STATE OF NEW YORK

REPORT
OF
THE ADMINISTRATIVE BOARD
OF
THE JUDICIAL CONFERENCE

THE JUDICIAL CONFERENCE
AND
THE OFFICE OF COURT ADMINISTRATION

FOR THE CALENDAR YEAR
JANUARY 1, 1975 THROUGH DECEMBER 31, 1975

LETTER OF TRANSMITTAL

TO:

THE HONORABLE HUGH L. CAREY, *The Governor of the State of New York*, and
The Legislature of the State of New York:

Pursuant to Chapter 684 of the Laws of 1962, as amended by Chapter 615 of the Laws of 1974, this Annual Report is submitted on behalf of the Administrative Board of the Judicial Conference of the State of New York, the Judicial Conference of the State of New York, and the Office of Court Administration.

March 15, 1976

Richard J. Bartlett
State Administrative Judge

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PREFACE

This is the 21st Annual Report of the Administrative Board of the Judicial Conference of the State of New York, of the Judicial Conference of the State of New York, and of the Office of Court Administration. It is submitted pursuant to Chapter 684 of the Laws of 1962, as amended by Chapter 615 of the Laws of 1974, and covers the period from January 1, 1975 through December 31, 1975.

This is the first Annual Report to cover a calendar year. All previous annual reports covered a judicial year, which began on July 1 of one year and ended on June 30 of the following year. The last Annual Report to cover a judicial year, the 20th Annual Report, was for the reporting period from July 1, 1973 through June 30, 1974. To make the transition from that report to this one, a special six-month report was published covering the period from July 1, 1974 through December 31, 1974.

The report comprises seven chapters. Chapter 1 briefly describes the structure, administration and financing of the courts in New York State. Chapter 2 discusses the Standards and Goals adopted by the Administrative Board on July 3, 1975. Chapter 3 presents statistics on court operations in calendar year 1975. Chapter 4 discusses five special programs: (a) the Mental Health Information Service, (b) the central index of post conviction relief, (c) retainer and closing statements, (d) compulsory arbitration pilot programs, and (e) statements of appointment and of fees or commissions under section 35-a of the Judiciary Law. Chapter 5 reports on seminars, workshops, and training programs conducted, coordinated or assisted by the Office of Court Administration in 1975. Chapter 6 summarizes the legislation sponsored at the 1975 session of the Legislature by the Chief Judge, the Administrative Board of the Judicial Conference, the Judicial Conference, and the Office of Court Administration; this chapter includes (a) the reports of the Judicial Conference to the 1975 and 1976 Legislatures in relation to the Civil Practice Law and Rules, including proposed amendments adopted pursuant to section 229 of the Judiciary Law, and (b) the *Fourth Annual Report to the Judicial Conference by the Advisory Committee on the Criminal Procedure Law.* Chapter 7 consists of three special studies prepared on the recommendation of the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules: (a) *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes,* by Professor Paul S. Graziano of St. John's University School of Law, (b) *Study of Attachment, Replevin, Receivership, Arrest,* by Professor Samuel J. M. Donnelly of Syracuse University College of Law; and (c) *Proposals for Amendments to Article 31 of the CPLR Authorizing Videotape Depositions and Depositions of a Party's Own Medical Expert,* by William P. McCooe, Judge of the Civil Court of the City of New York and Acting Justice of the Supreme Court.

All statistical tables appear at the end of the chapter in which they are cited.

ACKNOWLEDGMENT

The Administrative Board of the Judicial Conference gratefully acknowledges the assistance and cooperation extended to it, to the Judicial Conference, and to the Office of Court Administration, during the past year, by the Governor and his staff, members of the Legislature, members of the Judiciary, Court personnel, bar associations, and individual lawyers and laymen.

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Chapter 1

INTRODUCTION

The Judiciary is one of the three branches of New York State Government. The powers and the structure of the New York State Judiciary are embodied in Article VI of the State Constitution, which was approved by the voters in the 1961 election and became operative September 1, 1962, effecting the first court reorganization in New York since 1894. Article VI provides for a "unified court system for the State" and specifies the organization and jurisdiction of the courts in the State; in addition, it establishes the method of selection and removal of judges and justices and the responsibilities for administrative supervision of the courts.

1.1 COURT STRUCTURE

In New York State the courts of original jurisdiction, or trial courts, hear a case in the first instance, and the appellate courts hear appeals from the decisions of other tribunals.

The appellate structure of these courts is shown in figures 1-a and 1-b.

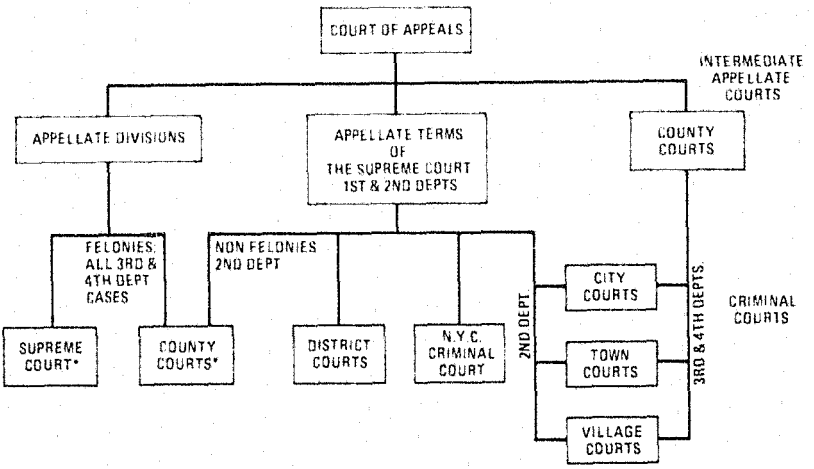
1. The Court of Appeals is the highest court of the State; it consists of the Chief Judge and six Associate Judges, elected statewide for 14-year terms. Five members of the Court constitute a quorum, and the concurrence of four members is required for a decision.

The jurisdiction of the Court is limited by Section 3 of Article VI of the Constitution to the review of questions of law, except in a criminal case in which the judgment is of death or a case in which the Appellate Division, in reversing or modifying a final or interlocutory judgment or order, finds new facts and a final judgment or order is entered pursuant to that finding. An appeal may be taken directly from the court of original jurisdiction to the Court of Appeals from a final judgment or order in an action or proceeding in which the only question is the constitutionality of a state or federal statute. In other matters, the Constitution provides that certain types of cases can be taken to the Court of Appeals as a matter of right, while in still other cases an appeal to the Court of Appeals may be taken only with the leave of a justice of the Appellate Division or a judge of the Court of Appeals or upon the certification of the Appellate Division or the Court of Appeals.

2. The Appellate Divisions of the Supreme Court are established in each of the State's four Judicial Departments (see the map at the end of this chapter). Their responsibilities include:

Figure 1-a

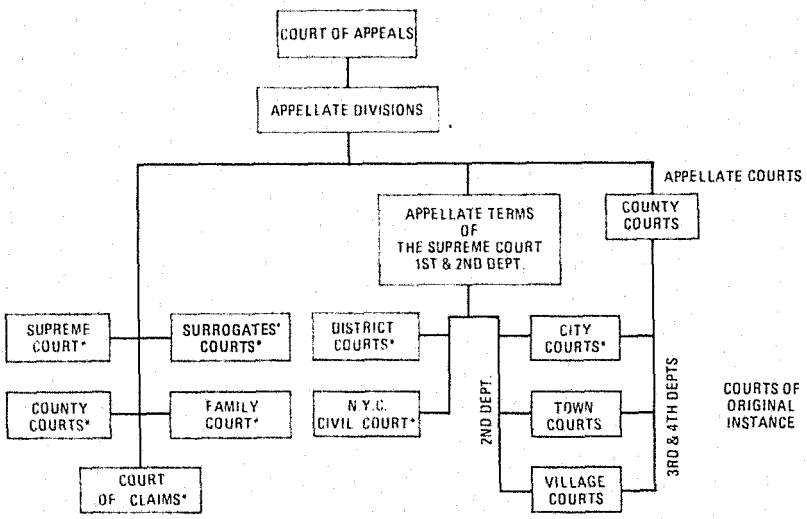
NEW YORK STATE JUDICIAL SYSTEM
CRIMINAL APPEALS STRUCTURE



*Appeals involving death sentences must be taken directly to the Court of Appeals.

Figure 1-b

NEW YORK STATE JUDICIAL SYSTEM
CIVIL APPEALS STRUCTURE



*Appeals from judgments of courts of record of original instance which finally determine actions where the only question involved is the validity of a statutory provision under the New York State or United States Constitution may be taken directly to the Court of Appeals. Only some of the City Courts are courts of record.

- Resolving appeals from judgments or orders of the courts of original jurisdiction in civil and criminal cases and reviewing civil appeals taken from the Appellate Terms.
- Conducting proceedings to admit, suspend, or disbar lawyers and to suspend or remove judges of lower courts.

Each Appellate Division has jurisdiction over appeals from judgments and from final and some intermediate orders rendered in county-level courts and original jurisdiction over selected proceedings. Where established by the Appellate Divisions, Appellate Terms exercise jurisdiction over civil and criminal appeals from various local courts and certain appeals from the county courts.

As prescribed by Section 4, Article VI of the Constitution, justices of the Supreme Court are designated to the Appellate Divisions by the Governor. The Governor designates the Presiding Justice of each Appellate Division, who serves for the length of his or her term of office as a justice of the Supreme Court. Associate justices are appointed for a five-year term or for the remainder of their term of office, whichever period is shorter.

3. The Supreme Court has unlimited, original jurisdiction, but it generally hears cases outside the jurisdiction of other courts, such as:

- Civil matters beyond the financial limits of the lower courts' jurisdiction;
- Divorce, separation, and annulment proceedings;
- Equity suits, such as mortgage foreclosures and injunctions; and
- Criminal prosecutions of felonies and indictable misdemeanors in New York City.

Supreme Court justices are elected by judicial district for 14-year terms.

4. The County Court is established in each county outside New York City. It is authorized to handle criminal prosecution of offenses committed within the county, although in practice, most minor offenses are handled by lower courts. The County Court also has limited jurisdiction in civil cases generally involving amounts up to $10,000.

