Spanjer Corp. v. Royal Hall, Inc., 146 Misc. 351, 263 N.Y. Supp. 101 (Sup. Ct. 1932).

tion lien may be rendered meaningful is by a suit under the somewhat amorphous inherent equity powers of the court.[161]

Where a suit under the court's equitable power is commenced before levy, however, it is not clear whether the judgment creditor would have priority over subsequent levies by other creditors or protection against transfers to bona fide purchasers.[162] In *Beck* v. *Burdett*[163] the chancellor stated that "an actual levy is probably necessary to enable him to hold the property against other execution creditors or bona fide purchasers." At least with regard to subsequent execution creditors whose executions are issued from courts of record the first creditor would be protected by the provisions of section 680 that "the one first delivered to an officer to be executed has preference, notwithstanding that a levy is first made by virtue of an execution subsequently delivered." Creditors whose executions are issued from courts not of record and bona fide purchasers, however, are not affected by the delivery lien of section 680.[164] While it was seen earlier that the commencement of a creditor's action in equity does not give the judgment creditor any lien on tangible assets until a receiver is appointed, the Court of Appeals in *First Nat. Bank* v. *Shuler*[165] indicated that this is not true where "the action is brought in aid of execution." It is not clear whether the Court meant that in such an event, the creditor obtained a new lien from the time of the commencement of the creditor's action or was merely referring to the existing execution lien. It could well be read as indicating that the creditor, in such an event, would obtain the same benefits with regard to the debtor's tangible assets that would normally be obtained over his intangible assets—*i.e.*, priority over all subsequent creditors and a lien good against bona fide purchasers—without the appointment of a receiver. The wary creditor, however, would do well to secure the immediate appointment of a receiver.

3. *Lien on Equitable Assets*

Since a sheriff cannot actually "seize" a debt or chose in action and a separate suit may be required before it may be collected, the security function of the "lien" is quite significant in an execution against such assets. Section 679(2) provides that "[d]ebts or causes of action arising under or on account of a contract"

[161] See 13 Carmody-Wait, Cyclopedia of New York Practice 755 (1954). Throop's notes to what is now section 1190 of the civil practice act indicate that he did not anticipate that the statutory creditor's action would be utilized in the fraudulent conveyance situation. "This section is confined by its terms to an action brought under the last section; it will not therefore apply to an action where the return of an execution is not necessary to enable a judgment creditor to attack a fraudulent conveyance, etc., under the general equitable powers of the court." N.Y. Code Civ. Proc. §1872, note (Throop ed. 1880).

[162] *Cf.* Stewart v. Beale, 7 Hun 405 (N.Y. Gen. T. 3d Dep't 1876), *aff'd without opinion*, 68 N.Y. 629 (1877).

[163] 1 Paige 305, 306 (N.Y. Ch. 1829).

[164] N.Y. Civ. Prac. Act §§682, 683.

[165] 153 N.Y. 163, 166, 47 N.E. 262, 264 (1897).

are not "bound" until they are levied upon pursuant to section 687-a.[166] Once a levy has been made under that section,[167] the judgment creditor apparently obtains all the rights that a levy upon tangible assets would give him.[168] Where a similar "levy" is made pursuant to an attachment, however, a subsequent bona fide purchaser would not be affected.[169]

B. Judgment Creditor's Action Liens

1. *Distinction Between Legal and Equitable Assets*

When a judgment creditor commences a creditor's action, he obtains a claim to the debtor's assets which is probably superior even to that of a subsequent bona fide purchaser.[170] While it is generally stated that the "lien" relates only to the debtor's equitable assets,[171] the reasons given for the existence of the "lien" do not compel this conclusion. The explanations may be separated into two categories: those considering commencement of the suit as imposing a disability upon the debtor so that he could not voluntarily pass title to anyone; and those considering the commencement of suit as imposing a disability upon the transferee so that he cannot receive title.

[166] Although they are not "bound" by delivery of the execution, the creditor may nevertheless obtain priority thereby over other executions and attachments. See Truebner Voelbel Co. v. A. Melides & Fils, 138 N.Y.S.2d 391, 393 (Sup. Ct. 1954), *aff'd without opinion*, 285 App. Div. 928, 139 N.Y.S.2d 884 (1st Dep't), *motion for leave to appeal denied*, 285 App. Div. 1128, 141 N.Y.S.2d 820 (1st Dep't 1955).

[167] The levy is made "by leaving with the person against whom the cause of action exists or who owes the debt a copy of the execution certified by the officer making the levy and showing the date when the execution was delivered to him. The copy of the execution must be accompanied by or have indorsed thereon a writing specifying, with sufficient particularity to identify it, the debt or cause of action levied upon." N.Y. Civ. Prac. Act §687-a(1).

[168] "The levy is a seizure of all the rights of the judgment debtor in and to the debt or cause of action." *Id.* §687-a(2). The levy in this situation should be contrasted with the concept of a levy where tangible assets are involved. "The levy was a physical proposition; and the creditor, seated (through his agent the sheriff) upon the goods, which he held in custody until the day of sale, was in a position of domination that required no resort to any theory that relates to 'liens'." 1 Glenn, Fraudulent Conveyances and Preferences 44 (Rev. ed. 1940). Even where the sheriff does not actually take tangible assets into his custody, he may at least post a notice giving warning to potential purchasers. In the non-tangible asset situation, not only would there be no warning, but even the judgment debtor may be unaware of the levy.

[169] N.Y. Civ. Prac. Act §917(a).

[170] "It has been repeatedly held that the commencement of a suit in chancery by a judgment creditor, to reach choses in action and equitable assets, creates a lien or charge thereon, and the subsequent assignee takes them subject to the creditor's lien. . . ." Matter of Clover, 8 App. Div. 556, 557, 40 N.Y. Supp. 886, 887 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897). See Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 Colum. L. Rev. 504, 511 (1929) ("With or without notice, the assignee's rights were inferior to those of the judgment creditor.")

[171] "The general rule is that the filing of a judgment creditors' bill and service of process creates a lien in equity on the judgment debtor's equitable assets. [citations] And such is the rule in New York. [citations]" Metcalf v. **Barker, 187 U.S. 165, 172 (1902).** See also Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 142, 54 N.E.2d 336, 337 (1944).

Included in the category based on a concept of the debtor's disability is the view that the lien is derived from that obtained in a breach of trust suit[172] and the view that commencement of the suit is somehow equivalent to an execution levy.[173] In the breach of trust situation, the trustee would be prohibited from transferring any of the assets in question and the lien would presumably apply to both equitable and legal property. In this connection it is significant that the injunction which was served together with the subpoena in a creditor's suit, enjoined the transfer of all of the debtor's assets[174] and the judgment creditor's bill always included a prayer for the discovery of all of the debtor's assets.[175] No distinction between "equitable" and other assets may be drawn under this theory.

With regard to the analogy to an execution levy, which is more an illustration of the consequences rather than an explanation of why they should follow, the ground given for the property dichotomy is that there is no need for an "equitable" levy on tangible property since it may be reached by an actual levy.[176] This explanation is not fully convincing because the creditor's bill may have been based upon an inadequacy of execution to reach such property because the property was concealed or fraudulently transferred. Circular reasoning must be resorted to for justifications predicated upon the expectations of purchasers—*i.e.*, a potential purchaser of tangible assets need only check whether the property is still in the seller's possession while a potential purchaser of intangible assets would be required to check whether a creditor's suit had been commenced against the seller.[177] It is because of the "lien" rule that a purchaser would have different expectations.

[172] "One of the earliest judicial notices upon this point which I have met with in our courts was in (*Hadden* v. *Spader*, 20 Johns. 554, 571), where Mr. Justice Woodworth, in the prevailing opinion of the court for the correction of errors, assimilated the case to that of a suit against a trustee for a breach of trust. There the filing the bill and service of the subpoena, would affect the trustee with notice, and prevent any further dealing with the subject to the prejudice of the plaintiff. One owing another, or having moneys or property of his in his hands, is in some sense his trustee." Becker v. Torrance, 31 N.Y. 631, 637 (1864).

[173] Metcalf v. Barker, 187 U.S. 165, 173 (1902) ("commencement of the suit amounts to an equitable levy"); Miller v. Sherry, 69 U.S. (2 Wall.) 237, 249 (1864) ("It has been aptly termed an 'equitable' levy"); Lynch v. Johnson, 48 N.Y. 27, 33 (1871) ("regarded as an actual levy"); Porter v. Williams, 5 How. Pr. 441, 443 (N.Y. Sup. Ct. 1850), *aff'd*, 9 N.Y. 142 (1853) ("the same effect in creating a lien, as a levy"); *id.* at 444 ("the debtor could do nothing to divest the lien which his creditor had acquired").

[174] Matter of Clover, 8 App. Div. 556, 40 N.Y. Supp. 886, 887 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897).

[175] 1 Glenn, Fraudulent Conveyances and Preferences 51 (rev. ed. 1940).

[176] *Id.* at 53–5.

[177] There are numerous situations where a levy has been held valid although the sheriff does not actually take possession of the property and although a third person would have no reason to know that a levy had been made. Roth v. Wells, 29 N.Y. 471 (1864); Barker v. Binninger, 14 N.Y. 270 (1856); Dean v. Campbell, 19 Hun 534 (N.Y. Gen. T. 4th Dep't 1880); see 7 Carmody-Wait, Cyclopedia of New York Practice 635–37 (1953). Note also that the purchaser may be required to check court records to determine whether a receiver has been appointed.

The rule may have developed because of a desire not to impede commercial dealings in tangible property, but *quaere* whether this explanation would not be as valid with regard to intangible property today.

Under an explanation for restricting the lien to equitable assets based upon the disability of the transferee, the purchaser is held to have had constructive notice of the injunction and creditor's suit on the basis of a common law *lis pendens*.[178] It is stated that this effect is given only where the assets are not subject to levy upon an execution,[179] although the creditor's suit common law *lis pendens* was extended to real property, [180] and tangible personal property was subject to *lis pendens* in other situations.[181] While it was generally necessary in such situations to describe the property in the bill with particularity,[182] even a description was probably of no avail in the creditor's action situation where tangible personalty was involved.[183] In the case of equitable assets, however, a description was apparently not even necessary.[184]

Although it may be possible to explain the dichotomy between legal and equitable property in terms of the historical development of the creditor's bill,[185] it is probably due to a confusion between the priority and lien situations. Thus, the courts stated that the *lis pendens* "effect was given to the suit as the reward of superior diligence on the part of the creditor who initiated the proceedings."[186] The basis for the distinction between equitable and

[178] "The doctrine proceeded upon the ground of constructive notice by virtue of an actual *lis pendens*." Voorhees v. Seymour, 26 Barb. 569, 580 (N.Y. Sup. Ct. 1857). See Comment, *Priorities of Creditors Under Judgment Creditor's Bills*, 42 Yale L.J. 919, 924 (1933).

[179] *Id.* at 926.

[180] See Miller v. Sherry, 69 U.S. (2 Wall.) 237 (1864).

[181] See 14 Carmody-Wait, Cyclopedia of New York Practice 40–42 (1954).

[182] "If the creditor knows in advance all about the asset he seeks to reach, and sufficiently describes it in his bill, the suit may operate as a *lis pendens*, provided the subject matter is real estate. If, however, the bill cannot describe the property, but its nature is revealed through the discovery that is extorted from the debtor, or other defendants, then an appropriate amendment of the bill will be allowed so that thereafter it may operate as *lis pendens*, thus binding one who may purchase the property before final decree." 1 Glenn, Fraudulent Conveyances and Preferences 51–52 (rev ed. 1940).

[183] Even where the creditor's action is brought to recover specific personalty which was fraudulently transferred, and the property is described in the bill, there is substantial doubt as to whether the creditor obtains a "lien" by the commencement of the action which is superior to the claim of a subsequent bona fide purchaser. See notes 162–65 *supra*. It would seem *a fortiori* that where the suit is brought to discover the location of concealed, although known, assets, that the creditor would not obtain such a "lien."

[184] "[T]he courts generally say that the lien dates from the filing of the bill, whether the bill describes the property in question or not." Comment, *Priorities of Creditors Under Judgment Creditor's Bills*, 42 Yale L.J. 919, 925, n. 37.

[185] At one stage in the development of the creditor's bill in chancery, separate bills were brought for each particular function of the present creditor's action. See Wait, Fraudulent Conveyances 130 n. 3 (3d ed. 1897). Thus, one bill might be brought solely for discovery, another to reach property that had been fraudulently conveyed and a third to reach intangible assets. The lien upon equitable assets may have developed initially only in connection with the bill designed to reach such assets and may have been continued in this limited form even after the various functions were combined into one omnibus bill.

[186] Voorhees v. Seymour, 26 Barb. 569, 580 (N.Y. Sup. Ct. 1857).

legal assets in the priority situation is the view that a creditor who secures tangible assets by reason of an execution is more "diligent" than a creditor who believes it necessary to enter equity to secure such assets.[187] While it is possible to speak of "superior diligence" in the priority situation, however, it is a meaningless concept where the issue is between a creditor and a transferee since they are not in the same "race."

Nevertheless, despite the apparent absence of any valid justification, the weight of authority supports the view that, before the appointment of a receiver, the creditor's lien applies only to equitable assets.[188]

C. Supplementary Proceeding Receivership Liens

1. Transfers After Filing of Receivership Order

The rules relating to claims between receivership creditors and purchasers from the judgment debtor are largely statutory; they vest title to the property in the receiver from the time of filing the order. The order is good against a bona fide purchaser of real property from the time of filing of the order in the county where the property is located, and in the case of personal property from the time of filing in the county of the debtor's residence. Section 807 of the civil practice act provides:

> The property of the judgment debtor, whether acquired before or any time after the appointment of a receiver, is vested in a receiver who has duly qualified, from time of filing the order appointing him or extending his receivership, as the case may be; subject to the following exceptions in favor of a purchaser in good faith without notice and for valuable consideration.
>
> 1. Real property is vested in the receiver only from the time when the order or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.
>
> 2. Where the judgment debtor at the time when the order is filed resides in another county of the state, his personal property is vested in the receiver only from the time when a certified copy of the order is filed with the clerk of the county where he resides.

The real property rule has caused some difficulties but their consideration is not within the scope of this study.[189] With

[187] See note 60 *supra*.

[188] *But see* Matter of Clover, 8 App. Div. 556, 559, 40 N.Y. Supp. 886, 887 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897) ("In regard to movable property liable to execution at law, although it is subject to the lien of the creditor, it may be seized on execution by any other creditor until the order for a receiver is made but not afterwards, such order being equivalent to an actual levy on the property."); *cf.* Becker v. Torrance, 31 N.Y. 631, 640 (1864).

[189] For a discussion of the real property situation see Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Colum. L. Rev. 1007, 1022-26 (1935).

regard to personal property, if the receivership order is filed in a county other than that in which the debtor resides, the creditor's claim is superior to that of everyone except a subsequent bona fide purchaser "without notice."[190] Once the order is filed in the county in which the debtor resides, actual notice ceases to be material. The creditor's claim is superior even to that of a bona fide purchaser.

The personal property rule rationale is not the metaphysical one of title "vesting" in the receiver preventing its conveyance by the debtor, for if it were, there would be no reason for the bona fide—non-bona fide purchaser distinction. The rule is predicated upon the concept of transferee disability based upon constructive notice. The purchaser is conclusively presumed to have checked the receivership records.[191] Since all that is required is one filing in a county in which the debtor then resides, if the debtor goes to another county, the purchaser must also be presumed to know which other counties the debtor has resided in, and to have checked the records in those counties. While it is normal practice to check these records when purchasing real property it is unusual to do so where personal property is involved in a normal course of business transaction.

No distinction is made between equitable and legal assets of the debtor, the county in which they are situated, whether the receiver or creditor knows of their existence, and whether they are then in existence or not. Thus, in a case where after a receiver was appointed the debtor had a building erected, the Court found that although the "asset" was created by the contractors and workmen, the receiver's claim was superior to that of the mechanic's liens.[192]

While the duration of the lien is not clear, it would seem that only the most inordinate delay without any shred of justification would provoke a court into holding that the lien became dormant and ineffective.[193]

2. Transfers Before Filing of Receivership Order

The appointment of a receiver, it was seen earlier in the discussion on priority, affects not only transactions occurring after the appointment, but, pursuant to the concept of "relation back" in section 808, to those occurring at any time after the commencement

[190] It is not clear what the purchaser is not supposed to have notice of—the appointment of a receiver or the commencement of supplementary proceedings. If the purchaser had knowledge that a restraining notice had been served upon the debtor, even if he was unaware of the appointment of a receiver, in all likelihood he would not be considered "without notice." See N.Y. Civ. Prac. Act §808.

[191] Sections 809 and 810 of the civil practice act contain specific provisions relating to the manner in which receivership orders are to be filed and indexed to render them more easily accessible.

[192] John Mulstein Co. v. City of New York, 213 N.Y. 308, 107 N.E. 651 (1915). *But see* N.Y. Lien Law §28.

[193] See text at notes 91–102 *supra*.

of supplementary proceedings. Thus, once a receiver has been appointed, if the creditor had commenced supplementary proceedings by serving a subpoena upon the judgment debtor, the appointing creditor's claim to all personal property owned by the debtor at the time of service or thereafter acquired, would be superior to that of everyone except the persons enumerated in the last paragraph of section 808. That paragraph provides:

> But this section does not affect the title of a purchaser in good faith without notice and for a valuable consideration, or the payment of a bona fide debt in good faith and without notice, in either of which cases the burden of proving the bona fides shall be on such purchaser or payee.

While in the purchase situation it is apparently the third person who is required to be "bona fide," the matter is not clear in the debt situation. Use of the term "the payment" rather than "the receipt" would seem to indicate that it is the judgment debtor who must be "in good faith and without notice." If this is the case, no voluntary "payment" by the judgment debtor after he had been served with a subpoena would be within the exception. On the other hand, if a subpoena had been served only upon a garnishee, and the judgment debtor had no notice thereof, even if the payee had notice the transfer may not be assailable.[194]

If "payment" should be read as meaning "receipt,"[195] however, even after a judgment debtor has been restrained, he may be able to give a preference to another creditor if he is willing to risk possible punishment for contempt. The statute could mean that in the debt situation both parties must be in good faith, while in the purchase situation, only the purchaser need be.

In any event, if a "bona fide" purchase or payment has been made before the appointment of a receiver, the payee or purchaser's claim is superior to that of the judgment creditor or receiver. This would seem to indicate that the mere service of a supplementary proceeding subpoena would not give the creditor a lien which is good against such persons, regardless of whether the property is equitable or legal.[196]

It will be seen, however, that at least with regard to equitable assets, many courts have viewed the service of a subpoena as creating a "lien" which is good even against a bona fide purchaser. With

[194] *But see* N.Y. Civ. Prac. Act §799-a.

[195] The final phrase of section 808, stating that the payee has the burden of proving "the bona fides" of the transaction, would tend to support this position. See also McCorkle v. Herrman, 117 N.Y. 297, 302, 22 N.E. 948, 949 (1889).

[196] "If the old rule in respect to creditors' bills still prevails, we have this anomaly: That, if the creditor institutes supplementary proceedings, no equitable lien attaches to the choses in action and equitable assets of the debtor, as against a bona fide purchaser, without notice, and for a valuable consideration, but otherwise if he proceeds by action. But why should such a purchaser or assignee be protected in the one case, and not in the other?" Matter of Clover, 8 App. Div. 556, 564, 40 N.Y. Supp. 886, 891 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897).

the enactment of section 799-a of the civil practice act in 1938,[197] this position would seem to have been given some degree of legislative approval.

D. Supplementary Proceeding Liens Where No Receiver Appointed

As in the case of supplementary proceeding priorities, the development of rules governing claims between creditors who have commenced supplementary proceedings but have not secured the appointment of a receiver and purchasers or assignees of the judgment debtor's assets, has been marked by a great deal of confusion and continuing uncertainty.[198] It was natural for the early cases to look to the creditor's bill rules for guidance because the Field Code contained no reference to "liens" in this area.

Those courts which viewed the lien consequences as being based upon the transferee's disability because of the constructive notice obtained by *lis pendens*, denied the existence of any lien in supplementary proceedings where this factor is not present.[199] On the other hand, in a decision where the creditor's bill lien was explained on the basis of the judgment debtor's disability, no reason was seen for applying a different rule in supplementary proceedings.[200] Although

[197] N.Y. Laws 1938, c. 605.

[198] For example, as recently as 1943, the court which probably has had the greatest volume of supplementary proceedings dealt with a "lien" issue in these terms:

> "*I think* the cases support the view that the service of the third party subpoena has given the judgment-creditor *a lien of some sort* which, though formerly enforceable only by means of a receivership, may now, *I think*, be asserted, without the necessity of seeking the appointment of a receiver. . . ." Fort Washington Automobile Club, Inc. v. S.G.S. Garage Co., 40 N.Y.S.2d 584, 586 (N.Y. City Ct.), *rev'd on other grounds sub nom.* Murphy v. Fort Washington Automobile Club, Inc., 44 N.Y.S.2d 837 (Sup. Ct. App. T. 1943) (emphasis supplied).

[199] "The rule under the old system was well settled, that a creditor who had an execution returned unsatisfied would, by filing a bill and serving process upon the party, obtain a specific lien upon the equitable assets of his debtor. (Edmeston v. Lyde, 1 Paige, 637). . . . The doctrine proceeded upon the ground of constructive notice by virtue of an actual *lis pendens*, and this effect was given to the suit as the reward of superior diligence on the part of the creditor who initiated the proceedings. Can so broad an effect be given to the order for examination of the debtor under the code? An order, it must be remembered, which is obtained *ex parte* at chambers, without notice, and which may never, in any stage of the proceeding, become a matter of record. . . . It would be giving the naked order for an examination a very far reaching effect to hold that all the equitable assets of the debtor passed out of him *eo instanti* the order for his examination was made, and although there were no other party in existence that could take, they were to be held in abeyance until perchance, at some time thereafter, a receiver should be appointed in whom the title could vest." Voorhees v. Seymour, 26 Barb. 569, 580–82 (N.Y. Sup. Ct. 1857). See also Edmonston v. McCloud, 16 N.Y. 543 (1858).

[200] Porter v. Williams, 5 How. Pr. 441 (N.Y. Sup. Ct. 1850), *aff'd*, 9 N.Y. 142 (1853). Although this view was adopted in other states, see Cohen, *Collection of Money Judgments in New York: Third Party Orders*, 35 Colum. L. Rev. 1196, 1214–17 (1935), it was generally rejected by the New York courts, Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 Colum. L. Rev. 1007, 1015–17 (1935), until perhaps recently.

purportedly following the debtor's disability reasoning, a later Court of Appeals decision[201] indicated that the lien would not apply to a bona fide purchaser for value.[202] This view was apparently adopted by the Throop revisers who recommended the enactment of what is now section 808 of the civil practice act.[203] While that section specifies the extent of the lien where a receiver is subsequently appointed, it apparently does not govern the scope of the lien where a receiver is not appointed but the creditor proceeds by turnover order.

1. Variations in Lien Dependent upon Subsequent Choice of Turnover Order or Receivership

Although section 808 has been held to eliminate the equitable-legal asset dichotomy,[204] virtually all non-receiver supplementary proceeding "lien" cases speak in terms of a lien upon equitable assets only and cite as the source of the supplementary proceeding lien, not section 808, but the creditor's bill in chancery.[205] While it is not clear, this may mean that the lien upon equitable assets is good against a bona fide purchaser, as in the creditor's action situation, if the judgment creditor proceeds by turnover order[206] but not if he appoints a receiver.[207] Before the enactment of section 799-a of the civil practice act,[208] this question caused a considerable

[201] Lynch v. Johnson, 48 N.Y. 27, 33 (1871). "These sections furnish a simple substitute for the creditor's bill, as formerly used in Chancery. The commencement of the creditor's suit in Chancery gave the creditor at once a lien upon the equitable assets of the judgment debtor. (*Storm* v. *Waddell*, 2 Sandf. Ch. 494; *Brown* v. *Nichols*, 42 N.Y. 26). He was rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy upon the equitable assets of the debtor. Under section 292 and 294, the service of the order takes the place of the commencement of the suit under the old system, and should give the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of his debtor."

[202] *Ibid.* See Matter of Clover, 8 App. Div. 556, 560, 40 N.Y. Supp. 886, 888 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897), where the court disapproved the *Lynch* view because in a creditor's suit the "lien" was good against bona fide purchasers.

[203] See N.Y. Code Civ. Proc. §2469 (Throop ed. 1881). In addition to the purchaser exception, the section also excluded "the payment of a debt in good faith, and without notice," from the scope of the pre-receiver "lien."

[204] McCorkle v. Herrman, 117 N.Y. 297, 22 N.E. 948 (1889); Droege v. Baxter, 69 App. Div. 58, 74 N.Y. Supp. 585 (1st Dep't), *aff'd without opinion*, 171 N.Y. 654, 63 N.E. 1116 (1902). See text at notes 117–121 *supra*.

[205] See *e.g.*, Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 54 N.E.2d 336 (1944); Reynolds v. Aetna Life Ins. Co., 160 N.Y. 635, 648, 55 N.E. 305, 309 (1899); Becker v. Romanzo, 245 App. Div. 185, 281 N.Y. Supp. 317 (3d Dep't 1935); Franklyn Auto Supply Co. v. Bellerose Motors, Inc., 193 Misc. 667, 84 N.Y.S.2d 540 (Sup. Ct. 1948). *But see* Eisenberg v. Mercer Hicks Corp., 199 Misc. 52, 53–54, 101 N.Y.S.2d 662, 664 (Sup. Ct. 1950), *aff'd without opinion*, 104 N.Y.S.2d 804, 806 (County Ct. 1951) ("by commencing supplementary proceedings the judgment-creditor obtained a lien upon such property of the judgment debtor as the proceeding lawfully may reach").

[206] See City of New York v. Bedford Bar & Grill, 2 N.Y.2d 429, 141 N.E.2d 575 (1957); Cobbe v. Stowe, 171 Misc. 687 (County Ct. 1939); Weinstein v. Jerry Allen, Inc., 126 N.Y.L.J. 1010, cols. 3, 4 (N.Y. City Ct. 1951).

[207] See Matter of Clover, 8 App. Div. 556, 562, 40 N.Y. Supp. 886, 890 (4th Dep't 1896), *aff'd*, 154 N.Y. 443, 48 N.E. 892 (1897).

[208] N.Y. Laws 1938, c. 605.

amount of difficulty where an examination subpoena was served upon a garnishee and the judgment debtor subsequently assigned the assets which were in the garnishee's possession.[209] Section 799-a, in a somewhat modified form, was proposed by a committee of the Association of the Bar of the City of New York, to clarify the rule and to "give the judgment creditor rights in property in the hands of the third party and in debts due from the third party superior to those of a subsequent assignee from the judgment debtor."[210] The section provides:

> Every transfer by the judgment debtor by assignment or otherwise, of any property held by, or debt due from a third party upon whom there shall have previously been served an order or subpoena containing any stay or injunction as provided in this article, shall be subject to such rights and remedies as the judgment creditor would have had if such transfer had not been made; except that the foregoing provisions of this section shall not apply to (a) a transfer of a debt evidenced by a negotiable instrument which has been transferred to a transferee in good faith and for value, or (b) transfer of property which has been delivered, or for which a negotiable warehouse receipt, negotiable bill of lading or other negotiable document of title has been delivered, to a transferee in good faith and for value.[211]

In the bar association version, the section ended with the clause "if such transfer had not been made." The except clause was apparently added subsequently.

a. Effect of Section 799-a Where Garnishee Indebted to Judgment Debtor

Where a debt which is not evidenced by a negotiable instrument is involved, even if the judgment debtor and transferee for value had no notice of the service upon the garnishee, the judgment creditor would have "such rights and remedies" as he "would have had if such transfer had not been made." If the garnishee has paid the debt to the transferee, this rule may not be in conflict

[209] See discussion of cases in Cohen, *Collection of Money Judgments in New York: Third Party Orders*, 35 Colum. L. Rev. 1196, 1207–17 (1935) ("[i]n the cases involving this precise point the New York courts have achieved some weird examples of legal reasoning").