County Court judges are elected in each county for terms of 10 years.

5. The Surrogate's Court is established in every county and hears cases involving the affairs of decedents, including the probate of wills, the administration of estates, and adoptions.

Surrogates are elected for terms of 10 years in each county outside New York City and for terms of 14 years in each county in New York City.

6. The Family Court is established in each county and the City of New York to hear matters involving children and families. The major types of cases that it hears include:

- Juvenile delinquency;
- Child protection;
- Minors in need of supervision;
- Review and approval of foster care placements;
- Paternity determinations;
- Family offenses;
- Adoptions (concurrent jurisdiction with Surrogate's Court); and
- Support of dependent relatives.

Family Court judges are elected for 10-year terms in each county outside New York City and are appointed by the Mayor for 10-year terms in New York City.

7. The New York City Civil Court tries civil cases involving amounts up to $10,000. It includes a Small Claims Part for informal disposition of matters not exceeding $1,000 and a Housing Part for housing-code violations.

New York City Civil Court judges are elected for 10-year terms.

8. The New York City Criminal Court conducts trials of misdemeanors and violations. Criminal Court judges also act as arraigning magistrates for all criminal offenses.

New York City Criminal Court judges are appointed by the Mayor for 10-year terms.

9. There are four categories of inferior courts outside New York City: District, City, Town and Village Courts. These four courts handle minor civil and criminal matters. The methods of selection and the terms of office of justices of these courts vary throughout the State.

10. The Court of Claims is a special trial court that hears and determines claims against the State of New York. Trials in these cases are nonjury trials; a judge presides and renders a decision.

Court of Claims judges are appointed by the Governor with the consent of the Senate for nine-year terms.

11. The Court on the Judiciary is a special court convened to try charges that may result in the removal or retirement of a judge of a superior court.

The Court on the Judiciary consists of the Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, and a justice of each Appellate Division chosen by a majority of the justices of that Appellate Division.

Table 1 shows the authorized number of judges in the New York State judicial system.

1.2 COURT ADMINISTRATION

The constitutional authority for the administrative supervision of the court system is vested in the Administrative Board, consisting of the Chief Judge of the Court of Appeals as chairman and the Presiding Justices of the four Appellate Divisions. The same constitutional provision that grants the Administrative Board the power "to establish standards and

Figure 2
NEW YORK STATE JUDICIAL SYSTEM
ADMINISTRATIVE STRUCTURE

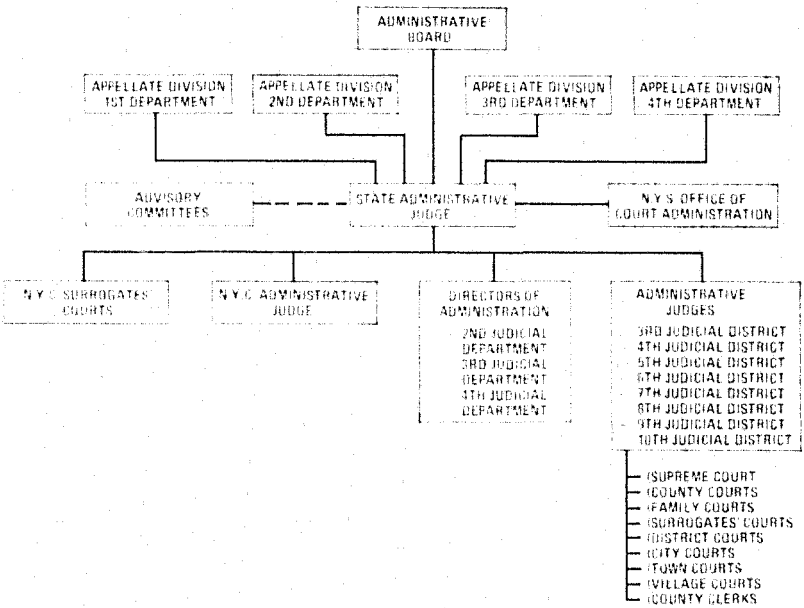
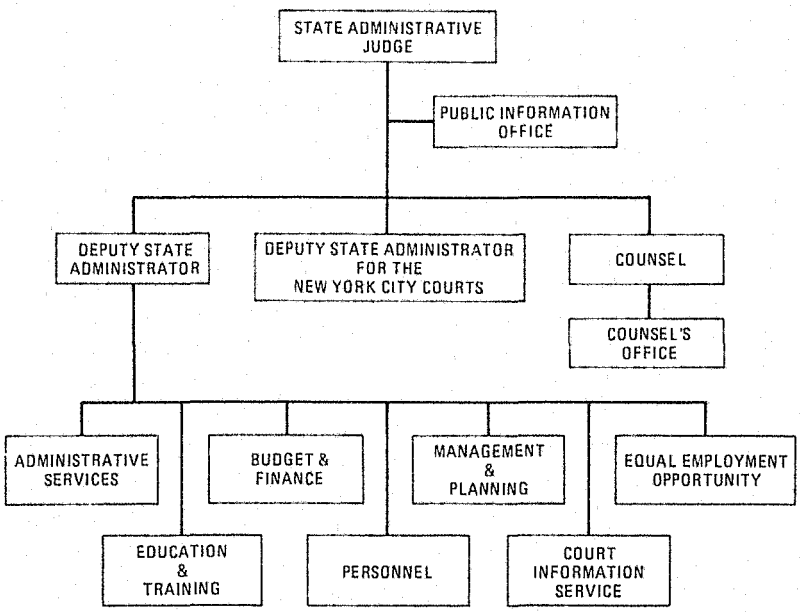


Figure 3
ORGANIZATION CHART
OFFICE OF COURT ADMINISTRATION



administrative policies for general application throughout the State" also provides that the four Appellate Divisions shall "supervise the administration and operation of the courts in their respective departments" in accordance with these standards and policies. This responsibility may be exercised through the designation of administrative judges.

The chairman of the Administrative Board, with the approval of the board, may appoint either a State Administrator or, as at present, a State Administrative Judge, who is empowered to establish an Office of Court Administration (OCA) to assist him, the Chief Judge and the Administrative Board in exercising their administrative and policy-making functions. The State Administrative Judge not only exercises the powers and responsibilities of the State Administrator as head of OCA and Secretary to the Administrative Board, but he is also responsible, in consultation with the Appellate Divisions, for overseeing and coordinating the operations of the various administrative judges designated by the Appellate Divisions, including the New York City Administrative Judge, who has been designated to supervise all trial-level courts in the City of New York except the Surrogates' Courts (see Figures 2 and 3).

The Administrative Board's principal actions during 1975 included the following:

- the adoption of standards and goals for the unified court system to eliminate, by January 1, 1979, undue delay in civil, criminal and family court proceedings (see Chapter 2).
- the adoption of a plan for reorganizing the administrative structure of the New York City courts. Effective January 1, 1976, the plan eliminated 20 nonjudicial management positions, reduced the number of administrative judges from 30 to 12, and clarified the responsibilities of judicial and nonjudicial administrators.
- the creation of the position of Deputy State Administrator for the New York City courts to assist the State Administrative Judge and the New York City Administrative Judge in the administration of the courts in the city, including the supervision of nonjudicial court personnel.
- the adoption of rule 20.10, effective September 1, 1975, which increased the role of the trial judge in the conduct of the voir dire examination (jury selection) in criminal cases.
- the adoption of amendments to Administrative Board rules 33.3(b) and 33.7 to expand the prohibitions against nepotism and partisan political activity of judges and their personal appointees.
- the requiring of comprehensive reports and recommendations to the Administrative Board by the State Administrative Judge on Supreme Court justices who are eligible for certification and recertification as retired justices.

— the enlargement of the Judicial Conference by the appointment of a judge of a district court, a judge of a city court outside New York City and a village or town justice. The appointments were authorized by an amendment to section 224 of the Judiciary Law, introduced at the request of the Judicial Conference.

In 1975, the Office of Court Administration continued to change its internal organization and operations to improve the Office's level of service. Two new units were established, while the others, through gains in experience, operated at increased levels of efficiency and productivity.

The Court Information Service implemented new systems of weekly part activity reporting for every Family Court part in January 1975. A similar system was implemented in every civil part in the Supreme and County Courts in April 1975. A long-term effort was begun to revise the JC-500 Criminal Disposition Reporting System to provide on-line computerized reporting in large jurisdictions and improved forms for reporting in smaller jurisdictions.

The Management and Planning Office assisted in formulating the standards and goals for the unified court system. When the standards were approved, the office assumed responsibility for monitoring their implementation. As part of that effort, an inventory was made in summer 1975 of all pending indictments, all pending Family Court proceedings, and all civil actions pending in the Supreme Court to determine the backlogs subject to disposition by the dates specified by the standards. Forms were designed to keep track of pending cases and to report progress in disposing of the backlogs and of new proceedings. Based on this information, continuing analyses of the allocation of judicial resources have been carried out. In addition, studies of local court facilities, procedures, and functions and duties of nonjudicial personnel were started to provide basic data necessary to the consideration of first-instance financing of court costs by the State.

For fiscal year 1975-76, the Budget and Finance Office installed a new budgeting, accounting and reporting system which emphasizes cost groupings by major purpose. The system facilitates the availability of fiscal data in forms which permit effectiveness and program analysis applications. Additionally, the office embarked on a project to automate the budget process in an effort to reduce to a minimum clerical time required for preparation. This will permit professional staff additional time for the conduct of project and effectiveness studies.

The Personnel Office conducted a position classification study of the Court of Claims which clarified title and assignment relationships and resulted in some organizational restructuring, including abolition of some positions. In connection with Equal Employment Opportunity requirements, an intensive and detailed program of job analyses of individual positions was started to ensure that qualifications and civil service examinations are strictly related to the job to be

performed. The office, with other units of the Office of Court Administration, participated in studies of the impact of a unified budget on the State court system, including the likely impact of consolidating the widely divergent fiscal policies, personnel rules and practices of the State, 57 counties, and scores of cities, which presently negotiate individual labor agreements with employee groups. The threat of a reduction in force in the New York City courts, as well as in several other jurisdictions in the State, resulted in the need to review the employment histories of thousands of employees to determine individual retention rights and to set up rosters of various kinds. In spite of austerity, some examinations for court employees had to be developed and future ones planned for at the county, city, and state levels. In general, the employee relations, examinations and list certification, position classification, and payroll certification activities continued to be administered in the interests of an efficient and improved court process.

The Equal Employment Opportunity (EEO) Programs Office was established in January 1975 with the appointment of Supreme Court Justice Jawn A. Sandifer as Equal Employment Opportunity Officer and Susan A. Whitaker as Director of EEO Programs. The purpose of the EEO Office is to ensure full and equal opportunities in employment for minorities and women in the courts of the State. The following affirmative actions were taken in 1975: Insertion of the nondiscriminatory clause in agreements, contracts, examination announcements; revision of job announcements and recruitment brochures to depict minorities and women in meaningful employment roles; development of a list of community organizations to be used as special recruitment sources; modification of the qualifications requirements with respect to education, sex and height for the position of uniformed court officer and implementation of a training program for this entry-level position which is designed to provide special recruitment and training in preparation for an examination to be scheduled soon; and initiation of job analysis and validation processes to make examinations more job related.

The Administrative Services Office was established in April 1975. The office is responsible for coordinating, planning and administering the Office of Court Administration's support services. Those services include the development and implementation of office standards and procedures, as well as all facilitative services, clerical support services, the internal personnel and payroll functions and the office resource management function. Consolidation of the previously fragmented support services has enabled OCA to operate more efficiently and effectively on a day-to-day basis.

The contributions of the Education and Training Office and of the Counsel's Office to the work of the Office of Court Administration in 1975 are described in Chapters 5 and 6, respectively.

1.3 COURT FINANCES

For the New York State fiscal year ending March 31, 1976, the estimated cost of operating all the courts in the State will be $300.08 million. Of this total, the State will pay $76.58 million (25 percent), and local units of government will pay $223.50 million (75 percent).

— State Support:	
Statewide Courts and Services	$ 42.66 million
State Assistance to Local Courts	10.29
Special Programs*	23.63
	$ 76.58 million
— Local Support:	
New York City	$117.35 million
Counties Outside N.Y.C.	106.15
	$223.50 million

*Includes Emergency Dangerous Drug Control Program, Emergency Felony Case Processing Program, the Emergency Narcotics Programs, and the Foster Care Assistance Program.

The State pays directly for the costs of the Office of Court Administration, the Court of Appeals, and the Court of Claims, as well as a portion of the salaries of the justices of the Supreme Court and the operations of the Appellate Divisions. The Legislature also appropriates funds for the Appellate Divisions and the Supreme Court in the first instance; these funds are repaid to the State proportionately by the various counties and New York City. The cost of all other courts is the responsibility of the counties, cities, towns or villages which they serve, although there is some state aid for salaries of judges in County, Surrogates', Family, some upstate City, and New York City courts. In addition, local personnel provide some service to the Supreme Court.

Table 1
NEW YORK STATE JUDICIAL SYSTEM
AUTHORIZED NUMBER OF JUDGES

Number of Judges*	Court
7	Court of Appeals
24	Supreme Court Justices, Appellate Division**
257	Supreme Court Trial Justices
50	Certificated Retired Justices of the Supreme Court
17	Court of Claims Judges
36	Court of Claims Judges (appointed pursuant to Chapter 603, Laws of 1973, Emergency Dangerous Drug Control Program)
35	Surrogates, including 6 in New York City
56	County Judges outside the City of New York in counties that have separate Surrogates and Family Court Judges
9	County Judges who are also Surrogates
8	County Judges who are also Family Court Judges
27	County Judges who are also Surrogates and Family Court Judges
101	Family Court Judges, including 39 in New York City
98	Criminal Court of the City of New York
120	Civil Court of the City of New York
49	District Court Judges
140	Judges of Courts of various names and jurisdictions in the 61 cities outside the City of New York
1,034	Total
2,240	Justices of Town and Village Courts

*The following new judges were authorized in the 1975 session laws: Ch. 205 added 1 Family Court Judge in Nassau; Ch. 555 added 1 Family Court Judge in Erie. These judges assumed office on January 1, 1976 and are therefore not included in the table.

**In addition to the 24 Supreme Court Justices permanently authorized, 4 justices and 12 certificated retired justices were temporarily designated to the Appellate Division.

JUDICIAL CONFERENCE OF THE STATE OF NEW YORK

ADMINISTRATIVE BOARD

CHAIRMAN	CHARLES D. BREITEL	CHIEF JUDGE OF THE STATE OF NEW YORK
	HAROLD A. STEVENS	PRESIDING JUSTICE APPELLATE DIVISION FIRST DEPARTMENT
	FRANK A. GULOTTA	PRESIDING JUSTICE APPELLATE DIVISION SECOND DEPARTMENT
	J. CLARENCE HERLIHY	PRESIDING JUSTICE APPELLATE DIVISION THIRD DEPARTMENT
	JOHN S. MARSH	PRESIDING JUSTICE APPELLATE DIVISION FOURTH DEPARTMENT
MEMBERS		
	CHARLES G. TIERNEY	JUSTICE, SUPREME COURT, 1st DEPT.
	JOHN E. CONE	JUSTICE, SUPREME COURT, 2nd DEPT.
	DeFOREST C. PITT	JUSTICE, SUPREME COURT, 3rd DEPT.
	GILBERT H. KING	JUSTICE, SUPREME COURT, 4th DEPT.
	GERALD SAPERSTEIN	SURROGATE
	DOUGLAS F. YOUNG	JUDGE, COUNTY COURT
	JOHN H. COOKE	JUDGE, COURT OF CLAIMS
	DANIEL J. DONAHOE	JUDGE, FAMILY COURT
	M. MARVIN BERGER	JUDGE, CRIMINAL COURT OF THE CITY OF N.Y.
	OREST V. MARESCA	JUDGE, CIVIL COURT OF THE CITY OF N.Y.
	ALFRED S. ROBBINS	JUDGE, DISTRICT COURT
	H. BUSWELL ROBERTS	JUDGE, CITY COURT
	DUNCAN S. MacAFFER	JUSTICE, VILLAGE COURT

MEMBERS OF THE LEGISLATURE*

HON. BERNARD G. GORDON	CHAIRMAN, JUDICIARY COMMITTEE OF SENATE
HON. JACK E. BRONSTON	RANKING MINORITY MEMBER, JUDICIARY COMMITTEE OF SENATE
HON. JOHN S. THORP, Jr.	CHAIRMAN, JUDICIARY COMMITTEE OF ASSEMBLY
HON. GORDON W. BURROWS	RANKING MINORITY MEMBER, JUDICIARY COMMITTEE OF ASSEMBLY
HON. H. DOUGLAS BARCLAY	CHAIRMAN, CODES COMMITTEE OF SENATE
HON. ABRAHAM BERNSTEIN	RANKING MINORITY MEMBER, CODES COMMITTEE OF SENATE
HON. STANLEY FINK	CHAIRMAN, CODES COMMITTEE OF ASSEMBLY
HON. MILTON JONAS	RANKING MINORITY MEMBER, CODES COMMITTEE OF ASSEMBLY

OFFICE OF COURT ADMINISTRATION

STATE ADMINISTRATIVE JUDGE	RICHARD J. BARTLETT
DEPUTY STATE ADMINISTRATOR	PETER R. GRAY
DEPUTY STATE ADMINISTRATOR - NEW YORK CITY COURTS	PETER PREISER
COUNSEL	MICHAEL R. JUVILER

FIRST DEPARTMENTAL COMMITTEE

CHAIRMAN	
PRESIDING JUSTICE	HAROLD A. STEVENS
MEMBERS†	
SUPREME COURT JUSTICE	CHARLES G. TIERNEY
CIVIL COURT JUDGE	OREST V. MARESCA
ADMINISTRATIVE JUDGES	
NEW YORK CITY	DAVID ROSS
DEPUTY ADMINISTRATIVE JUDGE OF N.Y.C. CIVIL DIVISION	EDWARD THOMPSON
DEPUTY ADMINISTRATIVE JUDGE OF N.Y.C. CRIMINAL DIVISION	JAWN A. SANDIFER
DEPUTY ADMINISTRATIVE JUDGE OF N.Y.C. FAMILY DIVISION	JOSEPH B. WILLIAMS
ASST. ADMINISTRATIVE JUDGE SUPREME COURT, CIVIL BRANCH (1st DIST.)	EDWARD R. DUDLEY
ASST. ADMINISTRATIVE JUDGE SUPREME COURT, CRIMINAL BR. (1st DIST.)	WILLIAM KAPELMAN
SURROGATE'S COURT	S. SAMUEL DIFALCO
SURROGATE'S COURT	BERTRAM GELFAND
SUPREME COURT JUSTICE	JACOB MARKOWITZ
FAMILY COURT JUDGE	LOUIS OTTEN
CRIMINAL COURT JUDGE	ARTHUR GOLDBERG
CIVIL COURT JUDGE	NATHANIEL SORKIN
ATTORNEY (1st DIST.)	SEYMOUR M. KLEIN
ATTORNEY (1st DIST.)	LOUIS A. CRACO
ATTORNEY (1st DIST.)	MARK F. HUGHES