[210] Committee on Law Reform, Report on Collection of Money Judgments 19 (Association of the Bar of the City of New York 1937). A bill having similar effect was disapproved the year before by another committee of the bar association on the ground that it "would effect a radical alteration in the settled practice of borrowing money and securing such borrowing by the assignment for security of book accounts receivable of the borrower." Committee on State Legislation, Bulletin No. 9, 479–80 (Association of the Bar of the City of New York 1936). While this bill used the term "lien," however, it was apparently purposely omitted in section 799-a. "Last year a bill was introduced into the Legislature creating a lien in favor of the judgment creditor by virtue of the service of a third party order. This bill failed of enactment. While the Committee does not recommend the specific creation of a lien, it does recommend that the judgment creditor be given priority rights." Committee on Law Reform, *op. cit. supra* at 19–20.

[211] Committee on Law Reform, *op. cit. supra* note 210 at 34.

with the bona fide purchaser exception of section 808 if by "rights and remedies" is meant only the right to obtain payment from the garnishee.[212] If the garnishee has not paid the debt to anyone, however, the result under the very limited bona fide purchaser proviso of section 799-a would differ from that under section 808. This may mean either that a creditor in such a situation would be able to recover the debt by a turnover order but would lose his claim if he has a receiver appointed or that section 799-a has effected a modification of section 808 by implication.[213] If the garnishee paid the debt to the judgment creditor, and the transferee brings suit against the creditor, the result under section 799-a would also apparently differ from that under section 808.

Where the garnishee has not paid the debt to anyone, although section 799-a indicates that the judgment creditor may secure an order that payment be made to him instead of to the assignee, if the garnishee abides by such an order he may nevertheless be required to pay the debt a second time to the assignee under section 794(3). That section states that if the garnishee has notice of an assignment by the debtor to a transferee in good faith and for value "prior to the entry of the order," payment by him in compliance with the order would not discharge his indebtedness. *Quaere* whether even interpleader furnishes the garnishee with an adequate means of escape from the meshes of these provisions.

b. Effect of Section 799-a Where Garnishee Holds Tangible Property of Judgment Debtor

Where tangible personal property for which a negotiable instrument has not been delivered is involved, if the property is not delivered to the purchaser in good faith and for value, but remains in the possession of the garnishee, the same situation is presented. The creditor may obtain the property under section 799-a but not under section 808. If the property has been delivered to a bona fide purchaser, however, the result under both sections is apparently the same. The creditor apparently may not recover the property

[212] In such a situation, the garnishee may be required to pay the debt twice. This might occur even without section 799-a, since the garnishee may be held in contempt for violating the restraining provision. In a contempt proceeding the creditor may be required to show actual damages if more than two hundred and fifty dollars is involved. N.Y. Jud. Law §773. Not only may the garnishee be required to pay the debt twice under section 799-a, but the creditor may also be able to recover twice the amount of the debt, by recovering both the amount paid by the transferee to the judgment debtor and the debt from the garnishee.

[213] If it has not effected such a modification, even the wary creditor who would proceed by turnover order rather than receivership may be compelled to forego his rights under section 799-a if another creditor has secured the appointment of a receiver. The rule appears to be that once a receiver has been appointed, no other judgment creditor, whether he has priority or not, is entitled to any of the debtor's assets unless he joins in the receivership. H. Alperstein, Inc. v. Luxor Modes, Inc., 133 N.Y.L.J. no. 17, p. 8, col. 1 (N.Y. City Ct. 1955); *cf.* Steinman v. Conlon, 150 App. Div. 708, 135 N.Y. Supp. 740 (1st Dep't 1912); Sorrentino v. Langlois, 144 App. Div. 271, 128 N.Y. Supp. 1003 (2d Dep't 1911).

from the transferee under either provision and his recourse to having the garnishee punished for contempt is probably not diminished under either.

Even after delivery, the creditor retains his "rights and remedies" if the transferee did not pay value or was not in good faith. The "delivery" distinction is probably based only on the ground that if the garnishee no longer has the property, it would be futile to attempt to recover it from him. Therefore, "rights and remedies" in the post-delivery non-bona fide transferee situation are probably against the transferee.

c. Where Section 799-a is not Applicable

Although section 799-a was designed to meet a particular problem which arose with regard to third-party subpoenas, its failure to deal with the situation where a subpoena has been served upon the judgment debtor presents some difficulties. Where the assets are in the hands of a garnishee but a creditor serves the judgment debtor instead, and the debtor subsequently assigns the assets in the garnishee's possession to a bona fide purchaser, does the creditor have any "rights and remedies"? If the garnishee in good faith paid the debt or delivered the property to the transferee, it is fairly clear that the creditor would not have recourse against the garnishee. His only remedy may be to have the debtor punished for contempt of the restraining provision but this is generally a futile remedy since, if the debtor has assets to pay the fine, they could have been reached through the ordinary enforcement procedures.

If the garnishee has not delivered the assets to a bona fide purchaser, however, would the judgment creditor have a prior claim to them? An early case, following the rule in the creditor's bill situation, held that service upon the judgment debtor does not give the creditor any lien upon property which the debtor had previously transferred and that if the creditor seeks to overturn the transfer as fraudulent he must serve the transferee.[214] Although this case dealt with a situation in which the judgment debtor had purportedly relinquished his claim to and control over the assets, there is some indication that it may have been extended to cover the situation in which the debtor relinquished only possession.[215] Where a receiver is appointed, it is now fairly clear that his title to the debtor's property in the hands of a garnishee would relate back to the service of a subpoena upon the judgment debtor.[216] While there is still some doubt where a

[214] Field v. Sands, 8 Bosw. (21 Super.) 685 (N.Y. Super. Ct. 1861). See Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 Colum. L. Rev. 504, 507 n. 21, 510 n. 33 (1929).

[215] See Wait, Manual of Supplementary Proceedings and Garnishee Executions 623 (Warren ed. 1936) ("If, however, the property is in the hands of a third person or under his control, the lien is not acquired by the service of an examination order on the debtor but by such service upon the third party.") The cases cited immediately following this proposition are merely instances in which service was effected upon the garnishee.

[216] *E.g.*, Ward v. Baker, 186 App. Div. 652, 175 N.Y. Supp. 66 (2d Dep't 1919); First Nat. Bank & Trust Co. of Elmira v. Lowell, 139 Misc. 891, 249 N.Y. Supp. 493 (Sup. Ct. 1931). See also cases cited note 79 *supra*.

receiver is not appointed, whenever the question has been presented directly, the courts have held that a creditor who serves the judgment debtor obtains priority over another creditor who subsequently serves the garnishee.[217]

Even if a lien over property in the possession of a garnishee is obtained by service upon the debtor the extent of the lien would not be governed by section 799-a and non-statutory rules would be controlling. Under those rules, the creditor may have a superior claim if the assets are "equitable" but not if they are tangible. This would probably be true even if the debtor himself had possession and had assigned but not as yet physically transferred the property at the time of service.

The difference in results depending upon whether the judgment debtor or a third party is served is probably due only to legislative oversight.

d. Significance of Restraining Provision

The significance of a restraining provision in determining the existence of the supplementary proceeding lien is not clear.[218] Section 799-a is expressly made applicable only where the subpoena or order contains a "stay or injunction." This may be viewed two ways: as indicating that if there is no restraining provision there is no lien; or that only the particular benefits of that section are not available but the common law lien, which may be independent of a restraining notice, continues. Under the latter view, if a debt is involved the creditor may have virtually the same rights under the common law lien as under the statute.[219] If a lien exists apart from a restraining provision, the service of an information subpoena or a witness subpoena might create such a lien. It might even be contended that since the service of these subpoenas constitutes the "commencement" of supplementary proceedings, and since the scope of the non-receiver lien is apparently not controlled by section 808 but by the creditor's bill lien rules, the lien obtained thereby should extend even to the debtor's equitable assets which are not in the possession of the financial institution or witness. Under section 808, the lien obtained by serving a garnishee has no effect upon assets of the judgment debtor which are in the latter's possession or in the possession of other garnishees.

[217] See text at notes 129–132 *supra*. See also Cohen, *Collection of Money Judgments in New York: Third Party Orders*, 35 Colum. L. Rev. 1196, 1220 (1935) ("But it appears well established that the creditor who is the first to inaugurate *any* supplementary proceedings has priority.")

[218] See Wait, *op. cit. supra* note 215 at 623. ("This rule [that an 'equitable lien on any property of the judgment debtor' is obtained by the commencement of supplementary proceedings] seemingly applies whether there is an injunction contained in the examination order or not.") *But see* Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 54 N.E.2d 336 (1944).

[219] Thus, if the debt has not been paid to the assignee, the creditor might have a superior claim to it. If it has been paid, however, his common law lien on the debtor's equitable property may enable him to recover the assets from the assignee, while under section 799-a he may be able to recover it from the garnishee.

Although there have been some recent dicta indicating that the restraining provision is significant in determining the existence of a lien,[220] it is not clear to what extent the restraint governs the *scope* of the lien. Thus, while it has been held that the priority obtained by commencing supplementary proceedings continues even after the two year duration of a restraining provision has expired,[221] would the duration of the lien be co-extensive with that of the restraining provision?[222] Even the cases basing the lien upon the restraining provision continue to differentiate between legal and equitable assets although the restraining provisions make no such distinction and prohibit the transfer of all of the debtor's assets.

IV. CONCLUSION

While it probably would be possible to formulate a system of liens and priorities in the enforcement area which would be more confused, make less sense and contain more anomalies and inconsistencies than the present one, it would be a task requiring enormous ingenuity. In discussing only a single aspect of the problem, the "lien" rule in supplementary proceedings, one commentator was moved to state:

> That the New York judges may have erred in their construction is not entirely important. That might have been remedied by legislative patchwork. But what really matters is the attitude which could produce the absurdities of the Throop Code and perpetuate them to the present day.[223]

The longevity which this unfortunate state of affairs has enjoyed, is due partly to the difficulties encountered by attempts to afford *ad hoc* legislative relief without a thorough reassessment of the outmoded preconceptions and traditions upon which the entire structure is based, and to an unwillingness to undertake the necessary complete overhauling of that structure.

In the notes to his revision of the article on execution, Throop explained:

> But in order to render the system clear, symmetrical, consistent, and just to all parties, it would be necessary to remodel it entirely; and, in so doing, to make some fundamental changes in the policy of existing legislation. . . . Amendments of that description were regarded as being without the scope of the duties of the commissioners. Even in the attempt to improve the present system, changes, which appeared to be desirable,

[220] See Wickwire Spencer Steel Co. v. Kemkit Scientific Corp., 292 N.Y. 139, 54 N.E.2d 336; Mariano v. Cathay House Chinese Restaurant, Inc., 199 Misc. 410, 106 N.Y.S.2d 325 (Sup. Ct. 1951); *In re* Airmont Knitting & Undergarment Co., 182 F.2d 740 (2d Cir. 1950).

[221] See note 135 *supra*.

[222] See Shenk Realty & Constr. Co. v. Barrett, 178 Misc. 857, 36 N.Y.S.2d 624 (N.Y. City Ct. 1942); *In re* Cofax Corp., 96 F. Supp. 420 (S.D.N.Y. 1951).

[223] Cohen, *Collection of Money Judgments in New York: Third Party Orders*, 35 Colum. L. Rev. 1196, 1217 (1935).

> were omitted, through a reluctance to open the door to greater evils than the amendments would remove. For the original statutes, including many of the most objectionable, have been the subject of repeated judicial construction, whereby most of the questions which can arise, concerning their meaning, and their application to particular cases, have been settled.[224]

Although approximately eighty years have elapsed since Throop reported that "it would be necessary to remodel it entirely" and despite the vast changes in society making such a remodeling all the more essential, the only revisions which have occurred have been piecemeal and unsystematic and have added to the total confusion. The present uncertainty of rights has, in addition to promoting an unnecessarily large volume of litigation, created a lawless situation in the great number of cases where the amount involved would not justify further litigation in which results are so unpredictable.

A. Priority

There are two basic questions in this area: Should any act of a non-secured creditor justify his obtaining legal priority over other creditors and, if so, what should that act be? Even apart from the considerations which warrant giving certain classes of creditors such as mechanics special "liens," there has been a continuing conflict of policy on the first question between according equal rights to all creditors and "rewarding the diligence" of the few.[225] If there were no priority structure, the law's principal interest in encouraging creditors to exercise diligence in collecting their debts, apart from the sort of considerations that underlie statutes of limitation, purportedly would be to minimize the risk to persons who might subsequently extend credit to the debtor without adequate knowledge of his financial condition. This rationale would seem to be based on the assumption that the "diligent" efforts of creditors would either give the potential creditor the knowledge he lacks or result in the actual collection of the prior debts. If this is the reason for rewarding "diligence," it would seem that the acts constituting "diligence" should at least be a matter of public record, which, under present tests of "diligence" they frequently are not.

Another factor, which played an important role in the development of the creditor's bill priority rules but which has now assumed a secondary position, is derived from a theory similar to "unjust enrichment." If one creditor assumes the risk, expense and bother of commencing and pursuing an enforcement procedure, discovers assets and secures their application to the payment of the debtor's obligations, it might be unfair to permit other creditors, who may not have undertaken any of these activities, to move in at

[224] N.Y. Code Civ. Proc. §1389–1486, preliminary note (Throop ed. 1880).
[225] See 2 Glenn, Fraudulent Conveyances and Preferences, §§374–394 (rev. ed. 1940).

the last stage and share in the proceeds with the diligent creditor.[226] While under this rationale priority would best be determined from the successful conclusion or continuous diligent pursuit of enforcement procedures, priority under virtually all enforcement procedures is measured from their commencement. Thus, where one creditor has undertaken the relatively inexpensive and mechanical task of delivering an execution or serving a supplementary proceeding subpoena, he would have priority over another creditor who went to much greater expense, discovered assets and successfully recovered them by suit from a transferee. For example, in a case where a senior judgment creditor had merely delivered an execution to the sheriff, it was held that he had priority over another judgment creditor who subsequently delivered an execution and pursued the following course of action:

> The junior judgment-creditor in its answering affidavit gives this version of the proceedings: that on the date of the issuance of the City Court execution, the City Marshal attempted to levy on office equipment of the defendant, but defendant urged the Marshal to levy upon a station wagon instead. The Marshal took possession of the station wagon. A third-party claim, under a chattel mortgage on the station wagon, was made by the First National Bank and Trust Company of Utica as mortgagee and it demanded that the vehicle be surrendered by the Marshal. The attorney for the judgment-creditor in the City Court judgment determined from the records in the Office of the Oneida County Clerk that the third-party claim was valid and he directed the Marshal to surrender the station wagon.
>
> On August 25, 1953, the Marshal made a levy on the office equipment of the defendant under the City Court execution. Again, the Marshal was served with a third-party claim by the bank under a new chattel mortgage which purported to cover the office equipment. A proceeding was commenced in the Utica City Court by the junior judgment-creditor to determine the title to the office equipment. The jurisdiction of the City Court of Utica to entertain the proceeding was contested. The City Court held that it had jurisdiction. In re Gilbert, 204 Misc. 787, 127 N.Y.S.2d 530. The question of title was heard on the merits and a decision was rendered by the City Court that the defendant was the holder of the title to the office equipment. An appeal to the Oneida County Court followed. While the appeal was pending, defendant moved the City Court of Utica to vacate the judgment of the junior judgment-creditor, which was refused. An appeal from this decision was taken to the Oneida County Court. Some time toward the end of the year 1953, the County Court dismissed both appeals. On January 2, 1954, the Marshal sold the office equipment of the defendant under the City Court levy.

[226] See Edmeston v. Lyde, 1 Paige 637, 639–40 (N.Y. Ch. 1829).

The senior judgment-creditor probably took the position that, when he discovered that the levy had been made by the junior judgment-creditor, all he had to do was await the sale under the City Court execution and levy and the subsequent application of the proceeds of the sale to his judgment as provided in Section 680 of the Civil Practice Act. In this, the Court believes that he was well within his rights, although it seems harsh to so rule against the junior judgment-creditor in view of the fact that he was put to great trouble and expense in defending the Marshal's interest under his execution.

However, he had to take the risk that some other creditor had rights prior to his own. Lopez v. Campbell, 163 N.Y. 340, 57 N.E. 501.[227]

Where there is a priority structure, the law should encourage diligence on the part of the creditor with priority in concluding the enforcement procedure, since delay in satisfying his judgment would block or at least deter other creditors from attempting to satisfy their judgments. Nevertheless, apart from the concept of an execution becoming "dormant," there is virtually no recognition of this facet of diligence. A creditor who secures the appointment of a receiver before other creditors have commenced enforcement procedures may be able to delay final enforcement indefinitely while retaining priority.[228] And a creditor who merely serves a supplementary proceeding subpoena upon the judgment debtor may have priority over all creditors who have not taken enforcement steps at that time, even if he takes no subsequent action for many years.[229] In fact, the wary creditor would now serve a supplementary proceeding subpoena as a matter of course immediately after judgment is entered.

The test is not actual diligence but symbolic "diligence." While a determination of actual diligence may involve the courts in lengthy hearings and may require their choosing between "apples" and "pears," the use of a standard of symbolic "diligence" frequently defeats any purpose that a rule utilizing diligence as a criterion might serve.

Alternatives that are not based on a priority system present their own difficulties. Thus, in a system under which all creditors are theoretically to share equally in the debtor's assets, such as in bankruptcy, an entire proceeding is required including notice to other creditors, their submission of claims, the testing of their validity, and so on. The adoption of such a proceeding for the ordinary enforcement of judgments would present a vast number

[227] Garro v. Republic Sheet Metal Works, 205 Misc. 889, 891–92, 129 N.Y.S.2d 568, 569–570 (Sup. Ct.) *rev'd on other grounds*, 284 App. Div. 660, 134 N.Y.S.2d 151 (4th Dep't 1954).

[228] See Palen v. Bushnell, 13 N.Y. Supp. 785 (Sup. Ct. 1889) (supplementary proceeding receivership in existence for more than 26 years); *cf.* N.Y. Civ. Prac. Act §804-a.

[229] Herlihy v. Watkins, 252 App. Div. 605, 300 N.Y. Supp. 242 (1st Dep't 1937). (Although six years elapsed between service and appointment of receiver, and although creditor did not pursue examination, he had priority over other creditor who served subpoena subsequently.)

of problems, involve inordinate delay, and would probably be extremely unfortunate. Another alternative may be to simply permit any judgment creditor who actually secures the debtor's assets to retain them to the extent of his judgment regardless of what procedures have been followed by other creditors. However, since actual seizure of the debtor's assets is frequently performed by a common official agent, such as a sheriff, it would probably be necessary to have some rules regarding the manner in which distribution is to be made by him. Similarly, where a garnishee is served with a number of restraining notices and turnover orders, there must be some rule specifying which one should be paid. Basing priority upon actual receipt would also frequently result in creditors expending substantial sums to discover and attempt to secure the debtor's assets, only to find that some other creditor had "won the race" and seized the assets. While this may be true today despite the existence of priority rules, it will be demonstrated below that it need not be under a different type of priority structure.

Assuming that some form of priority system is desirable, what should it be? Any system based on a single criterian would begin with a great advantage over the present one, for uncertainty is inherent in any system which affords multiple means for acquiring priority over all of the debtor's assets or over specific assets. If priority over all of the debtor's assets could be measured from the performance of a single act, at least certainty of result would be achieved, and the present confusion regarding priority rights where different creditors pursue different enforcement procedures would be eliminated.

If any factor should justify treating certain non-secured creditors differently from others, it would seem that the factor should be the conversion of a claim into a judgment rather than the mere service or delivery of some additional paper. Because of the great variety of enforcement procedures, the only "act" which need be common to all judgment creditors is the judgment itself. Furthermore, a judgment is a matter of public record while the commencement of enforcement procedures need not be. In the real property situation, of course, priority is obtained by merely docketing the judgment in the county in which the property is situated. Where personal property is involved, however, it has been felt that some further "act" on the part of the creditor is required to give him priority. The only apparent rationale for this feeling relates to the lien situation but not to the priority one—*i.e.*, that personalty is easily transported, difficult to differentiate and generally purchased without checking court records. While these factors must be considered in fixing lien rules, they are not relevant to priority. Thus, even under present law the "further acts" that suffice to create priority—such as delivery of an execution, service of a supplementary proceeding examination subpoena, commencement of a creditor's action or appointment of a receiver—do not in any way alter the above distinctions between real and personal property.

While it might be possible to make service of a restraining notice the "act" from which priority should be measured, this would involve needless problems and would afford no additional advantages. It would be necessary to establish a system for filing restraining notices and a method would have to be devised for according priority where, through no fault of judgment creditor, he is unable to serve the debtor.

On principle, a good case could also be made for basing priority on the order in which the creditors commenced actions leading to judgment or the order in which their claims arose. Such a system, however, would entail a great deal of uncertainty, for no judgment creditor's priority would be secure while there remained the possibility of outstanding claims upon which suit had not yet been brought or concluded. While a rule based upon the docketing of a judgment may enable a debtor to grant preferences by contesting one creditor's action until a default is taken by another creditor, it is doubtful whether this could be avoided under any workable priority system.

The date of entry of judgment is presently significant for priority purposes in the distribution of a decedent's estate. Section 212 of the Surrogate's Court Act provides that the debts of a deceased should be paid, after preferred claims and taxes, in the order in which "Judgments [are] docketed, and decrees entered against the deceased according to the priority thereof respectively." All judgments must be satisfied before the claims of general creditors may be reached and no priority is recognized among general creditors. At least two other states have also adopted provisions basing priority upon judgment rather than upon the commencement of enforcement procedures.[230]

Priority obtained by judgment should relate to all of the debtor's property which is not exempt from application to the satisfaction of the judgment. There is no reason for continuing the distinction between "equitable" and "legal" assets which should have become no more than an historical curiosity long ago.

There are numerous instances under present law where it is not clear whether a creditor with priority has the right to recover assets which were subsequently transferred by the debtor to other creditors. Under the Uniform Fraudulent Conveyance Act, a transfer to another creditor is not considered fraudulent unless made with intent to defraud creditors.[231] The rationale there, however, is based upon the view that all creditors are on an equal footing and that permitting one creditor to overturn a preference given by the debtor to another creditor would amount to no more than a substitution.[232] Where creditors are not on an equal footing, however, as would be the case where one creditor has priority, this rationale does not apply[233] and the creditor with priority should be able to recover preferences granted to other creditors after priority was obtained. Under section 808 of the civil practice act a distinction is apparently drawn between other creditors who have notice of something (probably the service of a supplementary proceeding subpoena upon the debtor) and those who do not. Only in the former case may the creditor who commenced supplementary proceedings before the transfer to the other creditor recover the property.[234] This distinction is justifiable only where the second creditor was put to some hardship by his lack of notice. Thus, if the second creditor, who might have no way of knowing that a subpoena was served, went through extensive enforcement procedures before recovering the assets, it would seem that he should be permitted to keep them. To avoid forcing a creditor to check all dockets in the state, in the absence of a central state filing system, a creditor who wishes to obtain priority should be required to docket his judgment with the clerk of the county in which the judgment debtor resides. A similar requirement is contained in section 807 of the civil practice act, governing the lien over personal property where a receiver has been appointed. Where the judgment debtor is a corporation, if a system of filing with the secretary of state is impractical, the judgment should be docketed in the county in which the corporation has its principal place of business. One county could be chosen for the docketing of judgments against non-residents.

The possibility of a change in the judgment debtor's residence to a different county raises another problem. A requirement that the judgment be redocketed in the new county in order to retain priority would certainly facilitate the task of subsequent creditors and purchasers. On the other hand, refiling after change of residence is not required in the chattel mortgage[235] or supplementary proceeding receivership situations[236] and, although there is a refiling required in the conditional sale area, the "reservation of property in the seller" continues until ten days after he receives *notice* of the removal.[237]

[230] See Ala. Code, tit. 7, §588 (1940); Miss. Code Ann. §1555 (1956).

[231] See N.Y. Debt. & Cred. Law §§272, 276.

[232] "That there was good reason for this is shown by the inability of equity courts to work out any different rule. The statutes of fraudulent conveyances, as we have seen, were always available to the general representative of creditors. His recapture of the asset means a replacement of it in the estate for equal distribution. But these laws also assist the single creditor who acts for himself alone at the foot of the judgment establishing his debt, or by way of attachment, as well as the creditor who (in States where a judgment is not required) establishes his debt on the very suit by which he seeks to realize it out of the asset in question. To allow such a creditor, thus acting in his own interest, to set aside a preferential transfer would simply amount to substituting him as the party preferred. That reason is enough, without our going into the conflict of ideas, and historical developments incident to it, regarding the sufficiency of "past consideration" to constitute one a purchaser for value, not only in the operation of equity rules but in the field of the law merchant." 1 Glenn, Fraudulent Conveyances and Preferences 489 (rev. ed. 1940).

[233] See Note, *Priority Among Judgment Creditors in Property Fraudulently Conveyed*, 43 Yale L.J. 1178 (1934).

[234] Where the supplementary proceeding creditor does not secure the appointment of a receiver but proceeds by turnover order, however, it was seen that this distinction may not be applicable.

[235] N.Y. Lien Law §§232, 235.

[236] N.Y. Civ. Prac. Act §807(2).

[237] N.Y. Pers. Prop. Law §74.

Another possible approach to the change of residence problem would be to provide that the judgment gives a creditor priority only in the county in which it is docketed and that if the creditor seeks to have priority over property in other counties, he must file additional copies of the judgment in those counties. This is the rule at present with regard to real property and the rule in those states which base priority over personalty upon the entry of judgment.[238] This approach, however, presents a great many difficulties. Where personalty is removed from one county to another, would priority be based upon the order in which judgments were docketed in the second county or would the priority obtained in the first county continue to prevail? Under the first alternative, security of priority could only be obtained by docketing throughout the state. Under the second, it would be necessary for judgment creditors to check whether the property passed through any other counties and whether judgments were docketed previously in those counties. For example, where the judgment debtor, a Suffolk county resident, has an automobile which is discovered by a judgment creditor in New York county, to determine whether he has priority the judgment creditor would have to check not only the records in New York county but those in Suffolk, Nassau, Queens and Kings counties and probably a good many others as well. Where the asset is a debt due the judgment debtor from an individual, there would be the same problem. It would be necessary to determine whether the garnishee ever passed through a county in which an unsatisfied judgment was docketed against the judgment debtor. Where property is removed from one county to another county in which a judgment was docketed before that in the first county, which creditor would have priority; the one whose priority attached first—that in the first county—or the one whose judgment was docketed first? Although a plan whereby docketing in one county gives priority throughout the state would require judgment creditors to discover whether the debtor has changed his place of residence, this is generally a much easier fact to determine than whether particular property of his has passed through different counties. The number of counties involved in a change of residence would also generally be substantially less than the number through which the property has passed.