SECOND DEPARTMENTAL COMMITTEE

CHAIRMAN	
PRESIDING JUSTICE	FRANK A. GULOTTA
MEMBERS†	
SUPREME COURT JUSTICE	JOHN E. CONE
CRIMINAL COURT JUDGE	M. MARVIN BERGER
COUNTY COURT JUDGE	DOUGLAS F. YOUNG
DISTRICT COURT JUDGE	ALFRED S. ROBBINS
ADMINISTRATIVE JUDGES	
APPELLATE TERM (2nd & 11th DIST.)	WILLIAM B. GROAT
APPELLATE TERM (9th & 10th DIST.)	HOWARD T. HOGAN
NINTH DISTRICT	JOSEPH P. GAGLIARDI
TENTH DISTRICT, NASSAU	THOMAS P. FARLEY
TENTH DISTRICT, SUFFOLK	ARTHUR M. CROMARTY
SUPREME COURT, CRIMINAL BR. (2nd DIST.)	VINCENT D. DAMIANI
SUPREME COURT, CIVIL BRANCH (11th DIST.)	CHARLES MARGETT
SUPREME COURT, CRIMINAL BRANCH (11th D.)	THOMAS S. AGRESTA
NEW YORK CITY	DAVID ROSS
NEW YORK CITY, CIVIL BRANCH	EDWARD THOMPSON
NEW YORK CITY, CRIMINAL BRANCH	JAWN A. SANDIFER
NEW YORK CITY, FAMILY DIVISION	JOSEPH B. WILLIAMS
COUNTY COURT, DUTCHESS	JOSEPH J. JUDICE
COUNTY COURT, NASSAU	RAYMOND L. WILKES
COUNTY COURT, SUFFOLK	FRANK L. GATES, Jr.
COUNTY COURT, WESTCHESTER	GEORGE BEISHEIM, Jr.
FAMILY COURT, NASSAU	WILLIAM J. DEMPSEY
FAMILY COURT, SUFFOLK	ARTHUR J. ABRAMS
FAMILY COURT, WESTCHESTER	VINCENT GURAHIAN
DISTRICT COURT, SUFFOLK	ANGELO MAUCERI
SUPREME COURT JUSTICE (2nd DIST.)	ANTHONY J. D'GIOVANNA
SUPREME COURT JUSTICE (9th DIST.)	MORTON B. SILBERMAN
SUPREME COURT JUSTICE (10th DIST.)	HENRY TASKER
SUPREME COURT JUSTICE (11th DIST.)	JAMES J. CRISONA
SURROGATE	PIERSON R. HILDRETH
FAMILY COURT JUDGE	WILLIAM BERMAN
FAMILY COURT JUDGE	RALPH E. CORY
FAMILY COURT JUDGE	PAUL F. MURPHY
FAMILY COURT JUDGE	SAUL MOSKOFF
FAMILY COURT JUDGE	PHILIP D. ROACHE
CRIMINAL COURT JUDGE	LUDWIG G. GLOWA
CRIMINAL COURT JUDGE	ROYAL S. RADIN
CRIMINAL COURT JUDGE	ANTHONY P. SAVARESE
CIVIL COURT JUDGE	DOMINICK CORSO
CIVIL COURT JUDGE	F. WILLIAM GUMA
CIVIL COURT JUDGE	JOHN J. KELLY
CIVIL COURT JUDGE	CHARLES B. LAWRENCE
CIVIL COURT JUDGE	ABRAHAM SCHULMAN
CITY COURT JUDGE	SANTI CARNEVALI
TOWN JUSTICE	MERCATOR C. KENDRICK
VILLAGE JUSTICE	EDWIN J. FREEDMAN
ATTORNEY (2nd DIST.)	EDWARD J. CONNOLLY
ATTORNEY (9th DIST.)	J. HENRY NEALE
ATTORNEY (10th DIST.)	EDWARD J. HART
ATTORNEY (11th DIST.)	GEORGE W. HERZ

DIRECTOR OF ADMINISTRATION: SHELDON AMSTER
16 Court Street
Brooklyn, New York 11201

THIRD DEPARTMENTAL COMMITTEE

CHAIRMAN	
PRESIDING JUSTICE	J. CLARENCE HERLIHY
MEMBERS†	
SUPREME COURT JUSTICE	DeFOREST C. PITT
COURT OF CLAIMS JUDGE	JOHN H. COOKE
FAMILY COURT JUDGE	DANIEL J. DONAHOE
VILLAGE JUSTICE	DUNCAN S. MacAFFER
ADMINISTRATIVE JUDGES	
THIRD DISTRICT	ELLIS J. STALEY, Jr.
FOURTH DISTRICT	NORMAN L. HARVEY
SIXTH DISTRICT	HOWARD A. ZELLER
SURROGATE	JOHN M. KEANE
FAMILY COURT JUDGE	J. GEORGE FOLLETT
COUNTY COURT JUDGE	GEORGE W. MARTHEN
COURT OF CLAIMS JUDGE	ROBERT M. GUIGLEY
TOWN JUSTICE	JAMES A. DAVIDSON
CITY COURT JUDGE	JOHN B. LAWLESS
CITY COURT JUDGE	JOHN B. LEONARD
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ATTORNEY (3rd DIST.)	BRUCE R. SULLIVAN
ATTORNEY (3rd DIST.)	JAMES S. CARTER
ATTORNEY (4th DIST.)	ROBERT J. NOLAN
ATTORNEY (4th DIST.)	WILLIAM J. HERRON
ATTORNEY (4th DIST.)	KENNETH H. HOLCOMBE
ATTORNEY (4th DIST.)	FLOYD J. REINHART
ATTORNEY (6th DIST.)	PAUL C. GOULDIN

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COUNTY COURT JUDGE	ALBERT ORENSTEIN
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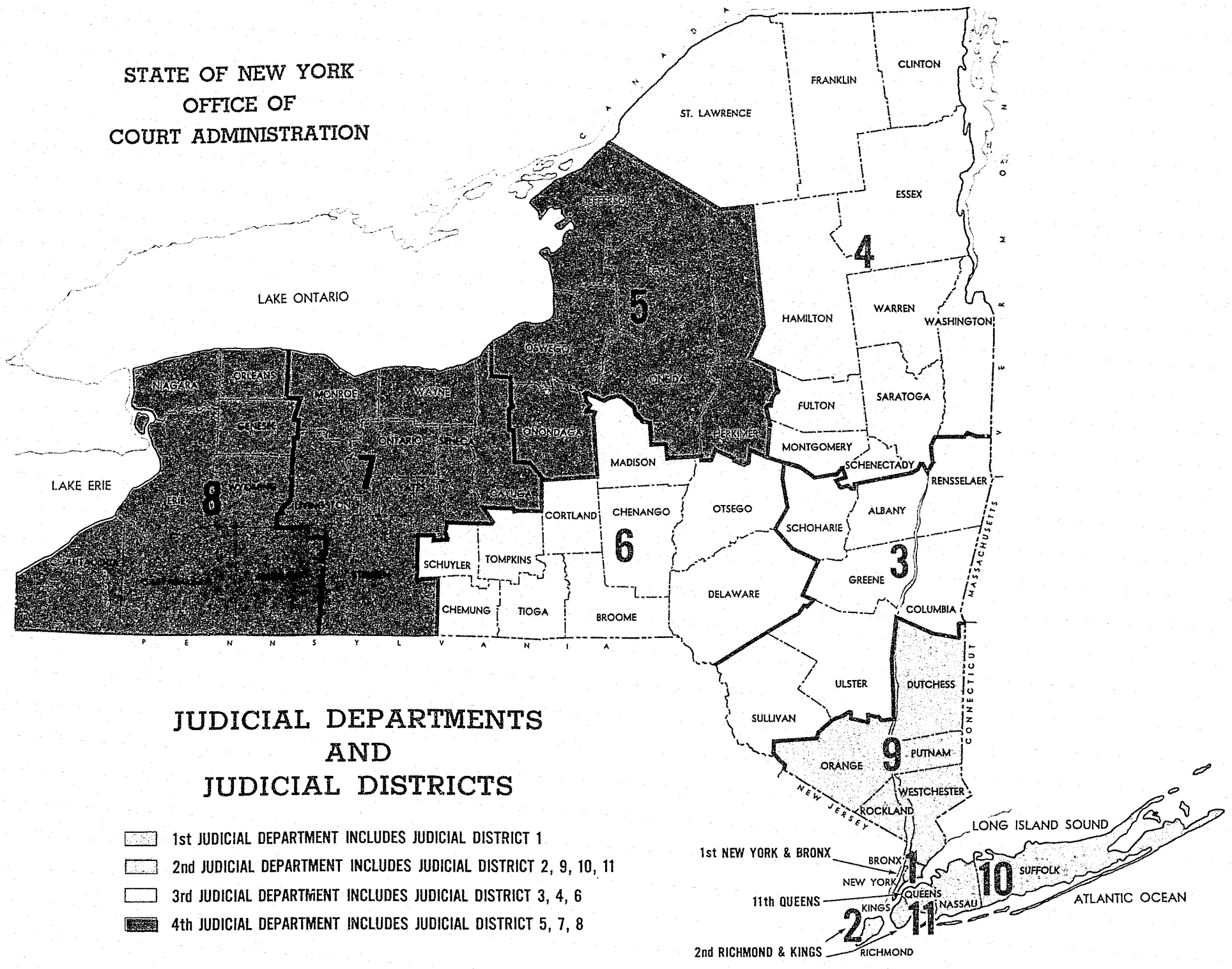
*By statute may attend meetings of Conference and make recommendations

†Members of Judicial Conference serving on Committee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RICHMOND
BRONX
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JUDICIAL DEPARTMENTS
AND
JUDICIAL DISTRICTS
1st JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 1
2nd JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 2, 9, 10, 11
3rd JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 3, 4, 6
4th JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 5, 7, 8

Chapter 2

STANDARDS AND GOALS

On July 3, 1975, the Administrative Board of the Judicial Conference adopted standards and goals for the timely disposition of felony indictments in Supreme Court and County Court and civil actions in Supreme Court and the timely completion of fact-finding in Family Court proceedings. The goals are designed to be achieved in stages between October 1, 1975, and January 1, 1979, under the supervision of the administrative judges.

In a forward to the standards and goals, State Administrative Judge Richard J. Bartlett said:

"There is intolerable delay in the disposition of cases in the unified court system, the degree of delay varying from court to court and county to county. Our goal is to reduce delay where it exists by requiring that all courts comply with these standards. . . .

"We recognize that timeliness of disposition is not the only, or indeed the primary, goal of the unified court system. The more important goal is improving the fairness of the judicial process. But delay erodes fairness so deeply that our first effort must be directed to its elimination. When court calendars are up to date, we will have done a great deal to improve the fairness of the process. We are, of course, addressing other measures which will further improve the quality of justice in the unified court system."

The standards and goals are as follows:

2.1 FAMILY COURT

2.1.1 Timely Completion of the Adjustment Process

Decisions as to whether a case should be adjusted by probation or referred to petition are an extension of the judicial function and should be under the policy direction of the Family Court. Presently, the Family Court Act requires that the adjustment process must be completed within 60 days unless extended for up to an additional 60 days by leave of a judge of the court. The Family Court Advisory and Rules Committee has drafted proposed uniform rules which contain a requirement — in support and family offense proceedings — that efforts at adjustment must begin within 15 days of the date of the request for a conference.

2.1.2 Timely Completion of Fact-Finding

The following standard for fact-finding will be achieved in the Family Court by January 1, 1979. Fact-finding will be completed within 60 days of the commencement of a new proceeding or a proceeding involving a modification or violation

of a previous order. This standard will be achieved in two stages.

1. By January 1, 1977, a fact-finding hearing will be completed within 90 days of the commencement of a proceeding.
2. By January 1, 1979, a fact-finding hearing will be completed within 60 days of the commencement of a proceeding.

2.1.3 Exceptions

Proceedings excludable from the standard are those in which:

1. A warrant for the respondent is outstanding.
2. An examination is being conducted into the respondent's mental competency.
3. The respondent is confined to a mental institution.

Proceedings for the interstate support of dependent relatives commenced in New York State are excluded from this standard. Such proceedings instituted outside this state shall be deemed to have commenced when the proceeding has been filed here. The standard for paternity proceedings shall commence at the time a blood test is ordered.

Other exceptions to this standard may be granted in the interest of justice with the approval of the designated administrative judge.

2.1.4 Strategy for Meeting the 90-Day 1977 Standard for Fact Finding

The strategy for meeting the 1977 standard consists of procedural restrictions, the imposition of sanctions, and monitoring procedures.

2.1.4.1 Procedural Restrictions

The following procedural restrictions will be established to insure compliance with the standard by January 1, 1977:

1. All prehearing motions and applications shall be made within 20 days and decided within 30 days of the commencement of a proceeding. Thereafter, all such motions and applications shall be deemed waived, except those of a jurisdictional nature.
2. No more than two adjournments shall be allowed prior to fact finding unless approved by the designated administrative judge.
3. The fact finding hearing shall be scheduled within 60 days of waiver or disposition of all prehearing motions and applications. Adjournment of a scheduled fact finding hearing may be granted only with the approval of the designated administrative judge.
4. Fact finding hearings shall be conducted without adjournment.
5. In the scheduling of fact finding hearings, first preference shall be given to those proceedings in which children have

been removed from their homes and then to those proceedings commenced earliest.

2.1.4.2 Responsibilities of the Participants

Each participant in a Family Court proceeding shall be responsible for his compliance with this standard.

Family Court judges:

1. Shall insure that each proceeding complies with this standard.
2. Shall deny unjustified requests for adjournment even if all parties join in the request.
3. May dismiss proceedings which are not ready for fact finding in compliance with this standard. (Applications to restore may not be made more than 20 days after dismissal.)
4. Shall insure that all prehearing motions and applications are made and decided within 30 days of the commencement of the proceeding.
5. Shall notify the designated administrative judge of any proceeding not in compliance with this standard with the reason therefor.

Designated administrative judges shall:

1. Pass upon all requests for exceptions to this standard.
2. Pass upon all requests for adjournments in proceedings in which two adjournments have been granted.
3. Report exceptions as may be required by the State Administrative Judge.
4. Take all other steps necessary to insure compliance with this standard.

The State Administrative Judge shall:

1. Insure compliance throughout the state with this standard.
2. Insure that statistical information regarding compliance with this standard is collected and disseminated.

Lawyers in Family Court proceedings shall:

1. Make all prehearing motions and applications within 20 days of commencement of a proceeding.
2. Appear in court when scheduled.

Probation officers shall comply with this standard by producing reports when ordered and appearing in court when scheduled.

All others who are parties or participants in Family Court proceedings shall comply with this standard by producing reports when ordered and by appearing in court or producing respondents who are in detention when scheduled.

2.1.4.3 Sanctions

Sanctions may be imposed against participants who fail to

meet their responsibilities in complying with the Family Court standards. The sanctions include the imposition of fines, contempt-of-court proceedings, dismissal, grievance proceedings against attorneys, and administrative discipline of personnel employed by public and private agencies.

2.1.4.4 Implementation Schedule

1. Proceedings commenced on or after October 1, 1975 must be adjudicated or fact finding initiated within 90 days of the commencement of the proceeding.
2. Proceedings commenced before October 1, 1975 must be adjudicated or fact finding initiated by January 1, 1977.

2.1.4.5 Monitoring Compliance with the 90-Day Standard for 1977

Monitoring procedures will be instituted to insure compliance with the 90-day standard or the imposition of sanctions when appropriate. These procedures will include:

1. A report on any proceeding which is not in compliance with this standard shall be made to the designated administrative judge who will then order the scheduling of a hearing date.
2. A report on exceptions to the 90-day standard shall be made as required by the State Administrative Judge.

2.2 CRIMINAL ACTIONS

2.2.1 Timely Processing of Criminal Cases

The following standard for the disposition of criminal cases will be achieved by January 1, 1979.

1. *Violations:* These cases will be brought to trial or disposition within 30 days of arraignment.
2. *Misdemeanors:* These cases will be brought to trial or disposition within 90 days of arraignment.
3. *Felonies:*
   a. Each defendant will be afforded an opportunity for a preliminary hearing within 3 days of arraignment in the local criminal court except in those cases in which a grand jury proceeding has commenced.
   b. Indictments (or superior court informations) will be filed in the superior court within 30 days after arraignment in the local criminal court.
   c. The district attorney shall file a notice of intention to offer evidence of a statement made by a defendant or of an identifying witness pursuant to section 710.30 CPL within 15 days of arraignment in the superior court.
   d. A conference to arrange full discovery and to discuss motions shall be held within 20 days of the prosecutor's filing of notice as described in section (c)

or within 30 days of arraignment in the superior court.

e. All motions must be made within 15 days of the first conference or within 45 days of the arraignment in the superior court.

f. All motions must be decided within 15 days.

g. A pretrial conference must take place within 75 days of arraignment in the superior court to discuss disposition and to calendar the case for trial.

h. A trial must begin or a disposition must be reached within 6 months after filing of the indictment in the superior court.

i. A case shall be ready for sentencing within 30 days of conviction.

The courts' emphasis in insuring compliance with the above standards will be in felony cases.

The standard for felony cases will be achieved in four stages:

1. By October 1, 1976, no class A felony case will have been pending for more than one year from the filing of an indictment. Further, no felony case will be pending in which the defendant has been detained in jail for more than one year.
2. By October 1, 1977, no felony case will have been pending for more than one year from the filing of an indictment.
3. By July 1, 1978, no felony case will have been pending for more than nine months from the filing of an indictment.
4. By January 1, 1979, no felony case will have been pending for more than six months from the filing of an indictment.

The timetable for cases being retried will commence with the remand for trial.

2.2.2 Exceptions

Cases excludable from the standard are those in which:

1. A warrant for the defendant is outstanding.
2. The defendant is confined to a mental institution.

Other exceptions to this standard may be granted in the interests of justice with the approval of the designated administrative judge.

2.2.3 Strategy for Meeting the 1976 Standard

The strategy for meeting the 1976 standard for class A felony cases and cases involving jailed defendants consists of procedural restrictions, the imposition of sanctions, and monitoring procedures.

2.2.3.1 Procedural Restrictions

Two procedural restrictions will be established to insure compliance with the 1976 standard.

2.2.3.2 Plea Negotiations

Plea negotiations are a legitimate part of the court process. As Chief Judge Breitel wrote in *People v. Selikoff*, 35 N.Y. 2nd 227 (1974), "plea negotiation serves the ends of justice. It enables the court to impose 'individualized' sentences, . . . adapted to . . . the individual before the court . . . In budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system, not just as to the courts but also to local detention facilities." It also relieves the parties of the inevitable risks of trials, shortens the judicial process and ". . . serves significant goals of law enforcement by permitting an exchange of leniency for information and assistance." Plea negotiations are, however, subject to abuse and should be regularized. Our goal is to reduce the backlog of pending cases and provide justice in a timely fashion so that the administrative need for negotiated pleas will be eliminated.

To facilitate the timely completion of pretrial proceedings, the following rule regarding plea negotiations will be instituted:

> The court will accept a lesser plea only within 90 days of arraignment in the superior court. The court will not thereafter accept a lesser plea except after trial is commenced.

Exceptions to this rule can be granted only with the approval of the designated administrative judge.

This rule will not become effective state-wide until legislation to require full pretrial discovery has been adopted. In the meantime, the courts will attempt to secure voluntary discovery and implementation of the 90-day plea negotiation limit.

2.2.3.3 Calendaring for Trial

At the pretrial conference, each case shall be calendared for trial. More than one adjournment of a case reached for trial shall not be permitted without approval of the designated administrative judge.

2.2.3.4 Responsibilities of Participants in Criminal Cases

Each participant in a criminal case shall be responsible for his compliance with this standard.

Judges presiding over criminal proceedings:

1. Shall insure that each case complies with this standard.
2. Shall calendar each case for trial at the pretrial conference.
3. Shall deny unjustified requests for adjournment, even if the prosecution and defense both join in the request.
4. May dismiss a case if the district attorney is not ready for trial in compliance with this standard.
5. Shall notify the designated administrative judge of any case not in compliance with this standard with the reason therefor.

Designated administrative judges shall:

1. Pass upon all requests for exceptions to this standard.
2. Report exceptions as may be required by the State Administrative Judge.
3. Take all other steps necessary to insure compliance with this standard.

The State Administrative Judge shall:

1. Insure compliance throughout the state with this standard.
2. Insure that statistical information regarding compliance with this standard is collected and disseminated.

Lawyers in criminal cases shall:

1. Make all prehearing motions and applications within 45 days of arraignment in the superior court.
2. Appear in court when scheduled.

Probation officers shall complete presentence investigation in sufficient time to permit sentencing within 30 days of conviction.

All other participants shall comply with this standard by appearing in court at the scheduled time.

The administrators of local detention facilities shall insure that detained defendants are in court on time for scheduled appearances.