The suggested priority rule would not effect any modification in the relationship between judgment creditor's priorities and the liens accorded to special creditors such as attorneys and mechanics. To the extent that those liens are now considered superior to judgment creditor's priorities,[239] they would continue to be so considered. The suggested rule would also leave unchanged the rules regarding special classes of property, such as negotiable instruments, which are presently not subject to creditor's priorities except under specified circumstances.[240]

One major problem remains. If priority is not subject to divestment, the first judgment creditor can delay enforcement of his

[238] See note 230 *supra*. See also Miss. Code Ann. §§1557, 1558 (1956).
[239] See N.Y. Lien Law §28.
[240] See N.Y. Pers. Prop. Law §120.

judgment indefinitely and block all subsequent creditors from enforcing their judgments. This frequently occurs today where the debtor's only assets are wages and one creditor with a substantial judgment has obtained a garnishment order pursuant to section 684 of the civil practice act. In that situation, however, other creditors are, at least theoretically, not barred from attempting to seek additional portions of the debtor's wages under section 793 of the civil practice act or from reaching other assets of the debtor, if they exist, through different enforcement procedures. If one creditor secures the appointment of a receiver in supplementary proceedings before other creditors have commenced enforcement procedures, his priority would be absolute but at least other judgment creditors would have the right to join in the receivership, exercise some control in directing the receiver's action, and insure that he will not delay indefinitely.

The problem of preventing frustration of the efforts of subsequent creditors to satisfy their judgments may be treated in numerous ways. Thus, a provision similar to present section 802(3) may be utilized. That section authorizes the court to dismiss a creditor's supplementary proceeding if he "unreasonably neglects or delays to proceed." However, it is difficult to say what kind of enforcement measures should be considered "reasonable." A creditor might be able to take only the most minimal measures and continue to have absolute priority, while another who has made what may seem to him reasonable efforts to insure eventual payment in full, such as by working out a long term payment arrangement, would find himself suddenly cut off from any recovery. Thus, where a creditor has reason to believe that the debtor will make a bona fide effort to satisfy the judgment in full if he is permitted to remain in business and that an immediate execution upon the debtor's inventory and store fixtures would not nearly satisfy the judgment, the creditor might nevertheless feel compelled to execute for fear that a subsequent creditor might deprive him of any recovery. This would be the case even though a sheriff's sale might realize only a fraction of the value of these items, working great hardship on the debtor and preventing him from fully satisfying the judgment in the foreseeable future.

One of the principal disadvantages of the present priority structure is that because of the confused and uncertain state of the law a premium is placed upon immediate seizure. The wary judgment creditor is naturally reluctant to grant extensions or to enter long term payment agreements where the debtor is in business and has tangible assets which may be seized by other creditors. Various extra-judicial devices for continuing the debtor in business have been developed to alleviate this situation. These devices, however, are dependent upon the consent of all creditors and their abiding by the agreement. If a later judgment creditor chooses to execute, he may deprive the early creditors of any recovery.

While a judgment creditor should have sufficient security to enable him to arrange a payment plan with the debtor, it is difficult to devise a priority system which provides this security and yet

does not enable an early judgment creditor to block subsequent creditors. If the first creditor can retain priority while receiving regular payments, he may prefer such a plan, although it may be of long duration, to the risk, expense and bother of discovering hidden assets and recovering the debtor's property from garnishees or fraudulent transferees. While this should probably be his prerogative, other creditors would have little incentive to undertake to find and recover the debtor's assets since, even if they were successful, the creditor with priority may be able to deprive them of the proceeds. An absolute priority system may also encourage "dead beats" to have a collusive judgment for a substantial sum entered against them and thereby frustrate subsequent bona fide creditors.

The placing of a specific time limitation upon priority would be too inflexible. The period would have to be long enough to permit a payment arrangement of some duration—probably at least a year. In some situations it may be harsh to make another creditor who obtains a judgment at the beginning of the period wait until it has run before commencing his enforcement proceedings. On the other hand, where no other judgment is obtained against the debtor during the period, there is no reason for compelling the creditor to satisfy his judgment by that time.

A system may be set up which would give a creditor priority upon the filing of a payment arrangement only over the assets from which the payments are to emanate. Other assets could be reached by other creditors or could be subjected to priority by different means. For example, if the debtor had fraudulently transferred certain assets, since future payments would not be derived from that source, the payment arrangement priority would not cover them and priority with regard to those assets may be given to the creditor who first brings suit to have the conveyance set aside. Where the other asset has not been transferred but concealed, priority may be based on some other factor such as its being levied upon pursuant to execution, the service of a turnover order, or a motion for such an order.

This approach, however, presents serious difficulties. First, it would probably produce a great deal of uncertainty, partly because of the multiplicity of priority rules which would be necessary and partly because of the problem of determining what property is covered by the payment arrangement priority. Second, and perhaps even more important, where the payment arrangement priority covers all of the debtor's assets—for example, where the debtor only has a small business—it would still be necessary to devise a method which would prevent subsequent creditors from being blocked indefinitely. It may be possible in such a situation to determine that the debtor is able to pay more than he is required to by the creditor with priority, and that the surplus should go to the creditor next in line, but this may require regular lengthy reviews of the debtor's business situation, particularly since a debtor who is continuing in business by the grace of a creditor may be compelled to pay cash by the persons from whom he acquires his merchandise. The courts should not be burdened with such tasks.

Mississippi, which bases priority upon entry of judgment, has met the problem with the following provision:

> A junior judgment-creditor may give written notice to any senior judgment-creditor requiring him to execute his judgment; and if the senior judgment-creditor, being so notified, shall fail, neglect or refuse to have execution issued, and levied within ten days from said notice for the satisfaction of his judgment, he shall lose his priority, and the junior judgment-creditor may cause execution to issue on his judgment and to be levied on any of the property of the defendant, and the proceeds of a sale thereof shall be applied to the junior judgment so levied.[241]

While this approach has merit, it also has certain disadvantages. It is not clear whether priority would be lost if the execution is issued but returned unsatisfied or whether it would continue indefinitely in such an event. This should probably depend upon whether the debtor has assets at the time, and whether the creditor with priority was notified of those assets or has had a reasonable time to discover their existence and location. There is also no apparent reason why the senior judgment creditor should be compelled to utilize only the execution remedy. Thus, if purported assets of the debtor are in the possession of a third party, the creditor might prefer to bring a proceeding for testing title rather than run the risk of liability for a wrongful levy. Where the creditor with priority is securing the application of assets, such as a small business, through an installment payment plan, should he be compelled, in all cases, to execute upon the source of those payments or should it depend upon the particular circumstances in each case?

These problems could probably best be avoided by providing for a more flexible motion procedure for divesting priority. The court could be given the power, on motion of a junior judgment creditor, to deprive the senior judgment creditor of priority over particular assets where he has failed to take steps to have those assets applied to the satisfaction of his judgment after a demand by the junior judgment creditor that he do so; or to compel him to satisfy his judgment within a specified period or lose priority; or to compel him to enter into a receivership with subsequent creditors in which the latter will have a voice in determining what enforcement measures should be undertaken. Of course, where it can be shown that the judgment of the creditor with priority was obtained by collusion, that creditor should be deprived of all priority.

Even though such a procedure for prodding the creditor with priority is available, a junior creditor should not be prohibited from attempting to satisfy his debt or judgment while this priority exists. Prompt action is frequently essential in this area and if a creditor without priority is in a position to take such action, he should not be hampered from doing so. It could be provided that

[241] Miss. Code Ann. §1556 (1956).

where a sheriff receives two or more executions at any time before distribution of the proceeds of a sheriff's sale, he must distribute them in the order in which the judgments were docketed for priority purposes but that he is not required to hold the proceeds for a senior judgment creditor who does not have an execution outstanding. Where a creditor without priority proceeds to recover assets of the debtor without utilizing the procedure for divesting priority described above, however, the senior creditor should be allowed to move, within a reasonably short period of time, to require the junior creditor to turn over the recovered assets.

Under such a system, then, a junior creditor could overcome the senior creditor's priority either by bringing a motion or by proceeding to recover assets of the debtor on his own, although in the latter case a prompt assertion of the senior creditor's authority could divest him of the recovered assets. The second method would be particularly useful where the junior creditor discovers some assets that must be seized quickly, or as an alternative method of prodding a procrastinating senior creditor in cases where the junior creditor has only a small judgment and doesn't consider it worthwhile to utilize the formal motion procedure.

The requirement that the senior creditor assert his priority promptly in such a case is important. A large number of judgments are for such small sums that creditors and their attorneys would be justified in feeling that an examination of county clerks' records and a procedure to divest senior judgment creditors of priority would not be warranted. If there were a reasonable short period in which senior judgment creditors would be required to assert their priority, these creditors would be willing to take the risk and proceed to enforce their judgments. Also, where the judgment debtor has changed his county of residence repeatedly and it might be difficult for a judgment creditor to determine whether or not he has priority, a requirement of prompt assertion of priority would encourage him to take the risk and proceed to have his judgment satisfied. Such a requirement would also aid in dealing with any docketing of collusive judgments that might be attempted in order to defeat the claims of bona fide judgment creditors. The small bona fide creditor would be encouraged under the proposed system to seize any property that he can in the face of the other's priority, and it is unlikely that the owner of the collusive judgment would commence a proceeding to set aside such seizures.

Where the creditor with priority has reasonable grounds for delaying execution upon the debtor's assets, such as where he has entered into an installment payment arrangement with the judgment debtor, he would be likely to receive notice of an execution by another creditor well within the period in which he is required to assert his priority. If he has served the judgment debtor or a garnishee with a restraining notice, it is also likely that the latter, faced with the possibility of punishment for contempt, would notify him of any attempt by another creditor to seize assets.

While there may be situations in which a reasonably diligent judgment creditor would not discover the transfer until the period of limitation had elapsed, the proposed procedure would still represent a substantial improvement over the present priority structure under which priority may be lost immediately upon the transfer.[242]

The proposed priority system affords the flexibility that is essential in this area. It would enable a junior judgment creditor to insure the diligent pursuit of procedures to satisfy the senior judgment and would afford judgment creditors sufficient security to enter into arrangements with the judgment debtor before other judgment creditors enter the picture.

B. Liens

The basic questions in the lien area are whether a judgment creditor's claim to the debtor's assets should be superior to that of a subsequent transferee from the debtor and, if so, from what point and under what conditions. It would seem that certainly where the transferee has not paid fair value for the assets, the creditor's claim should be superior. Nevertheless, under present law, a creditor's claim would not be superior unless he had commenced some form of post-judgment enforcement procedure before the transfer and, even then, it may depend upon whether the enforcement procedure was commenced against the debtor or a garnishee and whether the creditor subsequently secured the appointment of a receiver. The judgment creditor might be able to have the transfer set aside under the Fraudulent Conveyance Act, if he could show that the debtor was or became insolvent as a result of the transfer;[243] or that if the debtor was in business, he was left with an "unreasonably small capital";[244] or that he intended at the time of the transfer to incur "debts beyond his ability to pay as they mature"; [245] or that the conveyance was made with intent to defraud.[246] Also, the definition of fair consideration under that act includes the satisfaction of an antecedent debt.[247]

It is proposed that the simple entry of judgment operate to prevent the debtor from transferring good title to a transferee who does not pay fair value. The debtor should not be permitted to make gifts at his creditors' expense. In fact, it may be well to adopt a rule which would permit a judgment creditor to overturn every transfer without adequate consideration made by the debtor after the commencement of the action which led to the judgment. This might prevent many defendants from becoming extremely generous to their relatives and friends when the likelihood of an adverse judgment becomes apparent.

Where a transferee has paid fair value for the debtor's asset, however, the problems are more difficult. Under what circum-

[242] See N.Y. Civ. Prac. Act §682 (levy on execution issued from court not of record).
[243] N.Y. Debt. & Cred. Law §273.
[244] *Id.* §274.
[245] *Id.* §275.
[246] *Id.* §276.
[247] *Id.* §272.

stances should a judgment creditor be able to assert a prior claim to the asset if it has not been turned over to the purchaser as yet, and when, if ever, should he be able to recover the asset or its value from the purchaser after it has been delivered? Under present law, judgment creditors are given such rights in numerous situations and it is apparently irrelevant whether the debtor then turned the proceeds of the sale over to his creditors in the order of their priority or whether the sale was made in the ordinary course of business, except as that may indicate some knowledge on the part of the purchaser. The crucial factors today are notice, actual or constructive, and in one case, delivery to the purchaser.

A creditor who commenced a judgment creditor's action may recover from a subsequent purchaser of the debtor's equitable assets, regardless of any actual notice on the part of the purchaser. If an order appointing a receiver in supplementary proceedings is filed in the county in which the debtor resides, the receiver may recover any personal property subsequently sold to a bona fide purchaser even if the purchaser had no reason to believe that there might be a receivership. A purchaser without notice who has not actually received the property may also find that all he has purchased is a possible claim against the judgment debtor if the property, at the time of sale, is in the possession of a garnishee who was served with a supplementary proceeding subpoena containing a restraining provision. In addition, whether or not the purchaser without notice has received delivery, if the property is an intangible asset, a creditor who had commenced supplementary proceedings earlier may be entitled to recover it. Actual notice is also irrelevant if there has been a levy pursuant to an execution. The purchaser may also be required to know whether a turnover order in supplementary proceedings has been filed.

Actual notice is significant where the purchase is made after delivery of an execution but before levy and, when tangible assets are involved, after service of a supplementary proceeding subpoena containing a restraining provision but before an order appointing a receiver or a turnover order is filed.

The problem is one of balancing the interest of judgment creditors against the interest of the public in general in leaving ordinary business relationships unhampered by a requirement that potential purchasers of personal property check court records or make other extensive inquiries before consummating their purchases. If it is felt that the balance is strongly in favor of assisting creditors, which is apparently the view supporting the present receivership lien rule, then creditors should be able to obtain a lien without having to undertake the additional expense of a receiver. To the extent that the receivership rule requires a purchaser to check whether an order appointing a receiver was filed in the county in which the seller resides, it would be almost as simple for him to check whether an unsatisfied judgment has been filed in that county. The balance, however, should not be that strongly in favor of creditors. The receivership rule has probably only been tolerated this long because there are so few receiverships and because receivership creditors so seldom assert their rights against bona fide purchasers. The right to recover from a bona fide purchaser has also been rarely exercised by creditors who secured their lien under other enforcement procedures. Clarifying and simplifying the lien would probably increase the frequency of its use, which in this instance, would be undesirable.

Assuming that a creditor should not be able to obtain a lien which is good against a bona fide purchaser without notice, should he be able to obtain one where the purchaser has some "notice"? If the notice is that the sale is part of the seller's plan to defraud his creditors, the creditors, of course, should be able to recover. This is clearly a fraudulent conveyance under section 276 of the New York Debtor and Creditor Law and may be set aside even by creditors who have not obtained judgments.[248] Should the mere notice that an unsatisfied judgment exists against the seller carry the same consequences? If the judgment debtor is in business and the sale is in the ordinary course of that business, it would seem that it should not. The purchaser would ordinarily have every reason to believe that the seller's creditors acquiesce in his continuing to sell his assets. This would be true even if the purchaser knows that the seller has been served with a restraining notice. Where there is something unusual about the sale, however, and it in fact turns out to be in fraud of creditors, the sale may possibly be set aside under the Fraudulent Conveyance Act. The test there has been stated as follows:

> If the facts within the knowledge of the purchaser are of such a nature as, in reason, to put him upon inquiry and to excite the suspicion of an ordinary prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed.[249]

There would seem to be no reason for modifying this rule.

Where the sale is not in the ordinary course of the debtor's business, however, the considerations are different. The conversion of assets into cash outside of the ordinary course of business is frequently a prelude to an effort to defraud creditors. Certainly if the purchaser has notice that the debtor was restrained from transferring his assets, he should not be able to take good title as against the creditor who imposed the restraint. This is the rule today. It is extremely difficult, however, to prove such actual knowledge and it would seem not unreasonable to require the potential purchaser in the non-ordinary business situation to make inquiries as to whether a judgment against the seller has been docketed in the county in which the seller resides or has its principal place of business. Such docketing, then, should be sufficient to

[248] See also N.Y. Pers. Prop. Law §40 ("This article does not affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appear that such purchaser or incumbrancer had previous notice of the fraudulent intent of his immediate vendor, or of the fraud rendering void the title of such vendor.")

[249] Anderson v. Blood, 152 N.Y. 285, 293, 46 N.E. 493, 495 (1897).

entitle the creditor to recover from the purchaser. While this may place a burden upon certain classes of purchaser whose usual dealings are out of the ordinary course of business of the seller—for example, pawn brokers and used car dealers—it is no greater than that under present law, under which they are required to check such matters as receivership records, records of turnover orders, and in certain situations, sheriff's records. Where the debtor is acting in good faith and intends to apply the proceeds to the satisfaction of his judgments in the order of their priority, he could receive the authorization of his judgment creditors and their waiver of claims to the property. They, rather than he, should be the judge of whether the purchase price would be greater or less at a sheriff's sale. The purchaser, however, should not be required to check beyond the judgment docket in the county in which the seller resides or has its principal place of business at the time of the sale.

While it may be considered theoretically more satisfactory to hold that the creditor can pass good title until he is prohibited from transferring his assets—*i.e.*, until a restraining notice is served—basing the lien upon the service of a restraining notice would require establishing a filing system for such notices, and would enable a debtor to sell his assets in the interim and possibly defeat any recovery by the creditor.

Nor should the fact of service upon a garnishee be significant for lien purposes. If the sale was not in the ordinary course of business, the creditor's claim should be superior to that of a purchaser from the debtor regardless of whether the property is in the debtor's hands or those of a garnishee and regardless of whether the garnishee was served with a restraining notice. Where the sale was made in the ordinary course of the debtor's business, however, even actual notice of the restraint should only be treated as evidence to show that the purchaser knew or should have known of a plan to defraud creditors, within the meaning of section 276 of the New York Debtor and Creditor Law. A rule which would require all potential purchasers to check with the seller's possible garnishees, such as his warehouseman or storage company or the persons through whom he makes deliveries, to determine whether a restraining notice has been served on them, would be unjustified and absurd although it is seemingly the rule today under section 799-a of the civil practice act. While actual notice alters the situation, the purchaser may be justified in assuming that by permitting the debtor to continue in business, the creditor acquiesces in his making sales in the ordinary course of that business.

There is no reason for making special rules covering the post-levy or post-turnover order situation. The instances in which sales may be made in the ordinary course of business after a levy are extremely rare. Providing exceptions to the ordinary course of business rule would defeat its purposes since it would require all potential purchasers to check court records to determine whether a turnover order was filed or served. Where a purchaser actually knows of a turnover order, he would undoubtedly have the type of

knowledge that could defeat his title under the Fraudulent Conveyance Act.

The "ordinary course of business" concept is not new to the law. The Bulk Sales Act, section 44 of the New York Personal Property Law, covers transfers "otherwise than in the ordinary course of trade and in the regular prosecution of said business." Section 69 of the New York Personal Property Law, part of the Uniform Conditional Sales Law, provides that if the conditional seller "expressly or impliedly consents that the buyer may resell . . ., the reservation of property shall be void against purchasers under a resale from the buyer for value in the ordinary course of business." Prior to 1941, only purchasers without notice were protected. This provision, however, was deleted on the recommendation of the Law Revision Commission which suggested that all purchasers in the ordinary course of business be protected regardless of notice.[250] The "ordinary course of trade" is also a significant factor under the Uniform Trust Receipts Law.[251]

The suggested modifications in enforcement liens will not affect the relationship between these liens and those accorded to particular classes of creditors such as mechanics and attorneys, and will not affect any change in the consolidated law provisions specifying the methods by which a lien may be obtained over certain classes of property, such as negotiable instruments.

[250] N.Y. Law Rev. Comm'n Rep. 237–275 (1941).
[251] N.Y. Pers. Prop. Law §58-a.

GROUNDS FOR CIVIL ARREST AND BODY EXECUTION

GROUNDS FOR CIVIL ARREST AND BODY EXECUTION
TABLE I. PARTICULAR TYPES OF ACTIONS

	To recover funds embezzled or converted by public or private officer, attorney, or fiduciary (includes breach of trust)	To recover public funds obtained or converted by defendant	Action for fine or penalty	Fraudulent contracting of debt sued on	Torts	Action for fraud and deceit	Willful torts	Torts accompanied by violence	Defamation	Seduction	Breach of promise to marry	Alimony or support
Alabama	A-B		A-B	A-B	A-B							
Alaska [1]				A-B		A-B						A [2]
Arizona				A								
Arkansas	A		A	A								
California												
Colorado	A-B			A		A-B	B		A		A	
Connecticut								A	A			
Delaware												
D. C. [3]												
Florida [4]												
Georgia [5]	A		A	A			A					
Idaho [1]				A-B								
Illinois [1]						A		B	B	B		A-B
Indiana [1]				A								
Iowa [1]				A-B		A						
Kansas												
Kentucky			A									
Louisiana [6]												
Maine				A	B							
Maryland				A								
Massachusetts				A								
Michigan [1]	A		A [7]									
Minnesota												
Mississippi [8]												
Missouri [9]												

GROUNDS FOR CIVIL ARREST AND BODY EXECUTION
TABLE I. PARTICULAR TYPES OF ACTIONS — (Concluded)

	To recover funds embezzled or converted by public or private officer, attorney, or fiduciary (includes breach of trust)	To recover public funds obtained or converted by defendant	Action for fine or penalty	Fraudulent contracting of debt sued on	Torts	Action for fraud and deceit	Willful torts	Torts accompanied by violence	Defamation	Seduction	Breach of promise to marry	Alimony or support
Montana	A		A	A			A					
Nebraska				A		A						
Nevada [1]	A		A	A			A		A			
New Hampshire					A							
New Jersey	A[10]-B[10]			A-B			B	A-B				
New York [1]	A[10]-B[10]	A-B	A-B	A-B	A-B	A-B						
New Mexico [8]												
North Carolina [1]	A-B		A-B	A-B			A-B					
North Dakota [1]		A										A[2]
Ohio				A-B								
Oklahoma [11]												
Oregon	A-B		A-B		A-B						A-B	
Pennsylvania [1]	A[10]-B[10]		A-B	A							A-B	
Rhode Island			A-B	A-B								
South Carolina	A-B		A-B	A-B								
South Dakota	A-B		A-B	A-B	A-B						A-B	
Tennessee [5]												
Texas [8]												
Utah												
Vermont	A-B				A-B							
Virginia												
Washington												
West Virginia				A								
Wisconsin	A-B				A[12]-B[12]	A-B				A-B		
Wyoming				A								

TABLE II. BASED UPON EXTRINSIC CIRCUMSTANCES

	Absconding defendant or debtor	Concealment, removal, disposal or conveyance of property or assets	Refusal to deliver up assets for benefit of creditors	Insufficient property or assets within jurisdiction	Insufficient personal estate and creditor refuses to take land	Failure of judgment debtor to disclose assets on examination	Judgment directs execution against body	Arrest (on mesne process) order not vacated or set aside	Property for which recovery is sought was lost gambling	Excessive gambling since debt was contracted
Alabama [13]	A-B	A[14]-B[14]								
Alaska	A-B	A-B								
Arizona	A[14]-B[14]									
Arkansas										
California	A	A	B					B		
Colorado	B						B			
Connecticut		A								
Delaware	A	A			B					
D.C.	A			B					B	
Florida										
Georgia		A								
Idaho	A	A								
Illinois	A	B								
Indiana	A									
Iowa	B									
Kansas		A-B								
Kentucky	A									
Louisiana [15]								B		
Maine	A[16]					B				
Maryland										
Massachusetts	A-B	A		A						
Michigan		A								A
Minnesota	B									
Mississippi										
Missouri										

TABLE II. BASED UPON EXTRINSIC CIRCUMSTANCES — (Concluded)

	Absconding defendant or debtor	Concealment, removal, disposal or conveyance of property or assets	Refusal to deliver up assets for benefit of creditors	Insufficient property or assets within jurisdiction	Insufficient personal estate and creditor refuses to take land	Failure of judgment debtor to disclose assets on examination	Judgment directs execution against body	Arrest (on mesne process) order not vacated or set aside	Property for which recovery is sought was lost gambling	Excessive gambling since debt was contracted
Montana	A-B	A								
Nebraska	B									
Nevada	A-B	A								
New Hampshire	A-B	A-B						B		
New Jersey	A-B	A[17]-B[17]						B[17]		
New York[18]	A-B	A-B								
New Mexico										
North Carolina	A-B	A-B								
North Dakota	B									
Ohio		A-B						B	A-B	
Oklahoma	B	B								
Oregon	A-B	A-B								
Pennsylvania	A	A								
Rhode Island	A-B	A-B						B		
South Carolina	A-B	A-B								
South Dakota	A-B	A-B								
Tennessee	A									
Texas										
Utah	A-B[19]									
Vermont	A-B									
Virginia	A					B				
Washington	A-B									
West Virginia	A	A				B				
Wisconsin	A-B	A-B								
Wyoming	A-B[19]	A							A	

FOOTNOTES

A Civil arrest as mesne process authorized.

B Body execution (or arrest as final process other than for contempt) authorized.

[1] In Alaska, Idaho, Illinois, Indiana, Iowa, Michigan, Nevada, New York, North Carolina, North Dakota and Pennsylvania, execution against the judgment debtor's property must first be returned unsatisfied, in whole or in part, before body execution can issue. In Idaho, there is the further condition that the judgment must direct body execution. In New York, an unsatisfied property execution is required unless the debtor is actually confined by virtue of an execution in another action or by arrest on mesne process in the same action.

[2] In paternity cases, which are not considered quasi-criminal in these states.

[3] In the District of Columbia, there can be no body execution where the judgment is for money only.

[4] There are no statutory provisions for arrest on mesne process in Florida, and imprisonment for debt, except for cases of fraud, is barred by the state constitution. Moreover, there can be no body execution where the judgment is for money only, except for a fine imposed by a lawful authority.

[5] In Georgia and Tennessee, there are no statutory provisions for body execution, and imprisonment for debt is barred by the state constitution.

[6] In Louisiana, arrest on mesne process is barred by statute.

[7] Where fraud is alleged.

[8] In Mississippi, New Mexico and Texas there are no statutory provisions for arrest on mesne process or on execution, and imprisonment for debt is barred by the state constitution.

[9] In Missouri, arrest on mesne process or on execution is barred by statute.

[10] Includes any wilful misconduct of public officer.

[11] There are no statutory provisions for arrest on mesne process in Oklahoma, and imprisonment for debt is barred by the state constitution.

[12] Where injury is to person or character, or where action is for conversion.

[13] "Answer from defendants upon whom there has been personal service of process may be compelled by attachment, if the bill is a sworn bill of discovery, or is a bill for discovery and relief which is sworn to. * * * Such attachments are executed by arrest of the defendant." *Ala. Code* tit. 7, Equity Rules 18, 19 (1940).

[14] In alimony or support actions only.

[15] In Louisiana, if a debtor commits a fraud on a creditor in an insolvency proceeding, the creditor can have the debtor arrested. Fraud here includes all types of extrinsic fraud as well as tort actions for fraud and fraud in incurring the debt.

[16] In contract action. Otherwise, arrest is allowed in all types of cases.

[17] In contract action.

[18] N. Y. Civ. Prac. Act §827 allows arrest where the judgment demanded requires an act, non-performance of which could be punishable by the court as contempt, and defendant's non-residence or departure may render the judgment ineffectual.

[19] In Utah and Wyoming, a debtor about to be examined as to his assets may be arrested where there is danger of his absconding.