2.2.3.5 Sanctions

Sanctions may be imposed against participants who fail to meet their responsibilities in complying with the criminal standards. The sanctions include the imposition of fines, contempt-of-court proceedings, dismissal, grievance proceedings against attorneys, and administrative discipline of personnel employed by public and private agencies.

2.2.3.6 Implementation Schedule

1. Indictments for class A felonies or indictments in which the defendant is detained in jail on or after October 1, 1975 shall be disposed of or brought to trial within one year of the filing of the indictment.
2. Indictments for class A felonies or indictments in which the defendant is detained in jail filed before October 1, 1975 shall be disposed of or brought to trial no later than October 1, 1976. In the scheduling of these indictments for trial, preference shall be given to those indictments filed earliest.

2.2.3.7 Monitoring Compliance with the 1976 Standard

Monitoring procedures will be instituted to insure compliance with the 1976 standard or the imposition of sanctions when appropriate. These procedures will include:

1. A report on any indictment which is not in compliance with this standard shall be made to the designated administrative judge who will then order the scheduling of a trial.
2. A report on exceptions to the 1976 standard shall be made as required by the State Administrative Judge.

2.3 CIVIL ACTIONS

2.3.1 Timely Processing of Civil Actions

The following standard for the disposition of civil actions will be achieved by January 1, 1979: disposition will be reached or trial commenced within six months of filing of a note of issue.

The courts' emphasis in insuring compliance with the above standard will be on civil actions filed in the Supreme Court.

The standard for civil actions will be achieved in three stages:

1. By April 1, 1977, no civil action will have been pending for more than 18 months from the filing of a note of issue.
2. By January 1, 1978, no civil action will have been pending for more than 12 months from the filing of a note of issue.
3. By January 1, 1979, no civil action will have been pending for more than 6 months from the filing of a note of issue.

In those counties where applicable, the standard shall commence at the time a general preference is granted.

2.3.2 Responsibilities of the Participants

Each participant in a civil action shall be responsible for his compliance with this standard.

Judges presiding over civil actions:

1. Shall insure that each action complies with this standard.
2. Shall deny unjustified requests for adjournment, even if the parties join in the request.
3. May dismiss the case if the plaintiff is not in compliance with this standard.
4. May order an inquest if the defendant is not in compliance with this standard.
5. Shall notify the designated administrative judge of any action not in compliance with this standard with the reason therefor.

The designated administrative judge shall:

1. Pass upon all requests for exceptions to this standard.
2. Report on exceptions as may be required by the State Administrative Judge.
3. Take all other steps necessary to insure compliance with this standard.

The State Administrative Judge shall:

1. Insure compliance throughout the state with this standard.
2. Insure that statistical information regarding compliance with this standard is collected and disseminated.

Lawyers, parties, and witnesses in civil actions in Supreme Court shall comply with this standard by appearing in court at the scheduled time.

2.3.3 Implementation Schedule

1. Actions in which notes of issue shall have been filed on or after October 1, 1975 shall be disposed of or brought to trial within 18 months of such filing.
2. Actions in which notes of issue shall have been filed before October 1, 1975 shall be disposed of or brought to trial by April 1, 1977. In the scheduling of these actions for trial, preference shall be given to actions in which the notes of issue were filed earliest.

2.3.4 Strategy for Meeting the 1977 Standard

The strategy for meeting the April 1, 1977 standard consists of the imposition of sanctions and monitoring procedures.

2.3.4.1 Sanctions

Sanctions may be imposed against participants who fail to meet their responsibilities in complying with the civil standards. The sanctions include the imposition of fines, contempt-of-court proceedings, dismissal, grievance proceedings against attorneys, and administrative discipline of personnel employed by public and private agencies.

2.3.4.2 Monitoring of Compliance with the 1977 Standard

Monitoring procedures will be instituted to insure compliance with the 1977 standard or the imposition of sanctions where appropriate. These procedures will include:

1. A report on any action which is not in compliance with this standard shall be made to the designated administrative judge who will then order the scheduling of a trial.
2. A report on exceptions to the 1977 standard shall be made as required by the State Administrative Judge.

Chapter 3

COURT OPERATIONS

The operations of each of the 11 categories of courts described in Chapter 1 are discussed statistically in this chapter of the report. Operating information for the appellate courts, the Court of Claims, and the Surrogate's Courts for 1975 is presented on a courtwide basis. Court operations with respect to criminal proceedings, civil actions, and proceedings in the Family Court are discussed as separate topics.

3.1 THE COURT OF APPEALS

As noted in Chapter 1, the Court of Appeals is the highest court of the State. In 1975, 601 records on appeal were filed in the Court of Appeals, as shown in Table 2. During this period, 548 appeals and 1,142 motions were decided. The Court also heard oral arguments in 574 cases and decided 1,047 applications for leave to appeal.

Of the 548 appeals decided, 360 involved civil matters and 188 were criminal cases, as shown in Table 3. The basis of jurisdiction in the Court of Appeals in 223 (62%) of the civil appeals disposed of was a reversal, modification, or dissent in the Appellate Divisions. Ninety-eight (27%) of the civil appeals were heard by permission of either the Appellate Divisions or the Court of Appeals.

In the 360 civil appeals disposed of, 246 (68%) judgments or orders were affirmed, 78 (22%) reversed, 28 (8%) modified, and 8 (2%) dismissed. Among the 188 criminal appeals disposed of, 130 (69%) judgments were affirmed, 45 (24%) reversed, and 8 (4%) modified, as shown in Table 3.

In deciding the 548 appeals, judges of the Court of Appeals wrote 444 opinions, as shown in Table 4. These consisted of 362 opinions of the Court, 22 concurring opinions and 60 dissenting opinions.

3.2 APPELLATE DIVISIONS OF THE SUPREME COURT

The Appellate Divisions provide the first level of appeal from superior trial courts in addition to performing the other functions mentioned in Chapter 1. In 1975, 7,429 records on appeal were filed in the four Appellate Divisions, as shown in Table 5. There were 7,348 dispositions of judgments or orders appealed from, and the Appellate Divisions heard 3,794 oral arguments.

Of the 7,348 dispositions, 4,694 (64%) were affirmances, 686 (9%) were modifications, 1,015 (14%) were reversals without a new trial, and 222 (3%) were orders of new trials, as shown in Table 6.

In disposing of the 7,348 judgments or orders appealed

from, the four Appellate Divisions wrote 482 full opinions, 71 *per curiam* opinions and 3,478 memorandum opinions, as shown in Table 7.

3.3 APPELLATE TERMS OF THE SUPREME COURT

The Appellate Terms of the Supreme Court received 2,177 appeals and disposed of 1,579 in 1975, as shown in Table 8. The First and Second Departments together rendered 1,223 decisions, filed 695 *per curiam* opinions and wrote 484 memoranda (not filed). Two thousand five hundred and ten motions were heard or submitted.

3.4 CRIMINAL PROCEEDINGS

Trial jurisdiction in criminal proceedings is vested in different categories of courts, depending on the type of proceeding. The volume and the nature of the criminal proceedings in each category is discussed below.

3.4.1 The Supreme Court Within the City of New York

Table 9 presents a summary of the 1975 activities of the Supreme Court in New York City. The entries (except for items 1 and 9 through 13) are in terms of defendant-indictments. As such, each defendant is considered separately for each indictment with which he or she is charged. For example, if two indictments apply to the same defendant, each is counted separately, and two dispositions are recorded; if one indictment applies to two defendants, the action concerning each defendant is counted, and two dispositions are recorded. In the calendar year 1975, 19,720 defendant-indictments were filed in Supreme Court in New York City. During the previous 12-month period, 20,688 defendant-indictments were filed.

Dispositions in 1975 totaled 21,938. Table 10 shows the number and percent of defendant-indictments disposed of by nature of disposition for each county in New York City. The proportion of dispositions by trial increased from 9.6 percent in calendar-year 1974 to 10.7 percent in 1975.

A total of 12,038 felony defendants were awaiting disposition of their cases in Supreme Court in New York City at the end of 1975. This compares with 12,335 pending at the end of 1974. A breakdown of these defendants by county is presented and compared in Table 11.

The New York City Department of Correction reports that, at the end of December 1975, 3,457 defendants were being held while awaiting disposition or sentencing in Supreme Court in New York City. Of these, 360 had been detained for over one year. This is a decrease from the 369 defendants reported as detained more than one year on December 31, 1974. Table 12 shows the number and percent detained by county.

3.4.2 The Supreme Court and County Courts Outside the City of New York

Although the Supreme Court and County Courts outside the

City of New York possess civil and criminal jurisdiction, the caseload of the Supreme Court is largely civil and that of the County Courts is largely criminal. The defendant-indictments reported here were returned mainly by grand juries of the Supreme Court. All other criminal proceedings occurred principally in the County Courts.

There were 16,034 defendant-indictments filed outside of New York City during the 12 months of calendar-year 1975. Table 13 presents a summary of defendant-indictments, arraignments, dispositions and sentences for this period by county, district and judicial department.

Table 14 shows the number and percent of defendants disposed of by nature of disposition. There were 16,736 dispositions in 1975. The table shows that 18.5 percent of dispositions were by dismissal, 74.8 percent by plea and 6.7 percent by trial.

As reported by local detention facilities, 1,108 detainees were awaiting action in Supreme Court and County Courts outside the City of New York at the end of December 1975. Of these, 31 had been detained over one year. This compares with 1,130 detainees awaiting action in the same courts at the end of 1974—25 for over one year. Table 15 shows the number of defendants detained by judicial district.

3.4.3 The Supreme and County Courts—Statewide, Calendar Year 1973*

Table 16 is compiled and furnished by the State of New York Division of Criminal Justice Services (DCJS), Statistical Analysis Center, and is based on the monthly reports titled "Outcome of Procedures in Supreme and County Court" (Return D), which is furnished to DCJS by the clerks of each of these two courts. It is important to note that the figures in this table represent a count of defendants at the time of sentencing rather than a count of defendant-indictments as defined above in Section 3.4.1 and as recorded in Tables 9 through 14.

3.4.4 The Criminal Court of the City of New York

With an authorized strength of 98 judges, the Criminal Court of the City of New York has jurisdiction over misdemeanors and lesser criminal offenses. It is also the arraignment court for felonies.

Table 17 presents the breakdown of the number of arrest cases filed for the period January through August 1975—the only period for which the breakdown data are available.

Table 18 shows the breakdown of the 432,263 summons cases filed for the year 1975.

Table 19 compares the fines collected in the calendar-years 1974 and 1975.

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*Latest available figures.

Table 20 summarizes the court's activities in arrest cases for the year 1975. The total number of filings during 1975 was 205,725, compared with 198,265 filings in 1974.

There were 208,758 cases disposed of in 1975, compared with 191,937 dispositions in 1974. Table 21 presents a comparison of dispositions by number and percent by county for these two years.

According to the New York City Department of Correction, 1,038 defendants were detained while awaiting action in Criminal Court of the City of New York at the end of December 1975. This included 163 defendants detained over 30 days. The comparable figure for the end of December 1974 was 1,219 defendants of whom 164 were detained over 30 days. Table 22 provides a comparison of detainees at the end of calendar years 1974 and 1975 by stage of processing.

3.4.5 The District Courts and the Courts in Cities outside the City of New York

There were 1,064,859 dispositions including traffic cases in the District Courts and the courts in cities outside the City of New York during calendar-year 1975, as shown in Table 23. This is an increase of 89,991 from the last 12-month reporting period, the 1973-74 judicial year (July 1, 1973 to June 30, 1974).

3.4.6 Town Courts and Village Courts

Town Courts and Village Courts disposed of 1,634,818 criminal and traffic cases in calendar-year 1974*, which compared with 1,571,265 cases disposed of in calendar-year 1973. These two years are compared in Table 24.

3.5 CIVIL ACTIONS AND PROCEEDINGS

3.5.1 Supreme Court

The method of measuring incoming civil actions in the Supreme Court was modified in 1975, resulting in slightly higher intake figures than otherwise would have been reported. Previously, an action was counted as incoming during the month for which it was noticed for trial. As of April 1975, an action was counted as incoming during the month in which the note of issue was filed. Consequently, some actions which under the previous system would have been counted as 1976 intake were counted as 1975 intake, resulting in slightly higher incoming and ending pending figures than would otherwise have been reported.

*Latest available figures.

3.5.1.1 *Trends*

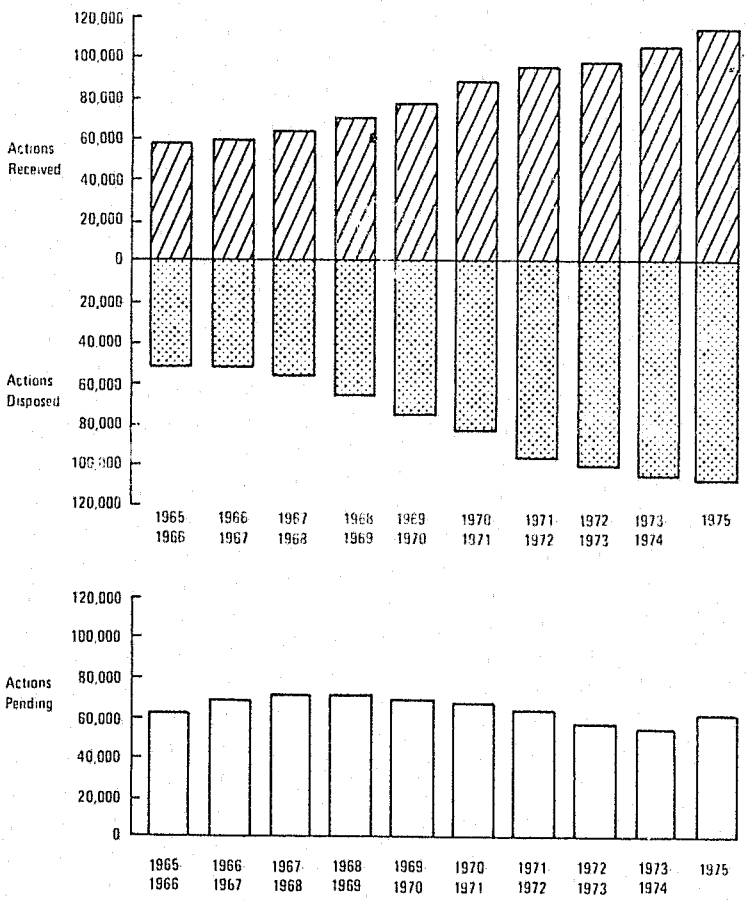
The volume of actions received and actions disposed of in the civil terms of the Supreme Court continued to increase in 1975, as shown in Figure 4.

Figure 4

THE SUPREME COURT — CIVIL TERMS

Actions Received, Actions Disposed, Actions Pending

*Last Ten Years**



*The diagram for 1975 is based on the calendar year; the diagrams for the earlier years are based on judicial years, beginning on July 1 of one year and ending on June 30 of the following year.

The measured rate of inflow in 1975 exceeded the rate of dispositions for the first time since the 1967-68 judicial year, resulting in an increase in the number of civil actions pending in the Supreme Court at the end of 1975. However, this apparent reversal of a trend may well be due to the change in reporting methods described in section 3.5.1 above.

3.5.1.2 *Actions Received*

In 1975, 115,514 civil actions were received in the Supreme Court, as shown in Table 25. This represented an increase of 11,100, or 10 percent compared with the judicial year 1973-74. The percentage increase was virtually identical in counties within New York City as compared with counties outside New York City. A significant reversal from the previous judicial year, in which matrimonial actions accounted for the largest category of increase in incoming actions, was that in 1975 the reported increase in matrimonial actions was less than 3 percent, while incoming nonmatrimonial actions increased by 21 percent.

3.5.1.3 *Actions Disposed Of*

Once again, as has been true for the past nine years, the Supreme Court disposed of more actions than in the year before. The 111,193 actions disposed of in 1975, as shown in Table 26, represent an increase of nearly 4 percent over the total for judicial year 1973-74. Dispositions of matrimonial actions accounted for slightly more than half the total dispositions statewide.

Table 27 breaks down the actions disposed of by stage and nature.

3.5.1.4 *Projected Average Age of Action at Disposition*

Beginning with the Twentieth Annual Report, which covered judicial year 1973-74, the Office of Court Administration departed from previous practice by measuring delay in disposing of civil cases prospectively in terms of the *projected average age.* This age is the statistical calculation of the average number of months that an action for which a note of issue is filed on December 31, 1975, can be expected to be pending before disposition.*

Table 28 shows that the average projected age at disposition of a nonmatrimonial action filed in Supreme Court on December 31, 1975 is 12 months. It is 8 months in New York City, and 15 months in counties outside New York City, with a range of 3 to 36 months for individual counties, as shown in the table.

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*Measuring delay from the filing of a note if issue ignores many proceedings which take place before filing, such as the issuance of summonses and complaints, pleadings, discovery proceedings, pretrial conferences and negotiations. However, the present reporting system begins with the filing of the note because it is the first milestone at which a civil case can be said to be pending before the court.

3.5.1.5 *Pending Caseload*

Table 28 shows statistics for the beginning and ending civil caseloads in the Supreme Court in 1975. Statewide the pending caseload grew by an apparent increase in 1975 of 4,277 cases during 1975, but, as explained in section 3.5.1 above, all or part of the apparent increase may be due to a change in the definition of an incoming action.

An increase in pending caseload was recorded in every judicial district except the First District, consisting of New York and Bronx counties, which showed a reduction of 3,476 actions pending.

3.5.2 The County Courts

3.5.2.1 *Trends*

The volume of civil actions received and actions disposed of in the County Courts continued to decline in 1975, as shown in Figure 5.

3.5.2.2 *Actions Received*

In 1975, the number of actions received in the County Courts decreased by 66, or 2 percent, compared with the judicial year 1973-74. The Third Department, which showed the largest reduction in new actions in the judicial year 1973-74, reported an increase of 160 actions in 1975, while the Second and Fourth Departments reflected decreases. Statewide, 3,495 actions were received in the County Courts in 1975, as shown in Table 29.

3.5.2.3 *Actions Disposed Of*

Although the Second Department registered an increase of 188 dispositions in 1975 as compared with the judicial year 1973-74, the 3,538 dispositions recorded Statewide (Table 30) represented a decrease of 95 from the judicial year 1973-74.

Table 31 shows the actions disposed of by stage and nature.

3.5.2.4 *Projected Age of Action at Disposition*

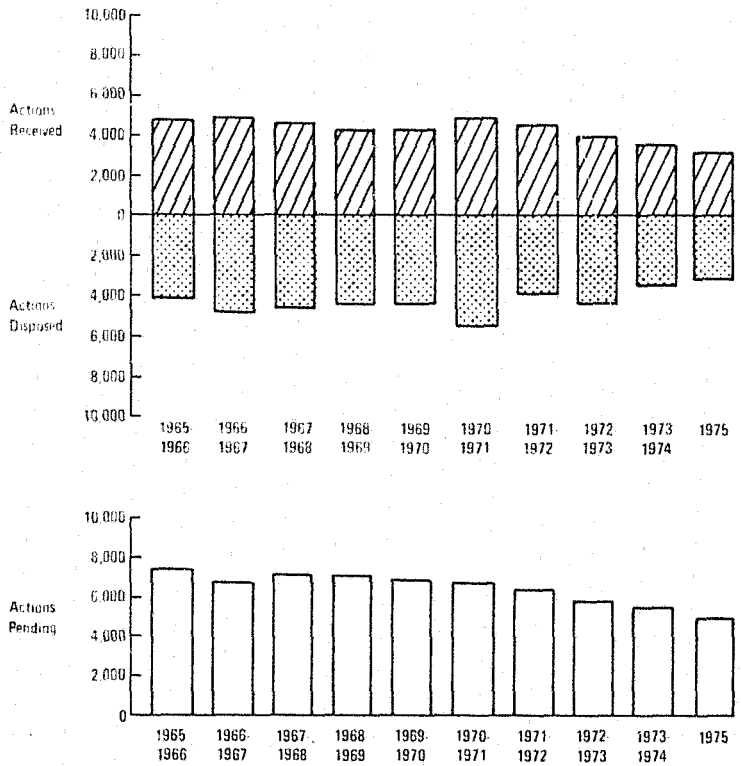
Table 32 shows that the projected average age of a case at disposition of an action filed on December 31, 1975, in the County Courts is 17 months. The projected average age is particularly high in the Ninth (24 months) and the Third (21 months) Districts, and notably low in the Seventh (5 months) and Eighth (6 months) Districts. Among individual counties, the projected average age varies greatly, but it should be noted that to some degree this wide variation is due to the small number of cases involved in the calculations for a particular county.