TABLE III. STATUTES

Alabama	arrest	*Ala. Code* tit. 7, §§301, 309 (1940) *Ala. Code* tit. 7, Equity Rules 18, 19 (1940)
	body execution	*Ala. Code* tit. 7, §§301, 309 (1940)
Alaska	arrest	*Alaska Comp. Laws Ann.* §§55-6-3, 61-7-10 (1949)
	body execution	*Alaska Comp. Laws Ann.* §55-9-75 (1949)
Arizona	arrest	*Ariz. Const.* art. 2, §18 *Ariz. Rev. Stat. Ann.*, R. Civ. P. 64 (1956) *Ariz. Rev. Stat. Ann.* §§12-826, 12-1664 (1956)
	body execution	*Ariz. Const.* art. 2, §18 *Ariz. Rev. Stat. Ann.* §12-1664 (1956)
Arkansas	arrest	*Ark. Stat. Ann.* §§34-601, 34-602 (1947)
	body execution	*Ark. Rev. Stat. Ann.* §34-618 (1947)
California	arrest	*Cal. Code Civ. Proc.* §479 (Deering 1954)
	body execution	*Cal. Code Civ. Proc.* §§684, 715 (Deering 1954)
Colorado	arrest	*Colo. Const.* art. II, §12
	body execution	*Colo. Rev. Stat. Ann.* §§77-9-1, 77-9-3 (1953) *Colo. Rev. Stat. Ann.*, R. Civ. P. 69 (d), 101(a) (1953)
Connecticut	arrest	*Conn. Gen. Stat.* §§52-562, 59-355 (1958)
	body execution	*Conn. Gen. Stat.* §§52-355, 52-369 (1958)
Delaware	arrest	*Del. Code Ann.* tit. 10, §3108 (1953)
	body execution	*Del. Code Ann.* tit. 10, §5051 (1953)
District of Columbia	arrest	28 U.S.C.A. 1651
	body execution	*D.C. Code Ann.* §11-326 (1951)
Florida		*Fla. Const.* Decl. of Rights, §16
	body execution	*Fla. Stat. Ann.* §55.14 (1943)
Georgia		*Ga. Const.* art. I, §2-121
	arrest	*Ga. Code Ann.* §§82-204, 107-201 (Supp. 1955)
Idaho	arrest	*Idaho Code Ann.* §8-102 (1948)
	body execution	*Idaho Code Ann.* §§11-102, 11-104 (1948)
Illinois	arrest	*Ill. Ann. Stat.* c. 16, §1 (Smith-Hurd 1951)
	body execution	*Ill. Ann. Stat.* c. 77, §65 (Smith-Hurd 1951)
Indiana	arrest	*Ind. Ann. Stat.* §3-302 (1946)
	body execution	*Ind. Ann. Stat.* §§2-4302, 2-4309, 2-4310 (1946)
Iowa	arrest	*Iowa Const.* art. I, §19
	body execution	*Iowa Code Ann.* §§630.1, 630.14 (1950)
Kansas	arrest	*Kan. Gen. Stat. Ann.* §60-802 (1949)
	body execution	*Kan. Gen. Stat. Ann.* §60-3471 (1949)
Kentucky	arrest	*Ky. Rev. Stat. Ann.* §425.010 (1955)
	body execution	*Ky. Rev. Stat. Ann.* §§425.070, 426.390 (1955)
Louisiana	arrest	*La. Rev. Stat.* §9-2662 (1951)
	body execution	*La. Rev. Stat.* §13-4281 (1951)
Maine	arrest	*Me. Rev. Stat. Ann.* c. 120, §§1, 2 (1954)
	body execution	*Me. Rev. Stat. Ann.* c. 120, §13 (1954)
Maryland		*Md. Const.* art. III, §38
Massachusetts	arrest	*Mass. Ann. Laws* c. 224, §§2, 4, 19 (1955)
	body execution	*Mass. Ann. Laws* c. 224, §6 (1955)
Michigan	arrest	*Mich. Comp. Laws* §§644.2, 644.4 (1948)
	body execution	*Mich. Comp. Laws* §§623.23, 623.26, 623.27 (1948)
Minnesota	arrest	*Minn. Const.* art. I, §12
	body execution	*Minn. Stat. Ann.* §575.03 (1947)
Mississippi		*Miss. Const.* art. 3, §30
Missouri		*Mo. Ann. Stat.* §506.180(5) (1952)
Montana	arrest	*Mont. Rev. Codes Ann.* §93-4002 (1947)
	body execution	*Mont. Rev. Codes Ann.* §93-5902 (1947)

Nebraska	arrest	*Neb. Const.* art. I, §20
	body execution	*Neb. Rev. Stat.* §25-1566 (1956)
Nevada	arrest	*Nev. Rev. Stat.* §31.480 (1957)
	body execution	*Nev. Rev. Stat.* §21.280 (1957)
New Hampshire	arrest	*N.H. Rev. Stat. Ann.* §§513.6, 513.8 (1955)
	body execution	*N.H. Rev. Stat. Ann.* §§513.8, 513.10 (1955)
New Jersey	arrest	*N.J. Rev. Stat.* §§2A:15-41, 2A:15-42 (1952)
	body execution	*N.J. Rev. Stat.* §§2A:17-77, 2A:17-78, 2A:17-79 (1952)
New York	arrest	*N.Y. Civ. Prac. Act* §§826, 827
	body execution	*N.Y. Civ. Prac. Act* §§764, 766
New Mexico		*N.M. Const.* art. II, §21
North Carolina	arrest	*N.C. Gen. Stat.* §1-410 (1953)
	body execution	*N.C. Gen. Stat.* §1-311 (1953)
North Dakota	arrest	*N.D. Rev. Code* §§32-1305, 32-3612 (1943)
	body execution	*N.D. Rev. Code* §28-2505 (1943)
Ohio	arrest	*Ohio Civ. Code Ann.* §11789 (1946)
	body execution	*Ohio Civ. Code Ann.* §11745 (1946)
Oklahoma		*Okla. Const.* art. II, §13
	body execution	*Okla. Stat. Ann.* tit. 12, §844 (1937)
Oregon	arrest	*Ore. Rev. Stat.* §29.520 (1953)
	body execution	*Ore. Rev. Stat.* §23.080 (1953)
Pennsylvania	arrest	*Pa. Stat. Ann.* tit. 12, §§257, 259 (1953)
	body execution	*Pa. Stat. Ann.* tit. 12, §§2141, 2142 (1951)
Rhode Island	arrest	*R.I. Gen. Laws Ann.* §10-10-1 (1956)
	body execution	*R.I. Gen. Laws Ann.* §9-25-15 (1956)
South Carolina	arrest	*S.C. Code* §10-802 (1952)
	body execution	*S.C. Code* §10-1705 (1952)
South Dakota	arrest	*S.D. Code* §37.2502 (1939)
	body execution	*S.D. Code* §33.1902 (1939)
Tennessee		*Tenn. Const.* art. I, §18
	arrest	*Tenn. Code Ann.* §23-108 (1955)
Texas		*Tex. Const.* art. I, §18
Utah	arrest	*Utah Code Ann.*, R. Civ. P. 64A (1953)
	body execution	*Utah Code Ann.*, R. Civ. P. 69(K) (1953)
Vermont	arrest	*Vt. Stat.* §§3011, 3521, 3522, 3529 (1958)
	body execution	*Vt. Stat.* §2740 (1958)
Virginia	arrest	*Va. Code Ann.* §8-569 (1950)
	body execution	*Va. Code Ann.* §8-438 (1950)
Washington	arrest	*Wash. Rev. Code* §7.44.010 (1951)
	body execution	*Wash. Rev. Code* §6.32.010 (1951)
West Virginia	arrest	*W. Va. Code Ann.* §5353 (1955)
	body execution	*W. Va. Code Ann.* §3816 (1955)
Wisconsin	arrest	*Wis. Stat. Ann.* §264.02 (1957)
	body execution	*Wis. Stat. Ann.* §272.09 (1957)
Wyoming	arrest	*Wyo. Comp. Stat. Ann.* §3-4902 (1945)
	body execution	*Wyo. Comp. Stat. Ann.* §3-4704 (1945)

EXEMPTIONS FROM CIVIL ARREST IN NEW YORK

EXEMPTIONS FROM CIVIL ARREST IN NEW YORK

	Person Exempt	Period of Exemption and Action in Which Exempt	Remarks
Canal Law §113	Superintendent of public works, and other officers and employees employed upon or in charge of the canal system.	Any time; in any civil action for any act done or omitted to be done by him in the exercise of his official duties.	
Civil Rights Law §20	Any person.	Any time; for the non-payment of costs awarded other than by final judgment.	Except attorney or court officer ordered to pay costs for misconduct as such, and witness ordered to pay costs on an attachment for non-attendance.
§21	Any person.	Any time; for disobedience of an order or judgment to pay money due on a contract, or as damages for breach of contract.	Except where otherwise specified by law.
§22	Any prisoner being transported to jail, and officer transporting him.	While being transported; in any action.	
§23	Any person.	Any time; in any action.	
§24	Any officer of a court of record, including an attorney employed in a cause to be heard at the term.	During the actual sitting, which he is required to attend, of a term of the court of which he is an officer; in any action.	Except as prescribed by statute.
§25	Any person subpoenaed or ordered to attend for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment or by commitment.	While going to, remaining at, and returning from the place where he is required to attend; in any action.	Arrest is absolutely void and is a contempt of the court, if any, from which the subpoena was issued, or by which the witness was directed to attend. Privilege has been waived by putting in bail, or by attorney giving notice and demanding a copy of the complaint. *Stewart v. Howard*, 15 Barb. 26 (N.Y. Sup. Ct. 1853); *Petrie v. Fitzgerald*, 1 Daly 401 (N.Y.C.P. 1864). *Contra*, *Mackay v. Lewis*, 7 Hun 83 (N.Y. Sup. Ct. 1876). *Cf.* N.Y. Code Crim. Proc. §618-a(4). Damages may be recovered from officer making an arrest. N.Y. Civ. Rights Law §26.

EXEMPTIONS FROM CIVIL ARREST IN NEW YORK — (Concluded)

	Person Exempt	Period of Exemption and Action in Which Exempt	Remarks
Debtor and Creditor Law §100 *et seq.*	Insolvent debtor who is willing to assign his property for the benefit of creditors.	After court order made upon filing the assignment; in any action based upon a debt due at the time of making the assignment.	Debtor must institute proceedings for this relief.
Legislative Law §2	Member of the Legislature.	While attending upon legislative sessions, and for fourteen days before and after each session, or while absent for not more than fourteen days during the session with leave; in any civil action or proceeding other than for a forfeiture or breach of trust in public office or employment.	Either house has power to discharge from arrest any member or officer arrested in violation of privilege and (§4) to punish by imprisonment anyone arresting a member or officer in violation of privilege.
Military Law §235(2)	Person belonging to the organized militia of the state.	While at or going to or from any place at which he may be required to attend for military duty; in any action.	
Second Class Cities Law §139	Member of the police or fire department.	While on duty; in any action.	
Tax Law §300	Any person.	Any time; for non-payment of taxes.	
Code of Criminal Procedure §163	Officer who has arrested criminal prisoner	While transporting prisoner; in any action.	
§618-a(4)	Any person.	While in or passing through state in obedience to a subpoena or order; in connection with matters which arose before entrance into this state under subpoena.	Part of the uniform act to secure the attendance of witnesses from without the state in criminal cases.
New York City Administrative Code §434a-30.0, 487a-16.0	New York City policeman or fireman.	While on duty; in any action.	
United States Constitution Art. 1, §6	Member of United States Congress.	During attendance at the sessions of Congress, and in going to and returning from such sessions; in any action.	
Federal Statutes 1 Stat. 117 (1790), 22 U.S.C. §§252, 253 (1952)	Ambassador or public minister to the United States and domestic servants.	Any time; in any action.	
Bankruptcy Act §9, 52 Stat. 848 (1938), 11 U.S.C. §27 (1952)	Bankrupt.	Any time; in any action upon any claim or debt from which discharge in bankruptcy would be a release.	
	Person enticed into the jurisdiction.	Any time; in any action.	See *Higgins* v. *Dewey*, 34 N.Y. St. R. 629, 13 N.Y. Supp. 570 (N.Y. City Ct. 1890), *aff'd*, 39 N.Y. St. R. 94, 14 N.Y. Supp. 894 (N.Y. C.P. 1891).
	Person forcibly detained until the arrest could be made.	Any time; in any action.	See *Harland* v. *Howard*, 57 Hun 113, 10 N.Y. Supp. 449 (N.Y. Sup. Ct. 1890).
	Person brought into the jurisdiction on the pretext of criminal proceedings against him.	Any time; in any action.	See *Williams* v. *Bacon*, 10 Wend. 636 (N.Y. Sup. Ct. 1834) (*Dictum*).
	A principal, although liable, for fraud committed by his agent which he did not authorize, participate in, or ratify.	Any time; in any action.	See *Hathaway* v. *Johnson*, 55 N.Y. 93 (1873).
	A partner, for the act of a copartner in making a fraudulent disposition of partnership property.	Any time; in any action.	See *Scott* v. *Reed*, 8 N.Y. Civ. Proc. 269, 2 How. Pr. (n.s.) 521 (N.Y. Sup. Ct. 1885).

SECURITY FOR COSTS PROVISIONS IN THE CONSOLIDATED LAWS

SECURITY FOR COSTS PROVISIONS IN THE CONSOLIDATED LAWS

Persons Required by the Consolidated Laws to Give Security for Costs

Condemnation Law §§23, 24	Plaintiff in condemnation proceedings, in order to continue in possession; discretionary security.
Election Law §334(4)	Petitioner in proceeding to compel filing of statements of campaign receipts, expenditures and contributions; mandatory security as a condition of bringing proceeding.
Indian Law §11	Plaintiff in action by or for benefit of Indian nation, tribe or band, for trespass on tribal lands, brought against person other than an Indian; mandatory security as a condition of bringing action.
Mental Hygiene Law §§76, 125	Petitioner for rehearing of order certifying insane or mentally defective person to a mental institution, except mother, father, husband, wife, child or person residing with certified person; mandatory security as a condition of bringing petition. *Cf.* N.Y. Civ. Prac. Act §593 (security for costs on appeal to Court of Appeals).
Military Law §235	Plaintiff in action against military officer for act or omission done in his official capacity; mandatory security upon motion of officer.
Multiple Dwelling Law §355	Taxpayer plaintiff in action against house of prostitution; discretionary security.
Rapid Transit Law §46(i)	Corporate plaintiff in condemnation proceedings for construction, maintenance, or operation of additional track for elevated railroad; discretionary security.

SECURITY FOR COSTS PROVISIONS IN OTHER STATES

SECURITY FOR COSTS PROVISIONS IN OTHER STATES

STATE	MANDATORY SECURITY		DISCRETIONARY SECURITY		Attorney's Liability
	Motion By Defendant Required [1]	In Addition to Non-Residents and Foreign Corporations, the Following Plaintiffs Must Give Security:	Motion By Defendant Required [2]	The Following Plaintiffs May Be Required To Give Security:	
New York	X	Convict; assignee of convict; assignee or trustee for benefit of creditors; receiver or trustee in bankruptcy; bankrupt; dischargee from prison.[3]	X	Certain representatives;[4] plaintiffs in actions against certain representatives.[5]	Up to $100.[6]
Alabama		No others.	No provision.		All costs.
Arizona	X	Those having insufficient local property.	No provision.		No provision.
Arkansas		Domestic corporations except banks.	Representatives; insolvent assignees.		All costs.
California	X	No others.	No provision.		No provision.
Colorado		Representatives; those unable or unlikely to pay costs; qui tam actions on any penal statute; actions on executor's bond.	No provision.		All costs.
Connecticut		Those unable to pay costs; actions on probate bond.	No provision.		No provision.
Delaware	X	No others.	No provision.		No provision.
Florida		No others.	No provision.		All costs.
Georgia		Divorce actions.	No provision.		All costs.

SECURITY FOR COSTS PROVISIONS IN OTHER STATES — (Continued)

STATE	MANDATORY SECURITY		DISCRETIONARY SECURITY		Attorney's Liability
	Motion By Defendant Required [1]	In Addition to Non-Residents and Foreign Corporations, the Following Plaintiffs Must Give Security:	Motion By Defendant Required [2]	The Following Plaintiffs May Be Required To Give Security:	
Idaho		No others.	No provision.		No provision.
Illinois		Guardians; qui tam actions; actions on penal statute or executor's or administrator's bond.	No provision.		All costs.
Indiana		No others.	No provision.		No provision.
Iowa	X	Private corporations.	No provision.		No provision.
Kansas		All others.	No provision.		No provision.
Kentucky		Domestic corporations except banks.		Representatives, insolvent assignees.	All costs.
Louisiana	X	All others.	No provision.		No provision.
Maine	X	No others.	No provision.		No provision.
Maryland	X	No others.	X	Non-residents, foreign corporations.[7]	No provision.
Massachusetts		No others.	No provision.		No provision.
Michigan	X	No others.		All plaintiffs.	No provision.
Minnesota		Convicts. (Plaintiff who is committed for a crime.)	No provision.		No provision.
Mississippi		Insolvents.		All plaintiffs.	No provision.
Missouri		Representatives; those unable or unlikely to pay costs; qui tam actions; actions on executor's bond.	No provision.		All costs.
Montana	X	No others.	No provision.		No provision.
Nebraska		No others.	No provision.		No provision.
Nevada	X	No others.	No provision.		No provision.
New Hampshire	No provision.			All plaintiffs.	No provision.
New Jersey	X	No others.	No provision.		No provision.
New Mexico	No provision.			All plaintiffs.	No provision.
North Carolina		All others.	No provision.		No provision.
North Dakota		No others.	No provision.		No provision.
Ohio		Partnerships suing in company name; insolvent corporations.	No provision.		No provision.
Oklahoma		All others.	No provision.		No provision.
Oregon		No others.	No provision.		All costs.
Pennsylvania	No provision.		No provision.		No provision.
Rhode Island	X	No others.	X	All plaintiffs.	No provision.
South Carolina	X	No others.	No provision.		No provision.
South Dakota		No others.	No provision.		No provision.
Tennessee		All others.		Actions commenced by petition and motion.	No provision.

SECURITY FOR COSTS PROVISIONS IN OTHER STATES — (Concluded)

STATE	MANDATORY SECURITY		DISCRETIONARY SECURITY		Attorney's Liability
	Motion By Defendant Required [1]	In Addition to Non-Residents and Foreign Corporations, the Following Plaintiffs Must Give Security:	Motion By Defendant Required [2]	The Following Plaintiffs May be Required To Give Security:	
Texas	No provision.			All plaintiffs.	No provision.
Utah	X	No others.		No provision.	No provision.
Vermont	No provision.			No provision.	No provision.
Virginia	X	No others. (Exception for poor plaintiff.)		No provision.	No provision.
Washington	X	Assignees.		No provision.	No provision.
West Virginia	X	No others. (Exception for poor plaintiff.)		No provision.	No provision.
Wisconsin	X	Representatives of a debtor; convicts.		All plaintiffs.	Up to $100 [6]
Wyoming		Partnerships suing in company name.		No provision.	No provision.

[1] In the provisions which do not require a motion by the defendant, security must be given as a condition of bringing the action.

[2] In the provisions which do not require a motion by the defendant, security may be given upon the court's own initiative. Except for the provisions of Arkansas and Wisconsin, a motion by the defendant is also expressly authorized.

[3] The representatives enumerated are required to give security only when suing upon a cause of action which arose before the appointment, assignment, or petition in bankruptcy.

[4] Executors, administrators, trustees of express trusts, persons expressly authorized by statute to sue, official assignees, assignees of receivers, and committees of incompetents.

[5] Plaintiffs bringing an action against executors, administrators, trustees of express trusts, and persons expressly authorized by statute to be sued.

[6] The attorney is liable for costs up to $100 in New York and Wisconsin when the plaintiff was, at the commencement of the action, a non-resident, a foreign corporation, a convict, or one of the designated representatives, even if the defendant has not moved for security.

[7] In Maryland, a motion for mandatory security for costs may only be made prior to trial of the action. If the motion is made after trial has begun, it is addressed to the discretion of the court.

Citations to Provisions Covered in Table

New York	Civ. Prac. Act §§1522, 1523, 1524, 1530
Alabama	Code tit. 11, §§59, 61 (1940)
Arizona	Rules Civ. Prac., Rule 67(d) (1956)
Arkansas	Stat. Ann. §§27-2301, 27-2303–27-2305 (1947)
California	Code Civ. Proc. §1030 (1954)
Colorado	Rev. Stat. Ann. §§33-1-1, 33-1-2 (1953)
Connecticut	Gen. Stat. §§52-185–52-190 (1958)
Delaware	Chancery Rule 3(c); Rule Super. Ct. 3(f) (1953)
Florida	Stat. Ann. §58.01 (1943)
Georgia	Code Ann. §§24-3403, 24-3406–24-3407 (1935)
Idaho	Rules Prac. and Proc., Rule 12-116 (1951)
Illinois	Ann. Stat. c. 33, §§1, 3 (Smith-Hurd 1935)
Indiana	Ann. Stat. §2-4708 (1933)
Iowa	Code Ann. §§621.1–621.9 (1946)
Kansas	Gen. Stat. Ann. §60-2401 (1949)
Kentucky	Rev. Stat. Ann. §§453.220, 453.230, 453.235, 453.245 (1955)
Louisiana	Rev. Stat. §13:4522 (1950)
Maine	Rev. Stat. Ann. c. 112, §6 (1954)
Maryland	Rules Civ. Proc., Rule 328 (1957)
Massachusetts	Ann. Laws c. 231, §42 (1956)
Michigan	Comp. Laws §§613.8, 613.10 (1948)
Minnesota	Stat. Ann. §549.18 (1945)
Mississippi	Code Ann. §§1566, 1567 (1956)
Missouri	Rev. Stat. §§514.010, 514.020 (1951)
Montana	Rev. Codes Ann. §93-8628 (1947)
Nebraska	Rev. Stat. §§25-1701, 25-1703 (1956)
Nevada	Rev. Stat. §18.130 (1957)
New Hampshire	Rev. Stat. Ann. §525.3 (1955)
New Jersey	Rev. Stat. §2A:15-67 (1952)
New Mexico	Stat. Ann. §25-1-13 (1953)

North Carolina	Gen. Stat. §1-109 (Supp. 1957)
North Dakota	Rev. Code §28-2625 (1943)
Ohio	Rev. Code Ann. §§2323.30, 2323.31 (Baldwin 1958)
Oklahoma	Stat. Ann. tit. 12, §921 (Supp. 1958)
Oregon	Rev. Stat. §20.160 (1957)
Pennsylvania	No provision
Rhode Island	Gen. Laws Ann. c. 22, §§9-22-1, 9-22-2 (1956)
South Carolina	Circuit Ct. Rules, Rule 10 (1952)
South Dakota	Code §33.1820 (1939)
Tennessee	Code Ann. §§20-1622, 20-1624 (1955)
Texas	Rules Civ. Proc., Rules 142, 143 (1955)
Utah	Rules Civ. Proc., Rule 12j (1953)
Vermont	No provision
Virginia	Code Ann. §14-182 (1956)
Washington	Rev. Code §4.84.210 (1956)
West Virginia	Code Ann. §5854 (1955)
Wisconsin	Stat. §§271.27, 271.28, 271.34 (1958)
Wyoming	Comp. Stat. Ann. §3-3719 (1945)

RULE-MAKING POWER

TABLE OF CONTENTS

I. INTRODUCTION

Major revisions of civil procedure in this generation have been associated with an increased utilization of court rule-making power.[1] In part the courts have relied upon their inherent power to control their own practice.[2] At the same time legislatures have recognized the desirability of courts exercising authority to regulate procedure.[3] Recent provisions give explicit recognition to the desirability of the courts using nonjudicial bodies to assist them in the rule-making process.[4] This study briefly analyzes the constitutional and statutory bases for the exercise of the rule-making power and then sets forth the current provisions and the leading cases and articles interpreting them. A list of contemporary writings on the subject follows, and then a list of provisions establishing bodies that assist in the rule-making function.

II. AUTHORITY FOR COURT RULE-MAKING

A. Inherent

Authority of a court to regulate its own practice does not imply power to regulate the practice of an inferior court.[5] The former is often treated as an "inherent" power[6] while the source of the latter

[1] Many commentators have attempted a tally of the states that have empowered courts to promulgate procedural rules. There is very little agreement between the various lists and charts, because the great variety of provisions makes comparison difficult. However the trend is clear, and the results generally bespeak procedural reform. See Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 Fordham L. Rev. 338, 343 nn.31 & 32 (1955). See, generally, Institute of Judicial Administration, Rule-Making Power of the Courts (1955).

[2] Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. Cinn. L. Rev. 32 (1936); Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 Ill. L. Rev. 163, 172 (1915); see Joiner and Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich. L. Rev. 623, 629 (1957). For a discussion suggesting that whatever power courts once had may be lost through atrophy, see 13 Idaho S. B. Proc. 87, 100–103 (1937).

[3] See Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 Nw. U. L. Rev. 443, 449 (1952); *cf.* Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance 105 (1953); Brook, *Judicial and Executive Functions of the Legislator in New York*, 25 Fordham L. Rev. 275 (1956); Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 Minn. L. Rev. 815 (1956); American Bar Association, The Improvement of the Administration of Justice 12 (3d ed. 1952).

[4] *E.g.*, Alaska Const. art. 4, §2 (proposed); Wis. Stat. Ann. §251.181 (1957). See also Pub. L. No. 513, 85th Cong., 2d Sess. (July 11, 1958).

[5] See Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 Ore. L. Rev. 1, 14 (1926).

[6] See Pound, *supra* note 2, at 172; Scherr, *Regulating Procedure by Rules of Court in West Virginia*, 47 W. Va. L.Q. 136 (1940); *cf.* Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 636 (1935). For a criticism of the term "inherent power," see Report of the Committee on Rule-Making Power and Judicial Councils, 21 Mass. L.Q. 65 at 4–5 (renumbered) (July, 1936). For other meanings, see Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 Wash. U.L.Q. 459, 474 (1937). The regulation of the bar by the courts is also termed an "inherent power." Precedents supporting this function are often cited to confirm the rule-making power. See, generally Annots., 110 A.L.R. 22 (1937), 158 A.L.R. 705 (1945).

power is generally sought in constitutional authority, expressed or implied.[7]

B. Constitutional

1. *Express*

A few state constitutions specifically confer on the highest court power to regulate the procedure for other courts in the judicial system.[8] Subject to legislative restrictions, California has given this function to its Judicial Council.[9] In Delaware, the Chancellor is authorized to promulgate rules for the chancery courts.[10] In a few cases the legislature is expressly empowered to regulate court practice.[11]

2. *Implied*

A majority of states imply from the constitution supervisory rule-making authority.[12] In a dozen of these states, the highest court is given a general "supervisory control" over the lower courts.[13] Many others, following the Federal plan,[14] "vest" judicial power in the highest court;[15] judicial power is taken to include a supervisory control, which is interpreted to encompass rule-making.[16] Even the omnipresent "separation of powers" provision has been suggested as the predicate for this power.[17]

III. THE LEGISLATURE'S ROLE IN COURT RULE-MAKING

In several states the legislature retains a check on court-made rules before they are promulgated. There are two variants: under one, the legislature itself must take affirmative action before the rules become effective,[18] and under the other, the rules automatically become effective unless the legislature specifically disapproves.[19]

[7] See Shaw, *supra* note 1, at 349. *But cf. Ex parte* Foshee, 246 Ala. 604, 606, 21 S.2d 827, 829 (1945): "superintendence and control of inferior jurisdictions . . . includes by implication the power to make rules . . . sometimes said to be an inherent power."

[8] *E.g.*, Alaska Const. art. 4, §15 (proposed); Fla. Const. art. 5, §3; N.J. Const. art. 6, §2, para. 3; Tex. Const. art. 5, §25. The pitfalls of ambiguous draftsmanship are especially to be guarded against. See note 22 *infra*.

[9] Cal. Const. art. 6, §1a(5).

[10] Del. Const. art. 4, §10.

[11] *E.g.*, Idaho Const. art. 5, §13; Iowa Const. art. 5, §14; see Stewart, *Rules of Court in Iowa*, 13 Iowa L. Rev. 398, 401 (1928).

[12] When constitutional language is interpreted as conferring rule-making power on the courts, the subsequent statutory delegation of such power by the legislature cannot, in theory, be considered a grant of authority. See State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936). In reality, however, courts have refused to proceed without such "enabling legislation."

[13] *E.g.*, Ala. Const. art. 6, §140; Colo. Const. art. 6, §2; S.D. Const. art. 5, §2.

[14] U.S. Const. art. 3, §1.

[15] Ariz. Const. art. 4, pt. 1, §1; Ind. Const. art. 7, §1.

[16] See Shaw, *supra* note 1, at 349.

[17] See Comment, 4 Okla. L. Rev. 259, 260 (1951).

[18] *E.g.*, Ga. Code Ann. §81-1502 (1956).

[19] *E.g.*, 28 U.S.C. §2072 (1952); Conn. Gen. Stat. §51-14 (1958); Iowa Code Ann. §684.19 (Supp. 1958); Tex. Civ. Rev. Stat. art. 1731-a (1948); *cf.* Alaska Const. art. 4, §15 (proposed).

Although the ability of the legislature to repeal the enabling legislation is unquestioned, and *a fortiori*, it can enact procedural legislation subsequent to the enabling act,[20] some statutes are specific on this point.[21] Even when the rule-making power is specified by the constitution, there may be a provision for legislative overriding.[22]

IV. PRACTICE AND PROCEDURE

The content of the terms practice and procedure—frequently used in statutes and constitutions—is not clear.[23] There is authority for equating practice with procedure[24] and also for the proposition that procedure includes practice, evidence, and pleading.[25] Procedure itself is often defined in terms of its antithesis, substance.[26] But just as often appears the *caveat*, that what is substantive in one sense may be procedural in another.[27]

In an attempt to obviate the conflicts in common law definitions, some states specify the particular topics and headings that rules enacted pursuant to that authority may cover.[28] Some areas may be specifically excluded.[29] Generally, just to make sure, there is

[20] "[A]ssuming the power of the Legislature to enact rules of procedure and to delegate this power, it must follow . . . that it can take back whatever it can give, and we have been unable to discover any rule that compels it . . . to take back the whole rather than a part." In re Constitutionality of Section 231.18, Wisconsin Statute, 204 Wis. 501, 513, 236 N.W. 717, 722 (1931).

[21] *E.g.*, Ga. Code Ann. §81-1505 (1956); Minn. Stat. Ann. §480.058 (1958); Mo. Ann. Stat. §506.030 (1952); S.D. Code §32.0902 (1939); Wis. Stat. Ann. §251.18 (1957); *cf.* Ill. Ann. Stat. c. 110, §4 (Smith-Hurd 1956). *But see* Harris, *The Rule-Making Power*, 2 F.R.D. 67, 78 n. 2 (1943).

[22] Md. Const. art. 4, §18A; Mo. Const. art. 5, §5. *Cf.* Neb. Const. art. 5, §25. See also N.Y. Concurrent Res. No. 2283 (Senate, Feb. 3, 1958) proposing a new Judiciary Article, §26. *But see* N.J. Const. art. 6, §2, para. 3. The phrase "subject to law" was interpreted in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950) so as not to permit inconsistent statutes. For criticism of this interpretation, see Kaplan and Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 Harv. L. Rev. 234 (1951) (unfavorable); Pound, *Procedure Under Rules of Court in New Jersey*, 66 Harv. L. Rev. 28 (1952) (favorable).

[23] See generally Joiner and Miller, *supra* note 2, at 623.

[24] See Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 Ill. L. Rev. 276, 278 (1928).

[25] See Sackheim v. Pegueron, 215 N.Y. 62, 73, 109 N.E. 109, 111 (1915); Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404, 406 (1935); *cf.* Seefeld, *Extent to Which Courts Under the Rule-Making Power May Prescribe Rules of Evidence*, 25 Marq. L. Rev. 138 (1941). *But see* Williams, *supra* note 6, at 463 (evidence regarded as substantive; procedure equated to practice plus pleading); *cf.* introduction to proposed article 11, N.Y. Temp. Comm'n on the Courts Rep. II 87, Leg. Doc. 13 (1958).

[26] *Cf.* Sunderland, *supra* note 25, at 406.

[27] Thus, statutes of limitation, substantive for *Erie* v. *Tompkins* purposes, may be procedural for conflicts purposes. See Comment, 1938 Wis. L. Rev. 324.

[28] *E.g.*, Md. Ann. Code art. 26, §25 (1957); Utah Code Ann. §78-2-4 (1953); Wash. Rev. Code §2.04.190 (1956); Wyo. Comp. Stat. Ann. §1-117 (Supp. 1957); *cf.* Ark. Stat. Ann. §22-507 (1947).

[29] *E.g.*, Mo. Const. art. 5, §5; Colo. Rev. Stat. Ann. §37-2-8 (1953); Del. Code Ann. tit. 10, §561 (1953); Ga. Code Ann. §81-1506 (Supp. 1958); Mont. Rev. Codes Ann. §93-502 (1949); Pa. Stat. Ann. tit. 17, §61 (Supp. 1957); Wyo. Comp. Stat. Ann. §1-117 (Supp. 1957); *cf.* Utah Code Ann. §78-7-6 (1953).

attached the injunction that no rule shall modify the substantive rights of any litigant.[30]

V. LOWER COURTS

The authority for lower courts to regulate their own procedure is found in most of the states. The provisions are generally simple, requiring only that such rules be not inconsistent with law or higher court rules.[31] Some provisions suggest that lower courts are reluctant to make their own rules.[32] In a few states, the lower courts must first certify their rules to the higher courts before they become effective.[33] There are also statutes establishing commissions of lower court judges to provide rules for all their courts.[34]

In Connecticut the supervisory rule-making power is given to a court other than the highest court.[35]

VI. TRANSITION FROM STATUTES TO RULES

Transition from statutes to rules presents a special problem.

During the period when rules have been authorized but not yet adopted, a common provision declares that existing procedural statutes have only the force of rules, to exist until superseded.[36] Another approach is to repeal all procedural statutes as of the date the rules become effective.[37] When rules are not to be inconsistent with statute, the problem does not arise.[38]

VII. NOTICE, HEARING, INITIATIVE

Statutes typically provide the mechanical details for the promulgation of rules;[39] sometimes they differ depending upon whether initial rules or amendments are involved.[40] The bar or other interested parties are often given an opportunity to suggest changes in rules—in which case a hearing is provided.[41] In addition to this type of initiative, the effective date of the rule may be set far after promulgation, allowing objections to be raised and hearings to be held.[42] In lieu of, or in addition to, these *ad hoc* hearings, some statutes provide periodic hearings, at which objections may be voiced and specific suggestions made.[43]

VIII. ADVISORY BODIES

Experience has shown that if in addition to the grant of rule-making power, a body of experts is empowered to assist the courts in the preparation of rules, the efficiency of the system is increased.[44] In some states a new advisory committee is established; more frequently, the existing judicial council is given this extra duty. While the number and composition of the committees and councils vary,[45] there is generally some attempt to provide a cross-section of interested and expert opinion[46] while keeping the size within manageable limits.[47]

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[30] *E.g.*, 28 U.S.C. §2072 (1952).

[31] Occasionally, the rules of the lower court may override statutes and, in these cases, no provision is made for supervisory control by the Supreme Court. Del. Code Ann. tit. 10, §561 (1953); R.I. Gen. Laws Ann. §8-6-2 (1956).

[32] See Mont. Rev. Codes Ann. §93-502 (1949); *cf.* Ohio Rev. Code Ann. §2505.45 (Baldwin 1953).

[33] Ky. Rev. Stat. Ann. §24.030 (1955); Mass. Ann. Laws c. 215, §30 (1955); Ohio Rev. Code Ann. §§2101.04, 2505.45 (Baldwin 1953); W. Va. Code Ann. §5183 (1955). *But cf.* 8 Ohio Bar 447 (1935) (lacking specific authority Ohio Supreme Court has no direct control over lower court rules).

[34] Conn. Gen. Stat. §3130d (Supp. 1955); Wis. Stat. Ann. §§252.08, 253.30 (1957); *cf.* S.C. Code §10-16 (1952).

[35] Conn. Gen. Stat. §51-14 (1958).

[36] *E.g.*, Ariz. Rev. Stat. Ann. §12-111 (1956); Cal. Code Civ. Proc. §961; Conn. Gen. Stat. §51-14 (1958); Minn. Stat. Ann. §480.056 (1958); N.M. Stat. Ann. §21-3-2 (1953); N.D. Rev. Code §27-0209 (1943); S.D. Code §32.0902 (1939). An alternative phrasing with the same result merely provides for rules to supersede conflicting statutes. *E.g.*, Utah Code Ann. §78-2-4 (1953); Wash. Rev. Code §2.04.200 (1958).

[37] Va. Code Ann. §8-86.1 (1957); Tex. Civ. Rev. Stat. art. 1731-a (1945). See also Wicker and Anderson, *Regulation of Procedure by Rules of Court*, 15 Tenn. L. Rev. 758, 771 (1939).

[38] See *e.g.*, Cal. Const. art. 6, §1a(5); S.C. Code §10-16 (1952).

[39] See, *e.g.*, Ky. Rev. Stat. §447.152 (1958); N.M. Stat. Ann. §21-3-1 (1953).

[40] *E.g.*, S.D. Code §32.0902 (1939).

[41] *E.g.*, Minn. Stat. Ann. §480.054 (1958); N.D. Rev. Code §27-0212 (1943); S.D. Code §32.0902 (1939).

[42] N.D. Rev. Code §27-0211 (Supp. 1957); S.D. Code §32.0902 (1939); W. Va. Code Ann. §5183 (1955); Wis. Stat. Ann. §251.18 (1957).

[43] *E.g.*, Conn. Gen. Stat. §51-14 (1958).

[44] Wicker and Anderson, *supra* note 37, at 770 n.46: "a proper set-up of a procedural rules committee is a *sine qua non* of adequate procedural reforms. . . ." See Hyde, *From Common Law Rules to Rules of Court*, 22 Wash. U.L.Q. 187, 194 (1937); Clark, *Alabama's Procedural Reform and the National Movement*, 9 Ala. L. Rev. 167, 177 (1957). Indeed, in many instances, until such assistance was inaugurated, no progress was made at all. See Address by Gibson, C.J., in 15 Cal. S.B.J. 331, 332 (1940). "*Adequate machinery* to make the [rule-making] power effective is the vital and basic element of any successful reform." *Id.* at 333 (italicized in original). That the danger of rigidity is as ominous in courts as in legislative regulation, see Harris, *supra* note 21, at 75–76, requiring the spirit and desire for effective change to overcome the menace. See also National Conference of Judicial Councils, Minimum Standards of Judicial Administration 144 (1949).

Two characteristics of courts are most often cited by commentators in calling for this innovation: (1) courts themselves are heavily burdened with their ordinary judicial functions (*e.g.*, Sunderland, *supra* note 25, at 460); and (2) courts are "inherently" conservative. "No institution that can be conceived by the wit of man would be less likely to [make radical procedural changes] than an American court, steeped as it is in the tradition of conservatism with scrupulous regard for custom. . . ." Montague, *Restoring to the Courts the Power to Make Rules of Procedure*, 6 Ore. L. Rev. 17 (1926); see also Kaplan and Greene, *supra* note 22, at 252.

[45] See generally Sunderland, *The Function and Organization of a Judicial Council*, 9 Ind. L.J. 479 (1934).

[46] *E.g.*, Alaska Const. art. 4, §2 (proposed); Ga. Code Ann. §81-1601 (1956); Ind. Ann. Stat. §§4-3701—4-3708 (1946). See Address by Gibson, C.J., in 15 Cal. S.B.J. 331, 334 (1940) (cross-section would exclude judges currently sitting). *But see* Sunderland, *supra* note 45, at 491.

[47] Wicker and Anderson, *supra* note 37, at 770 n.46. *Compare* Vt. Stat. Ann. tit. 4, §§561–563 (1958) (5 members), *with* La. S. Ct. Rules, Rule XXI (Supp. 1958) (26 members).

CONSTITUTIONAL AND STATUTORY PROVISIONS AFFECTING RULE-MAKING POWER

Alabama

Const. art. 6, §140:

> [The Supreme Court has] a general superintendence and control of inferior jurisdiction.

See *Ex parte Foshee,* 246 Ala. 604, 606, 21 S.2d 827, 828 (1945): "[S]uperintendence and control of inferior jurisdiction . . . includes by implication the power to make rules . . . sometimes said to be an inherent power."

Code tit. 13, §17 (1940):

> The supreme court has authority . . . [t]o establish rules of practice in such court, and all other courts of record in the state, not contrary to the provisions of this Code.

See Note, 7 Ala. Lawyer 65, 67 (1946): "The Alabama court follows what is apparently the established rule in holding Assembly-made regulations for the judiciary pre-emptive when opposed to others."

Code tit. 7, §289 (1940):

> The Alabama equity rules adopted by the supreme court for equity practice in the courts of this state are hereby recognized; and the supreme court is empowered to adopt, from time to time, rules of pleading, practice and procedure in suits and proceedings in equity, and to amend the same, and said court may disregard any statutes, and rules of court or decisions inconsistent therewith, insofar as the same may be done agreeably to the constitutions of Alabama and of the United States. [1915]

Code tit. 7, §290 (1940):

> Should provisions of this title be applicable to suits and causes in equity, the rules for equity practice adopted by the supreme court, and as amended hereafter, where applicable shall prevail in suits and causes in equity. [1935]

Code tit. 7, §291 (1940):

> The several circuit judges may, from time to time, adopt and enforce rules to facilitate the business of the courts in their respective circuits as to equity proceedings, not contrary to law, nor inconsistent with the rules established by the supreme court.

Alaska

Const. art. 4, §15 (proposed):

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Arizona

Const. art. 6, §1:

> The judicial power . . . shall be vested in a supreme court . . . .

Rev. Stat. Ann. §12-109 (1956):

> A. The supreme court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. The rules shall not abridge, enlarge or modify substantive rights of a litigant.
>
> B. The supreme court shall print and distribute the rules to all members of the state bar and to all other persons who apply.
>
> C. The rules shall not become effective until sixty days after distribution. [1939]

Rev. Stat. Ann. §12-111 (1956):

> All statutes relating to pleading, practice and procedure shall be deemed rules of court and shall remain in effect as such until modified or suspended by rules promulgated by the supreme court. [1939]

Arkansas

Const. art. 7, §4:

> [The Supreme Court] shall have a general superintending control over all inferior courts of law and equity. . . .

Const. art. 7, §14:

> The circuit courts shall exercise a superintending control [over specified lower courts]. . . .

Stat. Ann. §27-2142 (1947):

> The Supreme Court may make rules for the convenient dispatch of business, . . . and may change the same. Provided, no mandate shall issue or decision become final until after fifteen [15] judicial days from the time the decision was rendered, unless the court, for good cause shown, shall otherwise direct. . . . [1913]

Stat. Ann. §22-507 (1947):

> The Supreme Court . . . shall have the power to prescribe by general rules for the Probate Courts . . . the forms of

process, writs, pleadings and motions, and the practice and procedure therein. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant. [Generally] rules shall take effect three months after their promulgation. All laws in conflict with the rules shall be of no further force or effect. . . . [1939]

Stat. Ann. §22-309 (1947):

Circuit courts shall have power to make and establish all proper rules which may be necessary for the dispatch of business. . . . [1873]

[§22-803 similar as to police courts]

California

Const. art. 6, §1a(5):

[The Judicial Council shall from time to time] [a]dopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force; and the council shall submit to the Legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure. [1926]

Code Civ. Proc. §961:

The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State.

The Judicial Council shall report the rules prescribed by it to the Legislature. . . .

[A]ll laws in conflict therewith shall be of no further force or effect. [1943]

Code Civ. Pro. §988j:

In appeals from municipal courts in civil cases, the practice and procedure on appeal, and the time and manner in which records on appeal shall be made up and filed, shall be prescribed in rules adopted by the Judicial Council. Until such rules are adopted, the practice and procedure, and the time and manner provided by statutes in force on the thirtieth day of June, 1943, shall govern. . . . [1945]

Pen. Code §1246:

The record on appeal shall be made up and filed in such time and manner as shall be prescribed in rules adopted by the Judicial Council. [1927]

Pen. Code §1247k:

The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all criminal cases in all courts of this State.

The Judicial Council shall report the rules prescribed by it to the Legislature. . . .

[A]ll laws in conflict therewith shall be of no further force or effect. [1941]

Colorado

Const. art. 6, §2:

The Supreme Court . . . shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law.

This provision has been interpreted to confer unlimited rule-making authority on the Supreme Court. *Kolkman* v. *People*, 89 Colo. 8, 300 Pac. 575 (1931).

Rev. Stat. Ann. §37-2-8 (1953):

The supreme court . . . shall have the power to prescribe, by general rules, for the courts of record . . . the practice and procedure in civil actions and all forms in connection therewith, provided, that no rules shall be made by the supreme court permitting or allowing trial judges to comment on the evidence given on the trial. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. Such rules shall take effect three months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force nor effect. [1913, as amended 1939]

Rev. Stat. Ann. §37-2-9 (1953):

The supreme court from time to time may institute rules of practice, and prescribe forms of process to be used, and regulations for the keeping of the records and proceedings of the court, not inconsistent with the constitution or laws of this state.

Rev. Stat. Ann. §37-4-21 (1953):

In addition to the ordinary power of making rules, such court sitting en banc may make all rules, which its peculiar organization may require different from the ordinary course of practice and necessary to facilitate the transaction of business in the courts held by the judges sitting separately and by rule may provide for the classification, arrangement and distribution of the business of the court among the several judges thereof. . . . [1887]

Connecticut

Const. art. 5, §1:

> The judicial power of the state shall be vested in a supreme court of errors, a superior court, and such inferior courts as the general assembly shall . . . establish . . . .

Gen. Stat. §51-14 (1958):

> (a) The judges of the supreme court of errors shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying the same and of promoting the speedy and efficient determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts. Subject to the provisions of subsection (b), such rules shall become effective on such date as the judges of the supreme court of errors shall specify but not in any event until sixty days after such promulgation. (b) All statutes relating to pleading, practice and procedure in existence on July 1, 1957, shall be deemed to be rules of court and shall remain in effect as such only until modified, superseded or suspended by rules adopted and promulgated by the judges of the supreme court of errors pursuant to the provisions of this section. The chief justice shall report any such rules to the general assembly for study at the beginning of each regular session. Such rules shall be referred by the speaker of the house or by the president of the senate to the judiciary and governmental functions committee for its consideration and such committee shall schedule hearings thereon. Any rule or any part thereof disapproved by the general assembly by resolution shall be void and of no effect and a copy of such resolution shall thereafter be published once in the Connecticut Law Journal. (c) The judges or a committee of their number shall hold public hearings, of which reasonable notice shall be given in the Connecticut Law Journal and otherwise as they deem proper, upon any proposed new rule or any change in an existing rule that is to come before said judges for action, and each such proposed new rule or change in an existing rule shall be published in the Connecticut Law Journal as a part of such notice. A public hearing shall be held at least once a year, of which reasonable notice shall likewise be given, at which any member of the bar or layman may bring to the attention of the judges any new rule or change in an existing rule that he deems desirable. (d) Upon the taking effect of such rules adopted and promulgated by the judges of the supreme court of errors pursuant to the provisions of this section, all provisions of rules theretofore promulgated by the judges of the superior court shall be deemed to be repealed. [1953]

Delaware

Const. art. 4, §1:

> The judicial power of this State shall be vested in a Supreme Court, a Superior Court [and other courts to be established by law].

Const. art. 4, §10:

> . . . The rules of the Court of Chancery shall be made by the Chancellor and he may make general rules providing for the distribution of the business of the court . . . . [1951]

Const. art. 4, §11:

> The Supreme Court shall have jurisdiction as follows:
>
> . . .
>
> (9) . . . The Supreme Court may by rules define generally the conditions under which questions may be certified to it and prescribe methods of certification. [1951]

Code Ann. tit. 10, §561 (1953):

> (a) The judges of the Superior Court, or a majority of them, may, from time to time, adopt and promulgate general rules which prescribe, establish and regulate the form, issuance and return of process and writs, the form and system of pleading, and all other practice and procedure with respect to the commencement, trial, hearing and determination of civil actions in the Superior Court.
>
> (b) Such rules shall be for the purpose of securing the just and, so far as possible, the speedy and inexpensive determination of every such action. The rules shall not abridge, enlarge or modify any substantive right of any party, and they shall preserve the right of trial by jury as at common law and as declared by the statutes and Constitution of this State.
>
> (c) The rules so adopted and promulgated, and all amendments thereof, shall, after they have taken effect, supersede all statutory provisions in conflict or inconsistent therewith.
>
> (d) Any inconsistency or conflict between any rule promulgated under the authority of this section or prior law, and any of the provisions of this Code or other statute of this State dealing with practice or procedure in the Superior Court, shall be resolved in favor of such rule of court. Nothing in this Code, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any rule heretofor promulgated governing practice or procedure in civil actions in the Superior Court.
>
> (e) As used in this section, the phrase "civil actions in the Superior Court" includes proceedings of every kind or char-

acter within the jurisdiction of that Court except criminal proceedings.

A parallel section gives the Chancellor rule-making power for the Court of Chancery. See Code Ann. tit. 10, §361 (1953) [1852].

Code Ann. tit. 10, §751 (1953):

The Orphans' Court may make all rules and orders necessary for regulating the practice of the Court, for the return of writs, commissions and other proceedings therein, entering rules on public officers or others, filing pleadings, and all others rules necessary for conducting causes, or executing orders, or decrees. [1852]

Code Ann. tit. 10, §6103 (1953):

The Rules of the Superior Court, as amended from time to time, shall govern, in so far as applicable, all condemnation proceedings of real and personal property under the power of eminent domain, except as otherwise provided in this chapter. [1951]

Code Ann. tit. 11, §5121 (1953):

(a) The Superior Court may, from time to time, adopt and promulgate general rules which prescribe and regulate the form and manner of process, pleading, practice and procedure governing criminal proceedings in the Superior Court from their inception to their termination, including such proceedings before inferior courts and justices of the peace as are preliminary to indictment or information filed in the Superior Court.

(b) Such rules shall not abridge, enlarge or modify the substantive rights of any person, and shall preserve the right of trial by jury as at common law and as declared by the statutes and Constitution of this State.

(c) The rules of criminal procedure for the Superior Court adopted and promulgated by the Supreme Court prior to the enactment of this Code shall take effect upon the enactment of this Code. Any amendments of or supplements to such rules which the Superior Court may hereafter adopt and promulgate shall take effect upon such date as the Superior Court shall fix in its order adopting and promulgating such amendments or supplements. After the effective date of any rule adopted and promulgated under this section, all laws inconsistent or in conflict therewith shall be of no further force or effect.

(d) Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed under authority of law. [1951]

Code Ann. tit. 11, §5122 (1953):

Any inconsistency or conflict between any rule of court promulgated under the authority of section 5121 of this title, or prior law, and any of the provisions of this Code or other statute of this State, dealing with practice and procedure in criminal actions in the Superior Court, shall be resolved in favor of such rule of court. [1953]

Florida

Const. art. 5, §3:

The practice and procedure in all courts shall be governed by rules adopted by the supreme court. [1956]

Stat. Ann. §25.371 (*Supp.* 1958):

When a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision. [1957]

Georgia

Const. art. 6, §2-3601, *par.* 1:

The judicial powers . . . shall be vested in a Supreme Court . . . and such other Courts as have been or may be established by law.

Const. art. 6, §2-3707:

The Supreme Court shall have power to hear and determine cases when sitting in a body, under such regulations as may be prescribed by it.

Code Ann. §81-1501 (1956):

The Supreme Court . . . and the Justices thereof shall have power to prescribe, modify, and repeal rules of procedure and pleading and practice in civil actions and civil proceedings of all kinds . . . and of practice and procedure for appeal or review in all cases, civil and criminal. . . . Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant. [1945]

Code Ann. §81-1502 (1956):

Whenever the Supreme Court shall have adopted or prescribed any rules . . . they shall be reported . . . to the General Assembly at the next regular session. . . . They shall not take effect until they shall have been ratified and confirmed by the General Assembly . . . . [1945]

Code Ann. §81-1503 (1956):

. . . [N]o such repeal, modification, or amendment shall be effective until it shall have been ratified by . . . the General Assembly. [1945]

Code Ann. §81-1504 (1956):

> The Supreme Court shall appoint a committee . . . from the bar of this State to aid in the preparation of rules. [1945]

Code Ann. §81-1505 (1956):

> This Chapter shall not be construed as constituting an abandonment or disclaimer of the power of the General Assembly to enact laws regulating procedure. . . . [1945]

Code Ann. §81-1506 (*Supp.* 1958):

> Nothing in the Rules of Procedure, Pleading and Practice in Civil Actions, adopted by the Supreme Court . . . shall repeal or affect the mode of any special statutory proceedings [giving examples] nor the fictitious forms of pleadings in ejectments. [1946]

Code Ann. §81-1507 (1956):

> The . . . Rules . . . adopted by the Supreme Court . . . shall apply to all suits in the superior courts . . . except those proceedings specifically excepted in section 81-1506, and shall also apply to all matters pertaining to service, pleading and practice in cases in city courts where not inconsistent with the acts creating [them] or acts amendatory thereof. [1946]

Idaho

Const. art. 5, §13:

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it . . . ; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court so far as the same may be done without conflict with this Constitution.

Code Ann. §1-1604 (1948):

> Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers but such rules must neither impose a tax or charge upon any legal proceeding nor give an allowance to any officer for services. [1881]

Code Ann. §1-212 (1948):

> The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed. [1941]

Code Ann. §1-213 (1948):

> The Supreme Court shall prescribe, by general rules, for all the courts of Idaho, the forms of process, writs, pleadings and motions, the manner of service, time for appearance, and the practice and procedure in all actions and proceedings. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigants. [1941]

Code Ann. §1-214 (1948):

> The Supreme Court is hereby authorized to appoint from among the district judges of Idaho and the members of the organized bar of Idaho such persons as it deems advisable to assist it in the formulation of such rules. [1941]

Code Ann. §1-215 (1948):

> Such rules, when adopted by the said Supreme Court, shall take effect six months after their promulgation and thereafter all laws in conflict therewith shall be of no further force or effect. [1941]

Illinois

Const. art. 6, §1:

> The judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court . . . and such courts as may be created by law . . . .

Ann. Stat. c. 110, §2 (*Smith-Hurd* 1956):

> 1) The Supreme Court . . . has power to make rules of pleading, practice and procedure for the city, town, county, circuit, superior, Appellate and Supreme Courts supplementary to but not inconsistent with the provisions of this [Civil Practice] Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure. . . .
> 2) Subject to rules the city, town, county, circuit, superior and Appellate Courts may make rules regulating their dockets, calendars, and business. [1933]

Ann. Stat. c. 110, §3 (*Smith-Hurd* 1956):

> The Supreme Court may provide by rule for the orderly and expeditious administration and enforcement of this Act and of the rules adopted hereunder, including the striking of pleadings, the dismissal of claims, the entry of defaults, the assessment of costs, the assessment against an offending party of the reasonable expenses, including attorney's fees, which any violation causes another party to incur, or other action that may be appropriate. [1933]

Ann. Stat. c. 110, §4 (*Smith-Hurd* 1956):

> This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. The rule that statutes in derogation of the common law must be strictly construed

does not apply to this Act or to the rules made pursuant thereto.

No statute hereafter enacted shall be construed to limit or affect the provisions of this Act or the rules adopted in accordance herewith, unless expressly declared to supersede or take precedence of designated provisions thereof or designated rules adopted pursuant thereto. [1933]

Ann. Stat. c. 37, §72.28 (*Smith-Hurd* 1935):

[Circuit and Superior Courts] may . . . make all such rules for the orderly disposition of business before them as may be deemed expedient, consistent with law. [1933]

Indiana

Const. art. 7, §1:

The judicial power of the State shall be vested in a Supreme Court . . . and such other courts as the General Assembly may establish.

Ann. Stat. §2-4718 (1946):

All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The Supreme Court shall have the power to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the Supreme Court shall adopt, and thereafter all laws in conflict therewith shall be of no further force or effect. The purpose of this act is to enable the Supreme Court to simplify and abbreviate the pleadings and proceedings; to expedite the decision of causes; to remedy such abuses and imperfections as may be found to exist in the practice; to abolish all unnecessary forms and technicalities in pleading and practice and to abolish fictions and unnecessary process and proceedings. [1937]

Ann. Stat. §2-4719 (1946):

Other courts of the state shall have the power to establish rules for their own government, supplementary to and not conflicting with the rules prescribed by the Supreme Court, or any statute. [1937]

Iowa

Const. art. 5, §1:

The judicial power shall be vested in a Supreme Court . . . and such other Courts inferior to the Supreme Court as the General Assembly may . . . establish.

Const. art. 5, §4:

The Supreme Court . . . shall exercise a supervisory control over all inferior Judicial tribunals . . . .

Const. art. 5, §14:

It shall be the duty of the General Assembly . . . to provide for a general system of practice in all the Courts of this State.

Code Ann. §684.18 (1950):

The supreme court shall have the power to prescribe all rules of pleading, practice and procedure, and the forms of process, writs and notices, for all proceedings of a civil nature in all courts of this state, for the purpose of simplifying the same, and of promoting the speedy determination of litigation upon its merits. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant. [1941]

Code Ann. §684.19 (*Supp.* 1958):

Any such rules and forms prescribed by the supreme court shall be reported by it to the general assembly within twenty days after the commencement of a regular session and shall take effect July 4 following the adjournment of such session, with such changes, if any, as may have been enacted at such session; and thereafter all laws in conflict therewith shall be of no further force or effect. [1941]

Kansas

Const. art. 3, §1:

The judicial power of this state shall be vested in a Supreme Court . . . and such other courts, inferior to the Supreme Court, as may be provided by law . . . .

Gen. Stat. Ann. §59-2501 (1949):

Appropriate rules of courts not inconsistent with the provisions of this act may be promulgated by the supreme court to regulate the practice in [probate] matters . . . . [1939]

Gen. Stat. Ann §60-3825 (1949):

The judges of the supreme court may make and amend . . . such further rules for the regulation of procedure in the supreme court and inferior courts consistent with this code [civil procedure], as they may deem proper. [1909]

Gen. Stat. Ann. §62-1726 (1949):

The supreme court shall have authority to make such additional rules, not repugnant to statutes as it may deem necessary or proper in order to facilitate the prompt and orderly preparation and presentation of the appeal and to carry into effect the final order of the court in such appealed [criminal] actions. [1937]

Gen. Stat. Ann. §62-2601 (1949):

The supreme court may make and amend . . . such rules, consistent with statutes relating thereto, pertaining to criminal procedure in the supreme court and the inferior courts of the state, as it deems necessary. [1941]

Kentucky

Const. §109:

> The judicial power . . . shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

Rev. Stat. §21.050 (1958):

> The Court of Appeals may . . . make rules consistent with law for the government of its proceedings and issue necessary writs to give it general control of inferior jurisdiction. . . .

Rev. Stat. §24.030 (1958):

> The circuit court of any county . . . may . . . cause such rules as it may adopt to be certified to the Court of Appeals. When this is done the Court of Appeals shall take judicial notice thereof, and the rules need not be copied into any transcript.

[§24.160 and §24.250 are similar provisions giving rule-making powers to other terms of the circuit courts.]

Rev. Stat. §447.151 (1958):

> The Court of Appeals, by rules promulgated . . . shall regulate pleading, practice, procedure and the forms thereof in all civil proceedings in all courts of the state, for the purpose of simplify the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. . . . [1952]

Rev. Stat. §447.152 (1958):

> Before the initial rules, or any amendments or supplemental rules, may be adopted under the provisions of KRS 447.151 to 447.157, copies of the proposed rule or rules shall be distributed to the Bench and Bar of the state for their consideration and suggestions, and the court shall give due consideration to such suggestions as may be submitted to the court. Any suggestions concerning rules proposed by the Court of Appeals, and any suggestions that may be advanced by interested persons, from time to time, for amendments to existing rules or for new or supplemental rules, shall be submitted to the court through the Judicial Council. The council shall receive and consider all such suggestions and shall report the same to the court, with the recommendations of the council thereon. The court shall conduct a public hearing to be held not later than three months from the date of distribution of any proposed rule or rules, of which hearing suitable publicity shall be given in advance. At such hearing the court shall consider any proposal submitted in writing, in advance, by the Kentucky State Bar Association, the Judicial Conference, or any substantial number of members of the Kentucky State Bar Association joining in the same suggestion. The initial rules and any amendment or supplemental rules shall be printed and mailed, at least ninety days before the effective date, to all members of the State Bar of Kentucky, and such rules may also be distributed at such times and to such other persons as the court may direct. [1952]

Rev. Stat. §447.153 (1958):

> [T]he Court of Appeals shall appoint an advisory committee composed of representative judges and attorneys. Such committee shall perform advisory duties in connection with the promulgation of the rules and amendments thereto as may be directed by the Court of Appeals . . . . [1952]

Rev. Stat. §447.154 (1958):

> No Act repealing or modifying any section of the Civil Code of procedure or any statute shall be construed by implication to limit the right of the court to promulgate rules . . . or to supersede, modify or amend any rule so promulgated. Nor shall KRS 447.151 to 447.157 be construed to limit in any manner the power of the Court of Appeals to make rules governing practice and procedure in the Court of Appeals. [1952]

Rev. Stat. §447.155 (1958):

> The rules of the Court of Appeals shall apply to criminal procedure in all situations where any provision of the Civil Code, superseded by the rules, has heretofore been made applicable to criminal procedure either by express reference or by interpretation. [1952]

Rev. Stat. §447.156 (1958):

> On or after July, 1953, all laws relating to pleading, practice and procedure shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to KRS 447.151 to 447.157 the rule shall take precedence over such laws. [1952]

Louisiana

Const. art. 7, §1:

> The judicial power shall be vested in a Supreme Court . . . and in such other courts as are hereinafter provided.

Const. art. 7, §10:

> The Supreme Court shall have control of and general supervision over all inferior courts. . . .

Const. art. 7, §18:

> The Supreme Court shall by rule prescribe the order of preference for the trial of all appeals filed therein. . . .

Const. art. 7, §27.

. . .

The rules of practice regulating appeals to and proceeding in the Supreme Court shall apply to appeals and proceedings in the Courts of Appeals, so far as they may be applicable, until otherwise provided.

Rev. Stat. Ann. §13.72 (1951):

The supreme court for a better administration of justice, may establish and enforce rules necessary to secure the regular and expeditious disposition of its business. . . . [1870]

Rev. Stat. Ann. §13.472 (1951):

Each district court may adopt rules for the conduct of business before it. These rules shall be entered in the minutes of the court and published in the manner which the court deems most effective and practicable. [1898]

Rev. Stat. Ann. §13.1147 (1951):

The judges of the civil district court may adopt rules regulating the allotment, assignment and disposition of cases, and the proceedings in such trials. . . . [1921]

Rev. Stat. Ann. §13.921 (1951):

The judges of the first [and second] city court of . . . New Orleans may make all necessary rules and regulations governing their respective courts. [1880]

[Rev. Stat. Ann. §§13.2017, 13.2148, 13.2220, 13.2243 give to other lower courts similar authority.]

Maine

Const. art. 6, §1:

The judicial power of this state shall be vested in a Supreme Judicial Court and such other courts as the legislature shall . . . establish.

Rev. Stat. Ann. c. 103, §7 (1954):

The supreme judicial court may exercise its jurisdiction according to the common law not inconsistent with the constitution or any statute. . . . It has general superintendence of all inferior courts for the prevention and correction of errors and abuses where the law does not expressly provide a remedy. . . .

[See c. 103, §7(a) (Supp. 1957).]

Rev. Stat. Ann. c. 107, §3 (1954):

The supreme judicial court shall make all proper rules for the regulation of equity practice necessary to simplify proceedings, discourage delays and lessen the expense of litigation, and it has full power for that purpose, but no rule of court now existing is repealed, except so far as is inconsistent herewith.

Rev. Stat. Ann. c. 106, §6 (1954):

The justices of the superior court may adopt rules governing the proceedings in said court, but until such rules are adopted and published, the rules of the supreme judicial court shall govern the proceedings unless inconsistent with the provisions of this chapter. The supreme judicial court shall take judicial notice of the rules of the superior court.

Maryland

Const. art. 4, §18:

It shall be the duty of the Judges of the Court of Appeals to make and publish rules and regulations for the prosecution of appeals to said appellate Court, whereby they shall prescribe the periods within which appeals may be taken, what part or parts of the proceedings in the Court below shall constitute the record on appeal, and the manner in which such appeals shall be brought to hearing or determination, and shall regulate, generally, the practice of said Court of Appeals, so as to prevent delays, and promote brevity in all records and proceedings brought into said Court, and to abolish and avoid all unnecessary costs and expenses in the prosecution of appeals therein; and the said Judges shall make such reduction in the fees and expenses of the said Court as they may deem advisable. It shall also be the duty of said Judges of the Court of Appeals to devise, and promulgate by rules, or orders, forms and modes of framing and filing bills, answers, and other proceedings and pleadings in Equity; and also forms and modes of taking and obtaining evidence, to be used in Equity cases; and to revise and regulate, generally, the practice in the Courts of Equity of this State, so as to prevent delays, and to promote brevity and conciseness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses attending the same. And all rules and regulations hereby directed to be made, shall, when made, have the force of Law, until rescinded, changed, or modified by the said Judges, or the General Assembly. [1956]

Const. art. 4, §18A:

. . . The Court of Appeals from time to time shall make rules and regulations to regulate and revise the practice and procedure in that Court and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of the courts other than the Court of Appeals to make rules of practice and procedure shall be subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law. [1944]

Ann. Code art. 26, §25 (1957):

> The Court of Appeals is authorized and requested to prescribe by general rules, the practice and procedure in all civil actions both at law and in equity in all courts of record throughout the State. Such general rules may, if the judges of the Court of Appeals deem it advisable, unite the practice and procedure in actions at law and suits in equity so as to secure one form of civil action and procedure for both. Such general rules may regulate all appeals in civil actions and may likewise regulate the form and method of taking and the admissibility of evidence in all civil actions. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant, nor shall any such rules apply to practice and procedure in criminal cases, but as used in §§25–28, the terms "practice and procedure" shall be liberally construed, and without intending hereby to limit their comprehensive application, shall be deemed to include the forms of process, writs, pleadings and motions, and the subjects of parties, depositions, discovery, trials, judgments, new trials and provisional and final remedies. Such general rules shall be reported to the General Assembly of Maryland within thirty days after the beginning of its next regular session and except as modified or repealed by act of the General Assembly shall take effect on the 1st day of September, 1941. Upon taking effect, such rules and any subsequent amendments or additions thereto, shall supersede any prior inconsistent public general law, public local law, municipal ordinance or rule of the Court of Appeals or any other court. Such rules may be rescinded, changed, modified or added to from time to time by the Court of Appeals or by the General Assembly, and such alterations or additions to the rules shall become effective at such time as the Court of Appeals or General Assembly shall provide. [1924]

Ann. Code art. 26, §27 (1957):

> The judges of the Supreme Bench of Baltimore City shall have power to establish rules governing the practice and procedure in the courts of Baltimore City, except the Orphans' Court, and the judges of the Circuit Courts of the counties and of the Orphans' Courts of Baltimore City and of the counties shall have power to establish rules governing the practice and procedure in their respective courts, provided that such rules shall not be inconsistent with any general rules adopted by the Court of Appeals, or with any statute then or thereafter in force. [1939]

Ann. Code art. 26, §28 (1957):

> In order to aid in the performance of the duties placed upon it by §25 hereof, the Court of Appeals shall have power to appoint a standing committee of members of the bar who shall serve without compensation, except their traveling and other expenses. . . . [1939]

Massachusetts

Const. pt. 1, *art. XXX:*

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Const. pt. 2, *c.* 1, §1, *art. III:*

> The general court [assembly] shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be held in the name of the commonwealth, for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes and things, whatsoever, arising or happening within the commonwealth, or between or concerning persons inhabiting, or residing, or brought within the same, whether the same be criminal or civil, or whether the said crimes be capital or not capital, and whether the said pleas be real, personal, or mixed; and for the awarding and making out of execution thereupon. To which courts and judicatories are hereby given and granted full power and authority, from time to time, to administer oaths or affirmations, for the better discovery of truth in any matter in controversy or depending before them.

Ann. Laws c. 211, §3 (1955):

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided. . . . [1782]

Ann. Laws. c. 213, §3 (1955):

> The courts shall, respectively, make and promulgate uniform codes of rules, consistent with law, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law, for the following purposes: First, Simplifying and shortening pleadings and procedure. Second, Prescribing the terms upon which amendments will be allowed or unnecessary counts and statements stricken from the records; discouraging negligence and deceit; preventing delay; securing parties from being misled; placing the party not in fault as nearly as possible in the condition in which he would have been if no mistake had been made; distinguishing between form and substance; and substituting fixed and certain requirements for the discretion of the court. Third, Conducting trials. Fourth, Presenting distinctly the questions to be tried by the jury. Fifth, Giving a party such notice of the evidence which is intended to be offered by the

adverse party as will prevent surprise and enable him to prepare for trial. Sixth, Prescribing such forms of verdicts as will place upon record the finding of the jury. Seventh, The entry of judgment by the clerk under a general order in all cases ripe for judgment. Eighth, Expediting the decision of causes and securing the speedy trial thereof. Ninth, Remedying abuses and imperfections in practice and diminishing costs. Tenth, Filing and hearing motions to set aside verdicts and notifying adverse parties thereof. Tenth A, Making effective the declaratory procedure provided by chapter two hundred and thirty-one A. Tenth B, Specifying the means whereby at a hearing upon a petition for certiorari the evidence adduced before the respondent shall be exhibited to the court. Eleventh, The superior court may also make and promulgate such rules for the regulation of the printing, publication and distribution of trial lists and for notifying attorneys of trials in civil causes as the public convenience in the several counties requires. The rules of the superior court shall not conflict with those of the supreme judicial court. [1782]

Ann. Laws c. 214, §6 (1955):

Procedure, process and practice in equity causes originating in the superior court, or transferred thereto from any other court, shall while in the superior court be regulated by rules made from time to time by that court. [1883]

Ann. Laws c. 215, §30 (1955):

The judges of the probate courts or a majority of them shall from time to time make rules for regulating the practice and for conducting the business in their courts in all cases not expressly provided for by law and shall prescribe forms, and, as soon as convenient after making or prescribing them, shall submit a copy of their rules, forms and course of proceedings to the supreme judicial court, which may alter and amend them, and from time to time make such other rules and forms for regulating the proceedings in the probate court as it considers necessary in order to secure regularity and uniformity. [1893]

Ann. Laws c. 218, §43 (1955):

The justices, or a majority of them, of all the district courts, except the municipal court of the city of Boston, shall from time to time make and promulgate uniform rules regulating the time for the entry of writs, processes and appearances, the filing of answers in civil actions, the preparation and submission of reports, the allowance of reports which a justice shall disallow as not conformable to the facts, or shall fail to allow by reason of physical or mental disability, death or resignation, the reporting of cases reserved for report when a justice shall fail to report the same by reason of physical or

mental disability, death or resignation, the granting of new trials, and the practice and manner of conducting business in cases which are not expressly provided for by law, including juvenile proceedings and those relating to wayward, delinquent and neglected children. [1890]

Ann. Laws. c. 218, §50 (1955):

The municipal court of the city of Boston . . . may from time to time make rules for regulating the practice and conducting the business therein in all cases not expressly provided for by law.

Michigan

Const. art. 7, §5:

The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same. [1850]

Comp. Laws §601.14 (1948):

The justices of the supreme court shall have power, and it shall be their duty, by general rules to establish, and from time to time thereafter to modify and amend, the practice in such court, and in all other courts of record, in the cases not provided for by any statute; and they shall, once at least in every 2 years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice:

1. The abolishing of distinctions between law and equity proceedings, as far as practicable;

2. The abolishing of all fictions and unnecessary process and proceedings;

3. The simplifying and abbreviating of the pleadings and proceedings;

4. The expediting of the decisions of causes;

5. The regulation of costs;

6. The remedying of such abuses and imperfections as may be found to exist in the practice;

7. The abolishing of all unnecessary forms and technicalities in pleading and practice;

8. To effectually prevent the defeat or abatement of any civil suit, ex contractu, for either any nonjoinder or misjoinder of parties, where the same can be done consistently with justice;

9. To provide for all necessary amendments of process, pleadings or other proceedings in such case; and

10. To provide the manner by which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit and brought in to answer thereto, if within the jurisdiction of the court. [1851]

Comp. Laws §601.24 (1948):

> The supreme court shall, amongst other things, regulate and prescribe the practice therein, and in the circuit courts, where the same is not prescribed by any statute, in relation to bills of exceptions, cases made by the parties, special verdicts, granting new trials, motions in arrest of judgment, taxation of costs, giving notice of special motions, and of such other proceedings as the court may think proper; staying proceedings when necessary to prevent injustice, and the hearing of motions, imposing terms, in their discretion, on granting such motions. [1851]

Comp. Laws §606.1(8) (1948):

> Said circuit courts may from time to time make rules for regulating the practice of the said courts in matters not covered by rule of the supreme court or by statute. [1851]

Minnesota

Const. art. 6, §1:

> The judicial power of the state is hereby vested in a supreme court, a district court, a probate court, and such other courts, minor judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish. [1956]

Stat. Ann. §408.05 (1958):

> The supreme court . . . shall prescribe, and from time to time may amend and modify, rules of practice therein . . . . [1921]

Stat. Ann. §480.051 (1958):

> The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, other than the probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant. [1947]

Stat. Ann. §480.052 (1958):

> Before any rules are adopted the supreme court shall appoint an advisory committee consisting of eight members of the bar of the state and at least two judges of the district courts and one judge of a municipal court to assist the court in considering and preparing such rules as it may adopt. [1947]

Stat. Ann. §480.053 (1958)

> The judicial council . . . may at any time make recommendations to the court for its consideration concerning rules of pleading, practice, procedure and the forms thereof in civil actions. [1947]

Stat. Ann. §480.054 (1958):

> Before any rule for the district or municipal courts is adopted, the supreme court shall distribute copies of the proposed rule to the bench and bar of the state for their consideration and suggestions and give due consideration to such suggestitons as they may submit to the court. The Minnesota State Bar Association, the District Court Judges Association or the Municipal Court Judges Association may file with the court a petition specifying their suggestions concerning any existing or proposed rule and requesting a hearing thereon. The court shall thereupon grant a hearing thereon within six months after the filing of the petition. [1947]

Stat. Ann. §480.055 (1958):

> 1. *Other courts.* Any court, other than the supreme court, may adopt rules of court governing its practice; the judges of district courts . . . and the judges of municipal courts . . . may adopt rules not in conflict with the rules promulgated by the supreme court.
>
> 2. *Bureaus.* Sections 480.051 to 480.058 shall not affect the power of any other statutory body to make rules governing its practice. [1947]

Stat. Ann. §480.056 (1958):

> All present laws relating to pleading, practice, and procedure, excepting those applying to the probate courts, shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to this act such laws, in so far as they are in conflict therewith, shall thereafter be of no further force and effect. [1947]

Stat. Ann. §480.057 (1958):

> 1. *Effective date of rules; publication.* All rules promulgated under sections 480.051 to 480.058 shall be effective at a time fixed by the court and shall be published in the appendix to the official reports of the supreme court and shall be bound therewith.
>
> 2. *Index; printing, publishing and distributing.* The revisor of statutes shall index and the commissioner of administration shall print, publish, and distribute copies thereof to the bench and bar and as required by law. [1947]

Stat. Ann. §480.058 (1958):

> Sections 480.051 to 480.058 shall not abridge the right of the legislature to enact, modify, or repeal any statute or modify or repeal any rule of the supreme court adopted pursuant thereto. [1947]

Mississippi

Const. art. 6, §144:

> The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

Const. art. 6, §163:

> The legislature shall provide by law for the due certification of all causes that may be transferred to or from any chancery court or circuit court, for such reformation of the pleadings therein as may be necessary, and the adjudication of the costs of such transfer.

Code Ann. §1961 (1957):

> The Supreme Court shall have power to make such rules in respect to making out records for said court as may be expedient, and may prescribe the form and manner in which records shall be prepared for appeal, and cause the same to be bound, but shall not require any record to be printed; and may enforce its rules by proper fines or by refusal to allow costs to be taxed to the clerks below on records not made out according to the rules, or by refusing to permit such records to be filed. And the court may prescribe the mode of pleading in causes therein, civil and criminal, and the manner of trying the same; and may also establish such rules of practice and proceedings therein as may be deemed necessary and proper for certainty and dispatch of business, and may dismiss causes for non-compliance with any of the rules; but such rules must be consistent with law. [1848]

Code Ann. §1664 (1957):

> Each court . . . shall also have power to arrange the business therein in a convenient manner, and to establish, from time to time, rules and orders for the conducting of suits and pleadings and respecting all matters to be done in term time or in vacation not repugnant to law. [1848]

Missouri

Const. art. 5, §5:

> The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose. [1945]

Ann. Stat. §477.010 (1952):

> The supreme court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms or rules shall abridge, enlarge or modify the substantive rights or any litigant nor be contrary to or inconsistent with the laws in force for the time being. [1943]

Ann. Stat. §506.030 (1952):

> If any part of this code shall be found to be in conflict or disconcordant with other parts of this code or with other statutes relating to civil procedure, the supreme court shall have power to promulgate rules necessary to harmonize the same so as to promote the orderly administration of justice. No such rule shall abridge, enlarge or modify the substantive rights of any litigant. Such rules shall be effective until superseded by legislative enactment. [1943]

Ann. Stat. §512.150 (1952):

> 1. All briefs shall be prepared [and filed] as provided by rule of the appellate court. . . . Any appellate court may suspend or modify the rules made in pursuance of this section in a particular case upon a showing the [sic] justice requires a suspension or modification, and shall do so especially when a litigant is a poor person and the general rules require a burdensome expenditure of money.
>
> 2. Any rules made by an appellate court under subsection 1 of this section with relation to the docketing of cases and setting the same for argument shall prevail over any statutory provision prescribing the order of hearings or preferences to be given in certain classes of cases. [1889]

Montana

Const. art. 8, §2:

> The supreme court . . . shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law.

Const. art. 8, §26:

> All laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, shall be uniform.

Rev. Codes Ann. §93-502 (1949):

> Every court of record may make rules, not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules must not impose any tax or

charge upon any legal proceedings, or give any allowance to any officers for services. In case of the failure or refusal of any district court to adopt and promulgate rules of court, the supreme court may, upon the application of any interested person, adopt and promulgate rules for the government of such court, and when adopted and promulgated such rules shall remain in full force and effect until modified or repealed by the authority adopting them. Any judge who shall fail or refuse to comply with and carry out in good faith the rules of court adopted by the supreme court, as herein provided for, shall be guilty of a contempt of the supreme court. [1895]

Rev. Codes Ann. §93-503 (1949):

Rules adopted by any court take effect thirty days after their publication.

Nebraska

Const. art. 5, §25:

For the effectual administration of justice and the prompt disposition of judicial procedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end, the court may, and when requested by the Legislature by joint resolution, shall certify to the Legislature, its conclusions as to desirable amendments or changes in the general laws governing such practice and proceedings. [1920]

Rev. Stat. §24-210 (1956):

The Judges of the Supreme Court shall during the month of January in each odd-numbered year revise the general rules of said court and adopt such additional rules as may be deemed necessary or appropriate for the dispatch of business before said court, including rules for the advancement of pending causes. [1911]

Rev. Stat. §26-1, 202 (1956):

The judges of the municipal court may promulgate rules of procedure and practice in said court, not in conflict with the laws governing such matters. [1929]

"The rule-making power was delegated to the Supreme Court in 1939 but the legislature reserved the power of modification. Pursuant to this authority, proposed rules were submitted to the 1943 session of the legislature and the rules were rejected followed by repeal of the 1939 enabling legislation. At present . . . [t]here is no provision requiring legislative approval of . . . rules but the Supreme Court has made only limited use of this constitutional power." Institute of Judicial Administration, Rule-Making Power of the Courts 24 (1955). The experience in Nebraska is generally cited to support the proposition that judicial rule-making fails

when an advisory body is not created to assist the court in this function. See, *e.g.*, National Conference of Judicial Councils, Minimum Standards of Judicial Administration 144 (1949).

Nevada

Const. art. 6, §1:

The Judicial power . . . shall be vested in a Supreme Court. . . .

Rev. Stat. §2.120 (1951):

1. The supreme court may make rules not inconsistent with the constitution and laws of the state for its own government and the government of the district courts; but such rules shall not be enforced until 30 days after their adoption and publication.

2. The supreme court by rules adopted and published . . . shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts . . . for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the [state] constitution. . . .

3. All statutes regulating original and appellate civil practice or procedure . . . in effect or taking effect on July 1, 1951, shall be deemed to be rules of court and shall remain in effect until modified or superseded by rules adopted and published pursuant to this section. Such rules shall take effect on a date specified by the supreme court, not in any event until 60 days after adoption and publication. [1951]

New Hampshire

Const. pt. 1, *art.* 37:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

"It has been said that the Supreme Court has an inherent rule-making power and pursuant to this opinion, that Court has promulgated its own rules of practice . . . ." Institute of Judicial Administration, Rule-Making Power of the Courts 25 (1955).

Const. pt. 2, *art.* 4:

The general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be holden, in the name of the state, for the

hearing, trying, and determining, all manner of crimes, offenses, pleas, processes, plaints [sic], actions, causes, matters and things whatsoever arising or happening within this state, or between or concerning persons inhabiting or residing, or brought, within the same, whether the same be criminal or civil, or whether the crimes be capital, or not capital, and whether the said pleas be real, personal or mixed; and for the awarding and issuing execution thereon. To which courts and judicatories, are hereby given and granted, full power and authority, from time to time to administer oaths or affirmations, for the better discovery of truth in any matter in controversy, or depending [sic] before them.

Rev. Stat. Ann. §491:10 (1955):

The [superior] court, acting as a body, may from time to time establish rules and orders of practice, consistent with the laws, for conducting and regulating its business, and may prescribe forms of proceedings in all cases not provided for. [1855]

Rev. Stat. Ann. §490:4 (1955):

The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, . . . and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts. [1855]

New Jersey

Const. art. 6, §2, *par.* 3:

The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

The term "subject to law" has been interpreted to mean only substantive law. Therefore, so long as court rules do not abridge substantive rights, they are not subject to legislative control. See *Winberry* v. *Salisbury,* 5 N.J. 240, 74 A.2d 406, *cert. denied,* 340 U.S. 877 (1950). For an adverse criticism of this case, see Kaplan and Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry* v. *Salisbury,* 65 Harv. L. Rev. 234 (1951). *But see* Pound, *Procedure Under Rules of Court in New Jersey,* 66 Harv. L. Rev. 28 (1952).

New York

Const. art. 6, §1:

The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or hereafter may be prescribed by law not inconsistent with this article. . . .

For a history of the Supreme Court, as seen through the previous stages of this provision, that connects its rule-making power with the Court of King's Bench, concluding "that the power to make rules of practice and procedure is a judicial power inherent in, and expressly conferred upon the Supreme Court," see *Hanna* v. *Mitchell,* 202 App. Div. 504, 513, 196 N.Y. Supp. 43, 52 (1st Dep't 1922), *aff'd without opinion,* 235 N.Y. 534, 139 N.E. 724 (1923).

Const. art. 6, §7:

The jurisdiction of the court of appeals shall be limited to the review of questions of law. . . .

Const. art. 6, §20:

[E]xcept as herein otherwise provided, the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. [1925]

Judiciary Law §51:

The court of appeals may from time to time adopt, amend, or rescind rules, not inconsistent with the constitution or statutes of the state, regulating the practice and proceedings in the court. [1870]

Judiciary Law, §83:

A majority of the justices of the appellate division in the four departments, by joint order of the four presiding justices or justices presiding, shall have the power, from time to time, to adopt, amend or rescind any rule of civil practice, not inconsistent with any statute; and a majority of the justices of the appellate division in each department, by order of such majority, shall have power, from time to time, to adopt, amend or rescind any special rule for such department not inconsistent with any statute or rule of civil practice. [1870]

New Mexico

Const. art. 6, §3:

The Supreme Court shall have . . . a superintending control over all inferior courts. . . .

Stat. Ann. §21-3-1 (1953):

The Supreme Court . . . shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. The Supreme Court shall cause such rules to be printed and distributed to all members of the bar of the state

. . . and to all applicants, and the same shall not become effective until thirty [30] days after they have been so printed, made ready for distribution and so distributed. [1933]

Stat. Ann. §21-3-2 (1953):

All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this act [21-3-1, 21-3-2], have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto. [1933]

Stat. Ann. §21-10-3 (1953):

The Supreme Court shall make rules for the government of the practice in writs of error and appeals which rules shall not conflict with any laws in force in this state. [1917]

North Carolina

Const. art. 4, §8:

[T]he [supreme] court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

Const. art. 4, §12:

The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution.

Gen. Stat. §7-20 (1953):

The justices of the Supreme Court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior court the rules of practice for such court, to be entered on the records thereof in each county. [1818]

Gen. Stat. §7-21 (1953):

The Supreme Court is hereby vested with the power to prescribe from time to time the modes of making and filing

proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the Supreme Court, and in the trial of actions in the superior court, and before referees: Provided, no rule or regulation so adopted shall be in conflict with any of the provisions of this Code. Such rules as may be adopted by the Supreme Court shall be printed and distributed by the Secretary of State as are the reports of the Supreme Court. [1921]

North Dakota

Const. art. 4, §86:

The supreme court, except as otherwise provided in this constitution . . . shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

Rev. Code §27-0208 (1943):

The supreme court of this state may make all rules of pleading, practice, and procedure which it may deem necessary for:

1. The administration of justice in all civil and criminal actions, remedies, and proceedings in any and all courts of this state; and

2. The method of taking, hearing, and deciding appeals to the courts from all decisions of public officers, boards, commissions, departments, and institutions exercising quasi judicial functions, in any case where an appeal from any such decision is allowed by law. [1919]

Rev. Code §27-0209 (1943):

All statutes relating to pleadings, practice, and procedure in civil or criminal actions, remedies, or proceedings, enacted by the legislative assembly, shall have force and effect only as rules of court and shall remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court. [1941]

Rev. Code §27-0210 (1943):

No rule promulgated under sections 27-0207 and 27-0208 shall abridge, enlarge, or modify in any manner the substantive rights of any litigant. [1941]

Rev. Code §27-0211 (*Supp.* 1957):

No new rule shall be promulgated by the supreme court under the provisions of sections 27-0207 and 27-0208 until such court first shall have given notice of its intention to do so by filing such proposed rule in the office of the clerk of the supreme court and by causing a certified copy thereof to be filed in the office of the clerk of the district court of each county

in the state and by mailing to each district judge, judge of the county court of increased jurisdiction, and to each attorney who has been currently licensed to practice law in this state a copy of such proposed rule . . . and stating also the time when and the place where the supreme court will afford any person interested an opportunity to appear and be heard with reference to the adoption of the same. Such notice and copy of the proposed new rule shall be so mailed not less than thirty days before the date fixed for such hearing; after such hearing has been held the court shall make such order as it shall deem just and proper. It may order that the rule be adopted as proposed; it may order that the proposed rule shall not be adopted; it may make any amendments or changes in the rule which in its judgment is desirable to accomplish the purpose sought to be furthered by the rule and adopt the rule as so changed without further notice. [1941]

Rev. Code §27-0212 (1943):

If at least five attorneys from each judicial district of this state shall join in a petition proposing a new rule relating to pleading, practice, or procedure and showing necessity therefor, or shall join in a petition setting forth:

1. A complaint against any rule or statute relating to pleading, practice, or procedure;

2. The alleged defect in such rule or statute; and

3. An amendment or proposal for its improvement, the supreme court shall fix a time and place for hearing the same and shall give notice in the manner provided for the giving of notice of intention to adopt a new rule. In such cases, the court shall not hold more than two such hearings in each year but in its discretion may join several complaints or petitions in one notice and hearing. [1941]

Rev. Code §27-0213 (*Supp.* 1957):

No new rule or amendment promulgated under the provisions of sections 27-0207 and 27-0208 shall become effective until the supreme court shall have:

1. Made an order in writing adopting the same;

2. Caused the same to be signed by the chief justice and attested by the clerk of the supreme court under the seal of such court;

3. Filed the same in the office of the clerk of the supreme court and caused a certified copy thereof and of the order adopting the same to be filed in the office of the clerk of the district court of each county in the state. The clerk of the district court of each county shall enter each rule so filed at length in the records of his office.

The clerk of the supreme court shall file proof of the filing of a certified copy of such rule and of the order adopting the same in the office of the clerk of the district court of each county with the original record relating to such rule; and such clerk shall mail a copy of any rule adopted by the supreme court under the provisions of section 27-0207 and 27-0208 and of the order adopting the same to each judge of the district court and to each judge of the county court of increased jurisdiction within eight days after such rule has been adopted.

All rules so adopted by the supreme court shall be published in the official reports of the cases decided by the supreme court of North Dakota. The court may make such additional publication of any rule as it may deem desirable. [1941]

Rev. Code §27-0214 (*Supp.* 1957):

A rule promulgated by the supreme court under the provisions of sections 27-0207 and 27-0208 shall become effective on the thirtieth day after the filing of the order in the office of the clerk of the supreme court unless the supreme court, in its order, shall fix a longer term before the effective date of such rule, in which case the date so fixed shall be the effective date. [1941]

Rev. Code §27-0215 (1943):

The clerk of the district court of each county, upon the receipt of a certified copy of any rule promulgated by the supreme court, shall file it and endorse upon it the date of its filing and shall notify the clerk of the supreme court in writing of the date of its receipt and filing. He shall register and index such rule and the same thereafter shall remain available to public inspection in his office. [1941]

Ohio

Const. art. 4, §1:

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law.

The constitution gives the supreme court no control over lower court rule-making "except through the usual testing process of proceedings in error." 8 Ohio Bar 447 (1935).

Const. art. 4, §2:

. . . No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

Rev. Code Ann. §2503.36 (*Baldwin* 1953):

The supreme court may prescribe rules for the regulation of its practice, the reservation of questions, the transmission of cases to it from the lower courts, and the remanding of cases.

Rev. Code Ann. §2505.45 (*Baldwin* 1953):

> The supreme court may make and publish rules with respect to the procedure in the supreme court not inconsistent with the laws of the state.
>
> The several judges of the courts of common pleas and the courts of appeals shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the supreme court. The supreme court may alter and amend such rules and make other rules necessary for regulating the proceedings in any court.

Rev. Code Ann. §2501.08 (*Baldwin* 1953):

> The judges of the court of appeals, or a majority of such judges, may make and publish such uniform rules of practice, for all the districts, as are not in conflict with statute or the rules of the supreme court.

Rev. Code Ann. §2101.04 (*Baldwin* 1953):

> The several judges of the probate court shall make rules regulating the practice and conducting the business of the court, which they shall submit to the supreme court. In order to maintain regularity and uniformity in the procedings of all the probate courts, the supreme court may alter and amend such rules and make other rules.

Rev. Code Ann. §2301.04 (*Baldwin* 1953):

> . . .
>
> The judges of the court of common pleas shall meet at least once in each month and at such other times as the chief justice of such court requires, and shall prescribe rules regulating the docketing and hearing of causes, motions, and demurrers and such other matters as are necessary for the advancement of justice and prevention of delay, and for the government of the officers of the court. . . .

Oklahoma

Const. art. 7, §2:

> . . . The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. . . .

Stat. Ann. tit. 12, §74 (1937):

> The justices of the Supreme Court shall meet every two years during the month of June at the capital of the State and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code, and shall make such further rules consistent therewith as they may deem proper. The rules so made shall apply to the Supreme Court, the district courts, the superior courts, the county courts and all other courts of record. [1910]

Stat. Ann. tit. 20, §41 (1937):

> [The Criminal Court of Appeals] may prescribe and promulgate such rules for the government of said court as it may deem necessary. [1910]

Stat. Ann. tit. 20, §277 (1937):

> . . . [E]ach County Judge in the State of Oklahoma shall be authorized and required to make and promulgate rules governing the procedure in his Court, which shall be in conformity with the general laws of the State of Oklahoma: Provided . . . that this Act shall not be construed so as to permit County Judges to make rules of procedure in violation of the laws of the State. [1919]

Stat. Ann. tit. 20, §278 (1937):

> No court within the State of Oklahoma, other than the County Courts of said State shall be authorized to make rules governing the County Court of the State of Oklahoma. [1919]

Stat. Ann. tit. 20, §704 (1937):

> The judges of [the Court of Common Pleas] or a majority thereof . . . may meet and prepare and promulgate, such rules of procedure for the purpose of the expeditious administration of justice not inconsistent with the provisions of this Act and the laws of this State and rules of the Supreme Court as may be necessary to carry on and facilitate the business of said court. All such rules shall be printed within a reasonable time after their adoption and furnished upon application to members of the bar and the public generally. . . . [1933]

Stat. Ann. tit. 20, §166 (1937):

> The procedure in [the Superior Court] shall follow the procedure that is or may be provided for the district court. . . . [1915]

Oregon

Const. art. 7, §1 (*amended*):

> The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. . . .

Const. art. 7, §9 (*original*):

> All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court shall belong to the Circuit Courts, and they shall have appellate jurisdiction, and supervisory control over the County Courts, and all other inferior Courts, Officers, and tribunals.

The provisions of the original constitution not specifically changed by the amended constitution remain in effect with the force of statutes. Const. art. 7, §2 (amended).

Rev. Stat. §2.120 (1955):

> The Supreme Court shall have power to make and enforce all rules necessary for the prompt and orderly dispatch of the business of the court, and the remanding of causes to the court below.

Rev. Stat. §2.130 (1955):

> The Supreme Court is empowered to prescribe and make rules governing the conduct in that court of all causes of original jurisdiction therein.

Rev. Stat. §2.310 (1955):

> For the more speedy and efficient transaction of judicial business, . . . general administrative authority over all circuit courts of this state is vested in the Supreme Court. . . . [1953]

Rev. Stat. §2.330 (1955):

> (1) The Supreme Court is authorized to adopt and make all general rules and orders to effectuate the purposes of ORS 2.310 . . . .
>
> (2) The Supreme Court is authorized to make rules, orders and directions to limit the length of time a matter may be kept under advisement by any circuit judge of the State of Oregon.
>
> (3) It hereby is further provided that nothing contained in this section or ORS 2.310 shall be construed as giving to the Supreme Court the power and authority to enact rules of civil procedure for circuit courts. [1953]

Rev. Stat. §3.140(2) (1957):

> The judges of the circuit courts may make all rules and regulations, not inconsistent with law, to facilitate the transaction of business. . . .

Rev. Stat. §46.280 (1957):

> The judge of a district court or, where there is more than one judge, the judges jointly, may make appropriate rules for the government of the court and the officers thereof not inconsistent with law, but such rules shall not be enforced until 30 days after their promulgation.

Pennsylvania

Const. art. 5, §1:

> The judicial power of this Commonwealth shall be vested in a Supreme Court . . . and in such other courts as the General Assembly may from time to time establish.

Const. art. 5, §26:

> All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform. . . .

Stat. Ann. tit. 17, §61 (*Supp.* 1958):

> . . . [T]he Supreme Court of Pennsylvania shall have the power to prescribe by general rule the forms of actions, process, writs, pleadings, and motions, and the practice and procedure in civil actions at law and in equity for the courts of common pleas of every county, for the county court of Allegheny County, for the municipal court of Philadelphia, and for such other courts having jurisdiction in civil actions as the General Assembly shall hereafter establish: Provided, That such rules shall be consistent with The Constitution of this Commonwealth and shall neither abridge, enlarge nor modify the substantive rights of any litigant nor the jurisdiction of any of the said courts, nor affect any statute of limitations. The provisions of this section shall not apply to the courts of oyer and terminer, courts of quarter sessions, and the Orphans' Courts of this Commonwealth, and the practice and procedure in said courts shall remain and continue as prescribed by existing law. At the time of the adoption, promulgation, and publication of its general rules, the Supreme Court shall fix the effective date thereof, which shall not be less than six months from the date of the adoption thereof. As soon as promulgated, a copy of all rules shall be sent to the prothonotaries or clerks of all courts which may be affected thereby, and shall be published by such prothonotaries or clerks in the same manner as local rules adopted by such courts.
>
> From and after the effective date of any rule promulgated under this section 1, and so long as said rule shall be operative, the operation of any act of Assembly relating to practice or procedure in such courts, and inconsistent with such rule, shall be suspended in so far as such act may be inconsistent with such rule. [1937]

Stat. Ann. tit. 17, §62 (*Supp.* 1958):

> Each of the courts of common pleas, the county court of Allegheny County, the municipal court of Philadelphia, and other courts established by the General Assembly, may adopt additional local rules for the conduct of its business, which shall not be inconsistent with or in conflict with said general rules prescribed by the Supreme Court of Pennsylvania. [1937]

Stat. Ann. tit. 17, §63 (*Supp.* 1958):

> The Supreme Court of Pennsylvania is hereby authorized and empowered to appoint a Procedural Rules Committee, the members of which shall have been admitted to practice before

the Supreme Court of Pennsylvania, which shall assist the Supreme Court of Pennsylvania in preparation, revision, promulgation, publication, and administration of the said general rules. [1937]

Stat. Ann. tit. 17, §65 (*Supp.* 1958):

For the purpose of expediting any business of the courts of record in this Commonwealth, whether civil or criminal, which is not otherwise specifically regulated by any of the general rules hereinabove provided for, and for the purpose of facilitating a speedy and proper administration of justice, the Supreme Court of Pennsylvania shall have the power to prescribe additional general rules for the conduct of such business of any court of record within this Commonwealth, but such rules shall not include any provision regulating the admission of attorneys to practice before any of the trial courts of this Commonwealth. [1937]

Stat. Ann. tit. 17, §66 (*Supp.* 1958):

The provisions of this act are severable, and if any of its provisions shall be held unconstitutional, the decision of the court shall not affect or impair any of the remaining provisions of this act. It is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included herein. [1937]

Stat. Ann. tit. 17, §67 (*Supp.* 1958):

The Supreme Court of Pennsylvania is hereby authorized and empowered to prescribe, by general rule, the practice and procedure governing appeals in all instances where appeals are authorized by law from any adjudication to the Supreme Court of Pennsylvania. Such rules shall be consistent with the Constitution of this Commonwealth and shall neither abridge, enlarge nor modify the substantive rights of any litigant nor the jurisdiction of any court or any agency of this Commonwealth nor affect any statute of limitations. [1953]

Stat. Ann. tit. 17, §2076 (1930):

Each of the [courts of common pleas] shall have full power and authority to establish such rules for regulating the practice thereof respectively, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper: Provided, That such rules shall not be inconsistent with the Constitution and laws of the commonwealth. [1836]

Rhode Island

Const. art. 10, §1:

The judicial power of this state shall be vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish.

Gen. Laws Ann. §8-6-2 (1956):

The supreme court, by a majority of its members, may from time to time make and promulgate rules for regulating practice and conducting business therein. The superior court, by a majority of its members, may from time to time make and promulgate rules for regulating practice and conducting business therein. Such rules relative to practice and procedure, when effective, shall supersede any statutory regulations with which they conflict.

In prescribing such rules the said courts shall have regard to the simplification of the system of pleading, practice and procedure in the respective courts in which such rules shall apply, in order to promote the speedy determination of litigation on the merits. [1905]

Gen. Laws Ann. §8-6-3 (1956):

All such rules shall be filed in the office of the secretary of state, and shall be effective upon such filing unless with respect to any such rule the court adopting the same shall specify a later date as the effective date thereof, in which case such rule shall be effective upon the date so specified. . . . [1940]

Gen. Laws Ann. §8-8-44 (1956):

There shall be a district court conference held annually, or oftener, at such time and place as shall be designated by the presiding justice of the superior court acting as administrative judge. This conference shall consist of all the judges and clerks of the district courts. The administrative judge shall preside and the administrative clerk shall act as secretary of the conference. The attorney-general, or some one of his assistants, shall attend to aid and advise the conference. The conference shall, with the concurrence of the administrative judge, have power to direct in what manner and to what extent entries shall be made of the decisions, judgments and proceedings of the district courts. With the concurrence of the administrative judge it shall have power to establish general administrative procedure for the district courts and to adopt general rules of procedure for the district courts which shall not be at variance with statutory law. To the end that the work of the district courts shall be efficiently and expeditiously transacted it shall give attention to all matters believed helpful to that end and shall make recommendations regarding procedure, and other matters pertaining to said courts. [1952]

Gen. Laws Ann. §9-14-28 (1956):

The superior court may, by general rule or by special order, vary the forms of process, mode of proceeding, or of decree, heretofore in use, in such manner as may be necessary to carry into effect the provisions of any statute of this state. [1905]

Gen. Laws Ann. §9-15-19 (1956):

> The superior court by a majority of the justices thereof . . . may make all such rules and orders, not contrary to law, with regard to proceedings before masters in chancery, their reports, and exceptions to and hearings on the same, as to it shall seem expedient. [1905]

Gen. Laws Ann. §14-1-61 (1956):

> The [juvenile] court shall have power to adopt rules of procedure for the conduct of the court, not inconsistent with the provisions of this chapter. [1944]

South Carolina

Const. art. 5, §1:

> The judicial power of this State shall be vested in a Supreme Court. . . . The General Assembly may also establish [inferior courts] as may be deemed necessary. . . .

Code §10-16 (1952):

> The justices of the Supreme Court and the judges of the circuit courts shall meet in general convention on such day and at such place as may be designated by the Chief Justice, at least once in every two years, . . . for the purpose of revising and amending the rules of the circuit courts and establishing such additional rules as may be deemed necessary to regulate the practice in the circuit courts. But such alterations or additions shall not be inconsistent with any of the statutes of this State. The judges shall cause to be transmitted to all the clerks of the circuit courts of this State copies of all rules amended and revised and of all new rules made by them within ten days from such amendment, revision or adoption. [1870]

Code §10-17 (1952):

> The justices of the Supreme Court shall, from time to time, make such rules for the orderly conduct of business in said court as they may deem proper, not inconsistent with the provisions of [law]. [1870]

Code §15-231 (1952):

> The circuit courts may make and establish all necessary rules for the orderly conducting of business in said courts, *provided* such rules are not repugnant to the laws of the State or the rules prescribed by the justices of the Supreme Court and circuit judges. [1902]

Code §15-447 (1952):

> The Supreme Court may, from time to time, make rules regulating the practice and conduct of business in the courts of probate in all cases not expressly provided for by law. [1870]

Code §15-1151 (1952):

> The judge [of the Juvenile Domestic Relations Court] shall make rules and regulations governing the following subjects:
>
> (1) Practice and procedure in the court of his county;
>
> (2) Probation;
>
> (3) The receipt and payment of funds for the support of wives or children;
>
> (4) The conduct and control of officers and employees.
>
> Such rules shall be printed within a reasonable time after their adoption and copies shall be available for the public and, insofar as the same are not in conflict with existing provisions of law and of this chapter, they shall have the force of law. [1944]

Code §15-1393 (1952):

> The court shall have power to devise and publish rules to regulate the procedure in cases coming within the provisions of this chapter . . . [1939]

South Dakota

Const. art. 5, §2:

> The supreme court . . . shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

Const. art. 5, §34:

> All laws relating to courts shall be general and of uniform operation throughout the state, and the organization, jurisdiction, power, proceedings and practice of all the courts of the same class or grade, so far as regulated by law . . . shall be uniform. . . .

Code §32.0902 (1939):

> The Supreme Court of South Dakota has power to make all rules of practice and procedure which it shall deem necessary for the administration of justice in all civil and criminal actions, remedies, and proceedings in any and all courts of the state and for the method of taking, hearing, and deciding appeals to the courts from all decisions of public officers, boards, commissions, departments, and institutions exercising quasi judicial functions, in any case where an appeal from any such decision is allowed by law. The Court shall also have power to make all necessary rules for the admission, disbarment, discipline, and reinstatement of attorneys at law to practice the profession of law in this state.
>
> All statutes relating to pleadings, practice, and procedure in civil or criminal actions, remedies, or proceedings, now existing or hereafter enacted by the Legislature shall have force and effect only as rules of court and shall remain in effect unless

and until amended, repealed, or otherwise altered by rules promulgated by the Supreme Court.

Nothing in this section shall abridge any power the Legislature may have to enact, amend, or repeal statutes or rules of court relating to pleading, practice or procedure, nor shall anything herein abridge the power of the Court hereafter to promulgate further, or to amend, or repeal any such statute the Legislature may have enacted, amended, or repealed, or to make such new or additional rules or amendments of its existing rules as it may elect.

No rule promulgated hereunder shall in any manner abridge, enlarge, or modify the substantive rights of any litigant.

No new rule, amendment, or repeal of existing rules or statutes relating to pleading, practice, or procedure, shall be promulgated by the Court until it shall first have given sixty days notice of intention so to do by filing such proposed new rule, amendment, or repeal in the office of the Clerk of the Supreme Court and publishing notice of the filing of the same, indicating its proposed purpose in general terms and fixing a time and place when the Supreme Court will afford any person interested an opportunity to appear and be heard with reference to the adoption of the same. Such notice shall be given by publishing the same once each week for two successive weeks in at least two daily newspapers within the state, the first publication to be at least sixty days before the date fixed for such hearing.

Whenever five licensed attorneys of the state on the active list of the State Bar, shall join in a complaint against any rule or statute relating to pleading, practice, or procedure, setting forth the alleged defect in the old rule and the amendment or proposal for its improvement or shall join in a petition proposing any new rule and showing necessity therefor, the Supreme Court shall fix a time and place for hearing the same and give notice in the same manner as above provided for notice of intention to adopt a new rule, amendment, or repeal. In such cases, the Court shall not hold more than two hearings in each year, and may in its discretion join in one notice and hearing several complaints or petitions.

No new rule, amendment, or repeal of any existing or future rule or statute, relating to pleading, practice, or procedure in civil or criminal actions, remedies, or proceedings shall become effective until the Supreme Court shall have made an order in writing adopting the same, shall have caused the same to be signed by the Presiding Judge and attested by the Clerk under the seal of the Court, and shall have filed the same in the office of the Clerk of the Court and given notice thereof as hereinafter prescribed. Upon the filing of any such rule, amendment, or repeal the Clerk of the Supreme Court shall prepare and certify copies thereof and forward one to the office of the clerk of courts of each organized county of the state by registered mail with return receipt requested and shall publish notice of the adoption of such rule, amendment,

or repeal in at least two daily newspapers of the state. The first of such publications shall be made within ten days after the mailing of said certified copies, and the second publication shall be made in not less than thirty nor more than forty days after the mailing of such copies.

Such notice shall state the date of mailing of the said copies and the purpose of the said rule, amendment, or repeal in general terms and that same may be inspected at the office of any clerk of courts in the state. Notice of adoption of several rules, amendments, or repeals may be given at one time and in the same published notice.

The Clerk shall file proof of such mailing and publication of the notice with the original record of such rule, amendment, or repeal.

The Supreme Court may make any additional provisions for publication or notice of the promulgation of any rule, as to it may seem advisable.

Such rule, amendment, or repeal shall become effective on the sixtieth day after the mailing of the certified copies by the Clerk as above provided, unless the Supreme Court shall in its order fix a longer term before the effective date of such rule, in which case the date so fixed shall be the effective date of such rule.

The clerk of courts of each county upon the receipt of any such certified copy of a rule, shall file it, and indorse upon it the date of its filing, and notify the Clerk of the Supreme Court in writing, of the date of its receipt and filing, and register and index it, and the same shall thereafter remain available to public inspection in his office.

The provisions of this section shall not apply to the original adoption of the rules of practice and procedure authorized to be made and promulgated by the Supreme Court as a part of the Code revision provided by chapter 60 of the Session Laws of 1937, but all of said rules made and promulgated by the Supreme Court pursuant to said chapter shall become effective throughout the state upon the entry of an order in the office of the Clerk of the Supreme Court adopting and promulgating said rules by order of such Court, either by reference to the said rules as contained in this Code or by a separate document containing said rules. Such order, however, shall be made prior to July 1st, 1939, and after such date the procedure for adoption of new rules, amendments, or repeals, otherwise provided in this section shall apply. [1937]

Tennessee

Const. art. 6, §1:

The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. . . .

Const. art. 6, § 3:

> . . . The Legislature shall have power to prescribe such rules as may be necessary to [regulate the jurisdiction of the Supreme Court]. . . .

"[T]here is no constitutional provision expressed or implied giving the Legislature the power to make rules of procedure for trial courts." Wicker and Anderson, *Regulation of Procedure by Rules of Court,* 15 Tenn. L. Rev. 758, 762 n.20 (1939).

Code Ann. §16-311 (1955):

> The Supreme Court may make rules of practice for the better disposal of business before it. [1835]

Code Ann. §16-513 (1955):

> The Supreme Court may, from time to time, adopt, promulgate and publish in the Tennessee Reports, rules to regulate the procedure, practice and pleading in the circuit and/or superior criminal courts, for the purpose of simplifying same and of promoting the speedy determination of litigation upon its merits. Such rules shall not become effective until six (6) months after their adoption by said court. However, nothing in this section shall be construed to vest in the Supreme Court power to abrogate, suspend or modify any statutory rule of practice, and no rule shall be adopted or promulgated unless by unanimous vote of the supreme judges. The attorney-general, ex officio, the president of the Tennessee Bar Association, ex officio, two (2) circuit judges, one (1) criminal judge and a member of the bar—the four (4) last named and their successors to be appointed by the Supreme Court—shall constitute an advisory commission, whose duty it shall be to study the administration of justice in the said courts, and to advise the Supreme Court, from time to time, respecting desirable changes. No compensation shall be paid any member of such commission or the Supreme Court for such services. Nothing in this section shall be construed to deprive the circuit or criminal courts of power to formulate their own rules, supplementary to and not inconsistent with those so promulgated. [1932]

Code Ann. §16-514 (1955):

> The circuit court may make all such rules of practice as may be deemed expedient, consistent with law, and with such rules as may be made by the Supreme Court, and may revise, as often as thought proper, the rules by it so made. [1851]

Code Ann. §16-627 (1955):

> The chancellors, or a majority of them, may make such rules as they may deem beneficial and proper to regulate the practice of the chancery courts, not inconsistent with the provisions of this Code not including the rules, themselves; and the rules thus agreed upon shall be obligatory on all the chancery courts.
>
> In the absence of any such action by the chancellors as a body, or in respects not so regulated, each chancellor may make rules of practice for the purpose of expediting business in his own chancery division. [1835]

Code Ann. §16-414 (1955):

> . . . The Court of Appeals is empowered to make all necessary rules to [transfer cases between divisions of the Court] and to expedite the hearing of such cases. [1929]

Texas

Const. art. 5, §25:

> The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of this State to expedite the dispatch of business therein.

Court rules that conflict with statutes are void. *Missouri, K. & T. Ry. Co. of Texas* v. *Beasley,* 106 Tex. 160, 155 S.W. 183, *rehearing denied,* 106 Tex. 179, 160 S.W. 471 (1913). For a contrary interpretation of the similar New Jersey constitutional provision, see *Winberry* v. *Salisbury,* 5 N.J. 240, 74 A.2d 406, *cert. denied,* 340 U.S. 877 (1950).

Civ. Stat. art. 1730 (1945):

> The Supreme Court shall from time to time make and promulgate suitable rules, form and regulations for carrying into effect the articles in this title relating to the jurisdiction and practice of said court. [1892]

Civ. Stat. art. 1731 (1945):

> The [Supreme] Court may make and enforce all necessary rules of practice and procedure, not inconsistent with the law, for the government of said Court and all other courts of the State, so as to expedite the dispatch of business in said courts. [1892]

Civ. Stat. art. 1731a (1945):

> (1) In order to confer upon and relinquish to the Supreme Court of the State of Texas full rule-making power in civil judicial procedings, all laws and parts of laws governing the practice and procedure in civil actions are hereby repealed. . . . Provided, however, that no substantive law or part thereof is hereby repealed.
>
> (2) The Supreme Court is hereby invested with the full rule-making power in the practice and procedure in civil actions. Such rules shall not abridge, enlarge or modify the

substantive rights of any litigant. Such rules, after promulgation by the Supreme Court, shall be filed with the Secretary of State and a copy thereof mailed to each elected member of the Legislature on or before December 1st immediately preceding the next Regular Session of the Legislature and shall be reported by the Secretary of State to the Legislature, and, unless disapproved by the Legislature, such rules shall become effective upon September 1, 1941; provided, however, the Supreme Court may, from time to time after September 1, 1941, promulgate any specific rule or rules or any amendment or amendments to any specific rule or rules and make the same effective, except as hereinafter provided, at such time as the Supreme Court may deem expedient in the interest of a proper administration of justice, the same to remain in effect unless and until disapproved by the Legislature. Any such specific rule or rules, or any such amendment or amendments to any specific rule or rules, shall be filed by the Clerk of the Supreme Court with the Secretary of State, and a copy thereof mailed by the said Clerk to each registered member of the State Bar of Texas, at least sixty (60) days before the effective date thereof, and reported by the Secretary of State to the next succeeding Regular Session of the Legislature in the same manner as hereinabove provided.

(3) At the time it files the rules, the Supreme Court shall file with the Secretary of State a list of all articles or sections of the General Laws of the State of Texas, and parts of articles and sections of such General Laws, which, in its judgment, are repealed by Section 1 of this Act. Such list giving the construction of the Supreme Court as to the General Laws and parts of laws repealed by Section 1 shall constitute, and have the same weight and effect, as any other decision of the Supreme Court.

(4) Such rules shall be published in the official reports of the Supreme Court; and the Supreme Court is authorized to adopt such method as it may deem expedient for the printing and distributing of such rules.

(5) If any sentence, paragraph or section of this Act shall be held invalid or unconstitutional, such holding shall not invalidate any other sentence, paragraph or section hereof, and the Legislature hereby expressly declares that it would have passed such remaining sentences, paragraphs, and sections despite such invalidity. [1939]

Utah

Const. art. 8, §1:

The Judicial power of the State shall be vested . . . in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law.

Code Ann. §78-2-4 (1953):

The Supreme Court . . . has power to prescribe, alter and revise, by rules, for all courts of the state of Utah, the forms of process, writs, pleadings and motions and the practice and procedure in all civil and criminal actions and proceedings, including rules of evidence therein, and also divorce, probate and guardianship proceedings. Such rules may not abridge, enlarge or modify the substantive rights of any litigant. Upon promulgation the Supreme Court shall fix the date when such rules shall take effect and thereafter all laws in conflict therewith providing for procedure in courts only shall be of no further force and effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court. [1943]

Code Ann. §78-7-6 (1953):

Every court of record may make rules, not inconsistent with law, for its own government and the government of its officers; but such rules must neither impose any tax or charge upon any legal proceeding nor give any allowance to any officer for service. [1943]

Vermont

Const. c. 2, §5:

The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.

Stat. Ann. tit. 12, §2 (1958):

The justices of the supreme court, the superior judges, the judges of municipal courts and the judges of probate shall each establish general rules of practice applicable to their courts and may modify, alter or amend such rules. [1892]

Stat. Ann. tit. 12, §1 (1958)

The justices of the supreme court and the superior judges, acting together, shall make and promulgate rules to carry into effect the provisions of [the civil practice act], and to cover all other matters of pleading and procedure, formulating the same with special reference to the simplification and expedition of court proceedings, and providing for the propounding of interrogatories by a party after the entry of an action at law or the filing of a bill or petition in equity and other pre-trial procedure, and from time to time, may alter, amend or repeal such rules. In like manner, the justices and judges may prescribe forms to be used as precedents for complaints, answers and other pleadings . . . and may arrange for the preparation and publication of such forms, together with the statutes and

rules relating to court procedure, at the expense of the state. [1915]

A special commission has been established to revise the rules of civil practice, subject to legislative approval. Public Acts 1957, No. 216.

Virginia

Const. art. 6, §87:

> The judicial power of the State shall be vested in a Supreme Court of Appeals, circuit courts, city courts, and such other courts, inferior to the Supreme Court of Appeals, as are hereinafter authorized, or as may be hereafter established by law. The jurisdiction of these tribunals, and of the judges thereof, except so far as conferred by this Constitution, shall be regulated by law.

Const. art. 6, §88:

> . . . In case the [Supreme] Court [of Appeals] shall sit in divisions, each of such divisions shall have the full power and authority of said Court in the determination of causes, the issuing of writs, and the exercise of all powers authorized by this Constitution, or provided by law, subject to the general control of the Court sitting in bank, and such rules and regulations as the Court may make. . . .
>
> Subject to such reasonable rules as may be prescribed by law as to the course of appeals, the limitation as to the time, the value, amount or subject matter involved, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this Constitution, have appellate jurisdiction. . . .

Code Ann. §8-1.1 (1957):

> The Supreme Court of Appeals may, from time to time, prescribe the forms of writs and make general regulations for the practice of all the courts of record, civil and criminal; and may prepare a system of rules of practice and a system of pleading and the forms of process to be used in all the courts of record of this State, and put the same into effect. [1919]

Code Ann. §8-1.2 (1957):

> The Virginia Code Commission is directed to include the rules adopted by the Supreme Court of Appeals, effective February one, nineteen hundred fifty, and all subsequent amendments, in the Code of Virginia, and cause them to be properly indexed and annotated.
>
> The rules so adopted and as from time to time amended shall supersede all statutory provisions in conflict therewith, provided that no such rule shall operate to restrict or abridge any right provided by §30-5 of the Code of Virginia [granting special stays in cases involving legislators when the legislature is convened.] [1950]

Code Ann. §8-86.1 (1957):

> The Supreme Court of Appeals may make, publish and put into operation, from time to time, such rules and regulations for maturing common law and chancery causes in the trial courts as may in the opinion of such court best promote the ends of justice and prevent delay in its administration; and when such rules and regulations shall have been so made and published, wherever they are in conflict with the rules now required to be taken in the clerks' offices on what is known as "rule days" in order to mature cases, the rules and regulations so made by the Supreme Court of Appeals shall in all respects supersede and take the place of the rule days in the clerks' offices in all the trial courts of the Commonwealth and all statutes providing for such rule days, so far as in conflict therewith, shall be and are repealed. This section shall be liberally construed so as to get rid of unnecessary delays and expense.
>
> Such rules and regulations as adopted from time to time shall be certified to every court of record in this State and the clerk of each court of record shall duly and promptly copy or post the same in regular order, properly indexed, in a book kept by him for that purpose; provided that such rules and regulations shall not become effective until sixty days from the adoption thereof and shall be printed by the public printer, when requested by the Supreme Court of Appeals and distributed as public documents. [1928]

Code Ann. §8-471 (1957):

> The Supreme Court of Appeals may from time to time make, change or modify such rules for making out and printing the records as it may deem proper. [1919]

Code Ann. §12-63.1 (1956):

> An appeal shall lie from any order or decision of the Commission to the Supreme Court of Appeals at the instance of the applicant or any party in interest. The method of taking and prosecuting such appeal insofar as not fixed by law shall be prescribed by the rules of the Supreme Court of Appeals. [1919]

Washington

Const. art. 4, §1:

> The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Const. art. 4, §24:

> The judges of the superior courts, shall from time to time, establish uniform rules for the government of the superior courts.

Rev. Code §2.04.180 (1958):

> The supreme court may from time to time institute such rules of practice and prescribe such forms of process to be used in such court and in the court en banc and each of its departments, and for the keeping of the dockets, records and proceedings, and for the regulation of such court, including the court en banc and in departments, as may be deemed most conducive to the due administration of justice. [1909]

Rev. Code §2.04.190 (1958):

> The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts and justices of the peace of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits. [1925]

Rev. Code §2.04.200 (1956):

> When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect. [1925]

Rev. Code §2.04.210 (1956):

> RCW 2.04.190 through 2.04.210 shall not be construed to deprive the superior courts of power to establish rules for their government supplementary to and not in conflict with the rules prescribed by the supreme court. [1925]

West Virginia

Const. art. 8, §1:

> The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace.

Code Ann. §5183 (1955):

> The supreme court of appeals may, from time to time, make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this State. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section. Such rules and regulations shall be uniform for all courts of the same grade or class; but any court of the State other than the supreme court of appeals may adopt rules of court governing its local practice, but such rules of local practice shall not be inconsistent with any general rule of court then in existence or thereafter promulgated, and shall be effective only after approval by the supreme court of appeals.
>
> The judicial council of West Virginia is hereby designated as advisory committee to make observation and report to the supreme court of appeals, from time to time, such recommendations as may, in its judgment, be proper; and all rules promulgated by the supreme court of appeals under the authority of this section shall, before taking effect, be referred to the chairman of the judicial council, the president of the West Virginia bar association and to the judge of every court effected thereby. In the event a hearing is requested, within twenty days after such reference, by any five of the persons so designated, the supreme court of appeals shall thereupon designate a day when a hearing on the matter of the adoption of such rules shall be held. In the event no hearing is requested or, if requested, after such hearing, the supreme court of appeals shall be free to adopt or reject the proposed rules. General rules and regulations governing pleading, practice and procedure, and local rules, shall from time to time be published as an appendix to the official reports of the supreme court of appeals and bound therewith. [1935]

Code Ann. §5183(1) (1955):

> . . .
>
> The inherent rule-making power of the supreme court of appeals is hereby declared. . . . [1945]

Wisconsin

Const. art. 7, §3:

> . . . The supreme court shall have a general superintending control over all inferior courts. . . .

Const. art. 7, §8:

> The circuit courts shall have original jurisdiction in all matters civil and criminal . . . and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. . . .

Const. art. 7, §22:

> The legislature . . . shall provide for the appointment of three commissioners, whose duty it shall be to inquire into, revise and simplify the rules of practice, pleadings, forms and

proceedings, and arrange a system adapted to the courts of record of this state, and report the same to the legislature, subject to their modification and adoption; and such commission shall terminate upon the rendering of the report, unless otherwise provided by law.

Stat. Ann. §251.18 (1957):

The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. Such rules shall not become effective until 60 days after their adoption. All such rules shall be printed by the state printer and paid for out of the state treasury, and the court shall direct the same to be distributed as it may deem proper. All statutes relating to pleading, practice and procedure may be modified or suspended by rules promulgated pursuant hereto. No rule modifying or suspending such statutes shall be adopted until the court has held a public hearing with reference thereto, notice of which shall be given by publication for 3 successive weeks in the official state paper, the expense of such publication to be paid out of the state treasury. Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure. The judicial council shall act in an advisory capacity to assist the court in performing its duties under this section. [1929]

This provision was held constitutional in an advisory opinion. The court found that the legislature could delegate its power as to court procedure to the courts because this power was never exclusive with the legislature. *In re Constitutionality of section* 251.18, *Wisconsin Statute,* 204 Wis. 501, 236 N.W. 717 (1931).

Stat. Ann. §251.11 (1957):

(1) The supreme court shall be vested with all power and authority necessary . . . to make, annul, amend, or modify the rules of practice therein from time to time as it shall see fit, not inconsistent with the constitution and laws.

(2) The supreme court may by rule provide that no party in any action or proceeding before the supreme court shall be required to prepare and furnish any printed case or other printed abridgment of the record or of the proceedings theretofore had. [1925]

Stat. Ann. §252.08 (1957):

(1) The several circuit judges of the state and the judge of any court having unlimited jurisdiction concurrent with the circuit court either in civil or criminal matters shall

constitute a board known as the "Board of Circuit Judges." They shall meet at least once in each year at such time and place as they shall determine. They shall make such rules and regulations as they shall deem advisable, not inconsistent with the statutes or the rules of practice adopted by the justices of the supreme court, to promote the due and prompt administration of the judicial business of their respective courts. . . . [1913]

A parallel provision establishes a Board of County Judges. Stat. Ann. §253.30 (1957).

Wyoming

Const. art. 5, §2:

The supreme court shall have general appellate jurisdiction . . . and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law.

Const. art. 5, §18:

Writs of error and appeals may be allowed from the decisions of the district courts to the supreme court under such regulations as may be prescribed by law.

Const. art. 5, §23:

Appeals shall lie from the final decisions of justices of the peace and police magistrates in such cases and pursuant to such regulations as may be prescribed by law.

Const. art. 5, §28:

Appeals from decisions of compulsory boards of arbitration shall be allowed to the supreme court of the state, and the manner of taking such appeals shall be prescribed by law.

Const. art. 5, §29:

The Legislature may by general law provide for . . . Juvenile Delinquency and Domestic Relations Courts. . . . Appeals shall lie in such cases and pursuant to such regulations as may be prescribed by law. [1948]

Comp. Stat. Ann. §1-107 (1945):

It shall be the duty of the supreme court, from time to time, to prescribe rules of practice for said court, not inconsistent with the constitution or laws of this state, and when said rules are adopted by said court, the same shall be as binding upon the court, and the attorneys thereof, and the parties having business therein as though the same were enactments of the legislature of the state. [1876]

Comp. Stat. Ann. §1-116 (*Supp.* 1957):

The Supreme Court of Wyoming may from time to time adopt, modify and repeal general rules and forms governing

pleading, practice and procedure, in all Courts of this State, for the purpose of promoting the speedy and efficient determination of litigation upon its merits. [1947]

Comp. Stat. Ann. §1-117 (*Supp.* 1957):

Such rules may govern:

(a) The forms of process, writs, pleadings and motions and the subjects of parties, depositions, discovery, trials, evidence, judgments, new trials, provisional and final remedies and all other matters of pleading, practice and procedure; and

(b) Any review of or other supervisory proceedings from the judgment or decision of any court, board, officer, or commission when such review is authorized by law.

Such rules shall neither abridge, enlarge nor modify the substantive rights of any person nor the jurisdiction of any of the courts nor change the provisions of any statute of limitations. [1947]

Comp. Stat. Ann. §1-118 (*Supp.* 1957):

Upon the adoption of any rule or form the Supreme Court shall enter it in its proceedings and shall fix the date upon which such rule or form shall become effective but such effective date shall be at least sixty days after notice thereof has been published by the Supreme Court in such publication as it may designate. From and after the effective date of any such rule or form all laws in conflict therewith shall be of no further force or effect. [1947]

Comp. Stat. Ann. §1-119 (*Supp.* 1957):

The Supreme Court shall appoint an Advisory Committee to make recommendations from time to time with respect to pleading, practice and procedure. Such Committee shall hold hearings upon proposed rules in such manner and upon such notice as the Supreme Court prescribes and report to the Court from time to time such recommendations as it deems proper. [1947]

United States

Const. art. 3, §1:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. . . .

28 *U.S.C.* §2072 (1952):

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. [1934]

This enabling act was upheld in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941) on the authority of *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1 (1825). For a history of the development of the Federal Rules of Civil Procedure see Hart & Wechsler, The Federal Courts and the Federal System 577-89 (1953). For a similar statute as to admiralty rules for the district courts, see 28 U.S.C. §2073 (1952) [1911].

28 *U.S.C.* §2074 (*Supp. V* 1958):

The Supreme Court shall have the power to prescribe, and from time to time amend, uniform rules for the filing of petitions or notices of appeal, the preparation of records, and the practice, forms, and procedure in the several United States Courts of Appeals in proceedings for review of decisions of the Tax Court of the United States.

Such rules shall neither abridge, enlarge, nor modify the sustantive rights of any litigant.

Such rules shall not take effect until they shall have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. [1954]

18 *U.S.C.* §3771 (1952):

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and precedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, . . . and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All

laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. [1940]

18 *U.S.C.* §3772 (1952):

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, . . . in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the time for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. [1940]

Proposed and Model Acts

Coffy, *A Challenge and an Appeal to the Tennessee Bar,* 15 Tenn. L. Rev. 698, 701-02 (1939):

(1) . . . [T]he Supreme Court of the State of Tennessee shall have the power to prescribe, by general rules, for the trial courts of the state forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law and in equity and from time to time to amend the same. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant, or the right of trial by jury as declared by the constitution of the state.

(2) . . . [T]he court shall unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; *Provided, however,* nothing shall be incorporated therein which will abolish separate courts for law and equity cases.

(3) . . . [T]he rules shall take effect three months after their promulgation by the court, and thereafter all laws in conflict therewith shall be of no further force and effect.

(4) . . . [T]his act shall take effect from and after its passage, the public welfare requiring it.

Wicker and Anderson, *Regulation of Procedure by Rules of Court,* 15 Tenn. L. Rev. 758, 769–71 (1939):

Section 1. . . . [T]he Supreme Court of Tennessee shall have the power to prescribe by general rules the forms of actions, process, writs, pleadings, and motions, and the practice and procedure in all civil actions in the Circuit Courts and the Chancery Courts and for such other courts having general jurisdiction in civil actions as the General Assembly shall hereafter establish. . . . The Supreme Court of Tennessee shall, by rules promulgated from time to time, regulate pleading, practice and procedure in civil cases in all the above-mentioned courts for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Provided, That such rules shall be consistent with the Constitution of Tennessee and shall neither abridge, enlarge nor modify the substantive rights of any litigant nor the jurisdiction of any of the said courts, nor affect any statute of limitations. At the time of the adoption, promulgation and publication of any such rule or rules, the Supreme Court of Tennessee shall fix the effective date thereof, which shall not be less than four months from the date of the adoption thereof. As soon as promulgated, a copy of all rules shall be sent to the the [sic] clerks of all courts which may be affected thereby. As soon as practicable all such rules shall published in the Tennessee Reports and in such other place or places, if any, that the Supreme Court considers desirable.

From and after the effective date of any rule promulgated under this Section 1, and so long as said rule shall be operative, the operation of any statute, Act or Code section relating to pleading and practice or procedure in the above mentioned Courts, and inconsistent with or in conflict with any rule or rules which are prescribed hereunder by the Supreme Court of Tennessee, shall be modified, repealed or suspended in so far as such statute, Act or Code section is inconsistent with such rule. All statutes, Acts, or Code sections now in force relating to the forms of process, writs, pleading, practice and procedure shall henceforth have effect only as rules of courts and shall remain in full effect unless and until modified, repealed or suspended by rules promulgated pursuant hereto. [§§2–5 deal with the establishment and duties of a Procedural Rules Committee.]

Section 6. . . . [E]ach of the trial courts mentioned in Section 1 of this Act may adopt additional local written rules for the conduct of its business, which shall not be inconsistent with the statutory law of Tennessee nor in conflict with the

general rules prescribed by the Supreme Court of Tennessee. [§7 repeals prior laws relating to rule-making in certain courts.]

Section 8. . . . [A]ll laws and parts of laws in conflict with this Act be and the same are hereby repealed and that this Act takes effect from and after its passage, the public welfare requiring it.

Harris, *The Rule-Making Power*, 2 F.R.D. 67, 77–78 (1943):

Sec. 1. The Supreme [highest appellate] Court may from time to time adopt, modify and repeal general rules and forms governing pleading, practice and procedure in all courts of this State, for the purpose of promoting the speedy and efficient determination of litigation upon its merits.

Sec. 2. Such rules may govern

(a) the forms of process, writs, pleadings and motions and the subjects of parties, depositions, discovery, trials, evidence, judgments, new trials, provisional and final remedies and all other matters of pleading, practice and procedure, and

(b) any review of or other supervisory proceedings from the judgment or decision of any court, board, officer, or commission when such review is authorized by law.

Such rules shall neither abridge, enlarge nor modify the substantive rights of any person nor the jurisdiction of any of any of the courts nor change the provisions of any statute of limitations.

Sec. 3. Upon the adoption of any rule or form the Supreme Court shall enter it in its proceedings and shall fix the date upon which such rule or form shall become effective but such effective date shall be at least sixty days after notice thereof has been published by the Supreme Court in such publication as it may designate. From and after the effective date of any such rule or form all laws in conflict therewith shall be of no further force or effect.

Sec. 4. The Supreme Court shall appoint an Advisory Committe or designate the Judicial Council to make recommendations from time to time with respect to pleading, practice and procedure. The Court may employ such assistants as may be necessary to aid the Committee or Council in its work and may fix the salaries of persons so employed within the amounts appropriated therefor from time to time. Such Committee or Council shall hold hearings upon proposed rules in such manner and upon such notice as the Supreme Court prescribes, and report to the Court from time to time such recommendations as it deems proper.

Sec. 5. Each of the other courts of the State may adopt additional local rules for the conduct of its business not inconsistent or in conflict with the general rules prescribed by the Supreme Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS ESTABLISHING JUDICIAL COUNCILS AND ADVISORY COMMITTEES

Alabama

No provision.

Alaska

Const. art. 4, §8 (proposed) (7 member judicial council: 3 lay members, 3 lawyers, chief justice of the supreme court).

Arizona

Rev. Stat. Ann. §12-110 (1956) (advisory committee selected from the state bar) [1939].

Arkansas

No provision.

California

Const. art. 6, §1a (an all-judge judicial council expressly given the rule-making function) [1926].

Colorado

No provision.

Connecticut

Gen. Stat. §51-25 (1958) [1930].

Delaware

Sup. Ct. Rules, Rule 35 (Supp. 1958).

Florida

Stat. Ann. §43.15 (Supp. 1958) [1955].

Georgia

Code Ann. §81-1601 (1956) (judicial council of judges, legislators, lawyers and layman) [1945]. See also *id.* §81-1504 (bar committee) [1945].

Idaho

Code Ann. §1-214 (1940) (committee of lower court judges and lawyers) [1941].

Illinois

Ann. Stat. c. 34, §§162-c–162-g (Smith-Hurd 1935) (advisory committee of bench and bar organized at county level) [1955].

Indiana

Ann. Stat. §§4-3701–4-3708 (1946) (judicial council of judges, lawyers, professors and legislators) [1935].

Iowa

No provision.

Kansas

Gen. Stat. Ann. §§20-2201–20-2206 (1949) (judicial council of judges, lawyers and legislators) [1927].

Kentucky

Rev. Stat. Ann. §§22.050–22.100 (Supp. 1958) [1950]. See also §447.153 (1955) (authorizing advisory committee to be appointed by court of appeals) [1952].

Louisiana

Sup. Ct. Rules, Rule 21 (Supp. 1958) (26 member judicial council from bench and bar) [1950].

Maine

Rev. Stat. Ann. c. 113, §§195-97 (1954) (judicial council of judges, lawyers, the attorney general, and laymen).

Maryland

Ann. Code art. 26, §§102-06 (1957) (9 member judicial council: 6 judges, 3 lawyers) [1924].

Massachusetts

Ann. Laws c. 221, §§24, 34 A-34C (1955) (judicial council of 6 judges and 4 lawyers) [1924].

Michigan

Comp. Laws §§691.31–691.33 (1948) (judicial council of judges, lawyers, law professors, the attorney general, and laymen) [1929].

Mississippi

No provision.

Minnesota

Stat. Ann. §480.052 (1958) (lower court judges and lawyers to serve as advisory committee) [1947].

Missouri

Ann. Stat. §§476.320-90 (1951) (an all-judge body from several courts) [1943].

Montana

No provision.

Nebraska

No provision.

Nevada

No provision.

New Hampshire

Rev. Stat. Ann. §494:1 (1955) (11 member judicial council of bench and bar) [1945].

New Jersey

Sup. Ct. Rules, Rule 1:23-1.

New York

Judiciary Law §230 (judicial conference of chief judge of court of appeals and 8 lower court judges). See also Const. Art. § 6, 9-a(4).

New Mexico

No provision.

North Carolina

Gen. Stat. §§7-448–7-456 (Supp. 1957) (14 members selected by various officials "on the basis of their interest in and competency for the study of law reform") [1949].

North Dakota

Rev. Code §§27-1501–27-1510 (1943) (judicial council of all judges of supreme and district courts, a county judge, the attorney general, dean of law school, 5 lawyers) [1927].

Ohio

Rev. Code Ann. §105.51 (Baldwin 1958) (16 member judicial council of which 6 are ex officio; includes judges, legislators, the attorney general, and lawyers) [1957].

Oklahoma

Stat. Ann. tit. 20, §§148–49 (Supp. 1958) [1951].

Oregon

Rev. Stat. §§1.810–1.840 (1957) (judicial council of all justices of supreme court and judges of other courts) [1955].

Rhode Island

Gen. Laws §§8-13-1–8-13-5 (1956) (judicial council of 6 lawyers appointed by the governor) [1939].

South Carolina

Code §§15-2801–15-2810 (Supp. 1957) (22 member judicial council representing all departments of government plus the bar) [1957].

South Dakota

No provision.

Tennessee

Code Ann. §§16-901–16-910 (1956) (16 member judicial council of which 6 need not be lawyers) [1943]. See also *id.* §16-513 (6 member advisory committee: judges, lawyers, the attorney-general, and the president of state bar association) [1932].

Texas

Civ. Stat. art. 2328a (1950) (16 member judicial council, one of whom must be a journalist) [1929].

Utah

No provision.

Vermont

Stat. Ann. tit. 4, §§561–63 (1958) (5 member judicial council: the chief justice of the supreme court, 2 lawyers, 2 laymen) [1945].

Virginia

Code Ann. §§17-222–17-227 (1950) (9 member judicial council) [1930].

Washington

Rev. Code §§2.52.010–2.52.080 (1956) (9 member judicial council) [1925].

West Virginia

Code Ann. §§5183, 5707 (1955) (9 member judicial council including one professor of law) [1933].

Wisconsin

Stat. Ann. §251.181 (1957) (16 member judicial council including judges, legislators, the attorney-general, revisor of statutes, deans of law schools, lawyers, the president of the bar association and laymen) [1951].

Wyoming

No provision.

United States

28 U.S.C. §331 (Supp. V. 1958), as amended, Pub. L. No. 513, 85th Cong., 2d Sess. (July 11, 1958).