3.5.2.5 *Pending Caseload*

As shown in Table 32, the pending caseload in the County Courts statewide as of the end of 1975 was 4,807 cases—a

Figure 5

THE COUNTY COURTS
OUTSIDE THE CITY OF NEW YORK — CIVIL TERMS
Actions Received, Actions Disposed, Actions Pending
*Last Ten Years**



*The diagram for 1975 is based on the calendar year; the diagrams for the earlier years are based on judicial years, beginning on July 1 of one year and ending on June 30 of the following year.

decrease of 263, or 5 percent, from the beginning of the year. Most of this reduction occurred in the Ninth District, although the greatest percentage reduction occurred in the Seventh District.

3.5.3 The Civil Court of the City of New York

3.5.3.1 *Trends*

The volumes of actions received and actions disposed of in

the Civil Court of the City of New York continued to decrease in 1975, as shown in Figure 6.

The number of summary proceedings received and disposed of continued to increase, as shown in Figure 7.

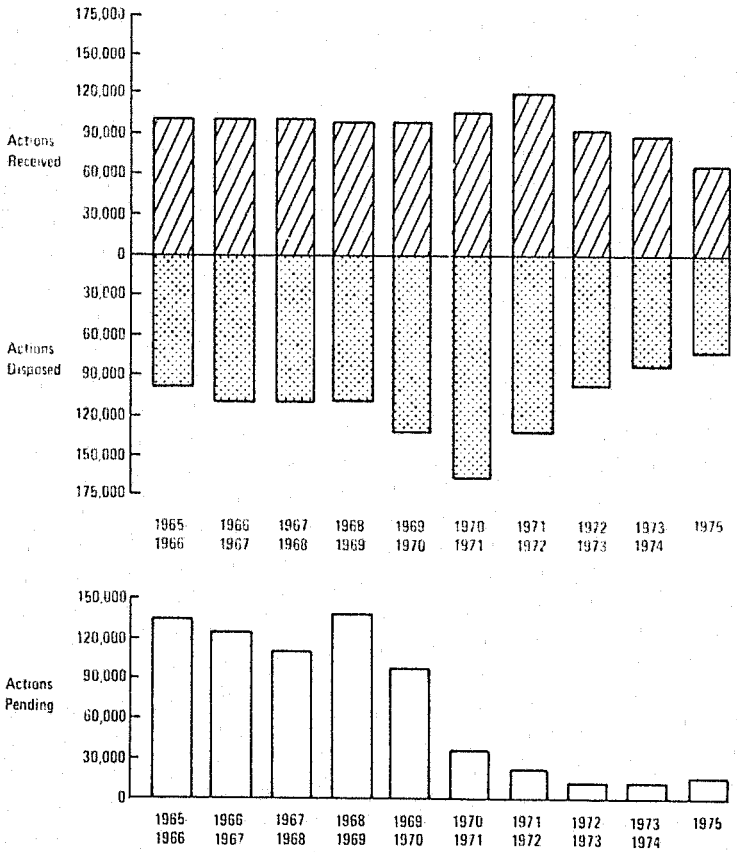
Although the number of summary proceedings pending appears to have increased (Figure 7), it should be noted that through the judicial year 1973-74, the pending figure was measured as of June 30, while for 1975 the measuring date was

Figure 6

THE CIVIL COURT OF THE CITY OF NEW YORK

Actions Received, Actions Disposed, Actions Pending [1]

*Last Ten Years**



[1] Excludes Bronx Compulsory arbitration cases discussed in Chapter 4

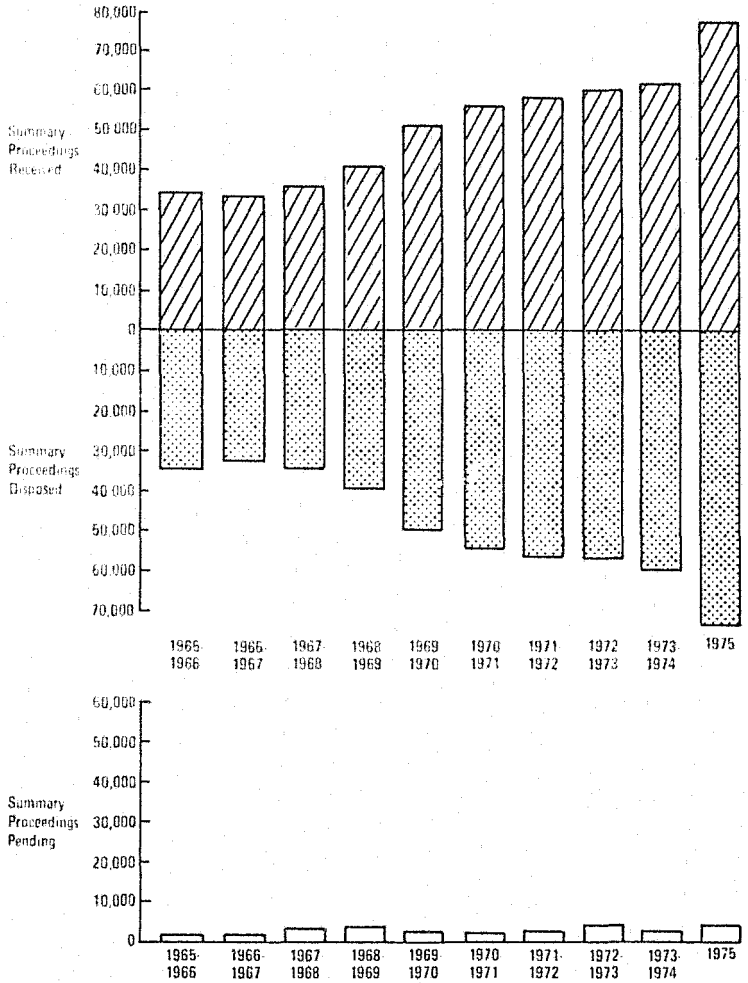
*The diagram for 1975 is based on the calendar year; the diagrams for the earlier years are based on judicial years, beginning on July 1 of one year and ending on June 30 of the following year.

Figure 7

THE CIVIL COURT OF THE CITY OF NEW YORK

Summary Proceedings — Received, Disposed and Pending

*Last Ten Years**



*The diagram for 1975 is based on the calendar year; the diagrams for the earlier years are based on judicial years, beginning on July 1 of one year and ending on June 30 of the following year.

December 31. Court caseloads of all types are normally at their lowest in June, just before the summer vacation periods. During the calendar year 1975, the pending caseload of summary proceedings actually decreased from 4,042 on January 1 to 3,125 on December 31.

3.5.3.2 *Actions*

3.5.3.2.1 Actions Received

In 1975, the number of actions received was 79,087, a decrease of 7,075, or 8 percent, from the judicial year 1973-74. A decrease occurred in each of the five counties.

About 1 1/2 percent of these actions were received in the Housing Part, as shown in Table 33.

3.5.3.2.2 Actions Disposed Of

There were 77,895 actions disposed of in 1975 (Table 34), down from 86,621 in the judicial year 1973-74. This decrease of 8,726 dispositions amounts to 10 percent of the 1973-74 figure. Each county registered a decrease except Richmond, which showed a slight increase in dispositions.

3.5.3.2.3 Projected Average Age of Action at Disposition

Table 35 reflects a projected average age of 3 months citywide, up from the 1 month calculated for 1973-74.

3.5.3.2.4 Pending Caseload

As shown in Table 35, the pending caseload increased by 1,205 actions during 1975. A 33 percent decrease in pending caseload in the Bronx was more than offset by increases in the four other counties.

3.5.3.3 *Summary Proceedings*

Figure 7 depicts the continuing rise in summary proceedings received and disposed of over the past eight years.

3.5.3.3.1 Summary Proceedings Received

As shown in Table 36, 75,820 summary proceedings were received in 1975. This is an increase of 15,624, or 26 percent, over the comparable figure for the judicial year 1973-74.

3.5.3.3.2 Summary Proceedings Disposed Of

As shown in Table 37, 75,306 summary proceedings were disposed of in 1975, up 13,343, or 22 percent from the judicial year 1973-74.

3.5.3.3.3 Pending Caseload

During 1975, the pending caseload of summary proceedings was reduced by 917 proceedings, or 23 percent.

3.5.3.4 *Special Terms*

3.5.3.4.1 Special Term Part I

Special Term Part I of the Civil Court of New York City deals with contested motions. In 1975, these motions decreased by

472 compared with 1973-74. Adjournments decreased by 1,235, and motions withdrawn or marked off the calendar decreased by 268. As shown in Table 38, 32,614 contested motions were granted, an increase of 742 over 1973-74. A total of 7,186 motions were denied, an increase of 289.

3.5.3.4.2 Special Term Part II

Special Term Part II of the Civil Court of the City of New York deals with *ex parte* orders, as shown in Table 39. The 98,104 *ex parte* orders in 1975 were an increase of 4,206 over 1973-74.

3.5.4 The District Courts and the Courts in Cities Outside The City of New York

124,102 civil cases were reported as received in the District and City Courts, as shown in Table 40. 121,148 cases were disposed of. Approximately 47 percent of all incoming cases and dispositions occurred in the Tenth District, which contains the State's two District Courts. Table 41 shows the geographical distribution of intake and dispositions in these courts.

3.5.5 Town Courts and Village Courts

There were 40,372 civil cases involving private litigants and penalty actions disposed of by Town and Village Justices in 1974. This was an increase of 2,046 dispositions, compared with 1973.

3.6 THE COURT OF CLAIMS

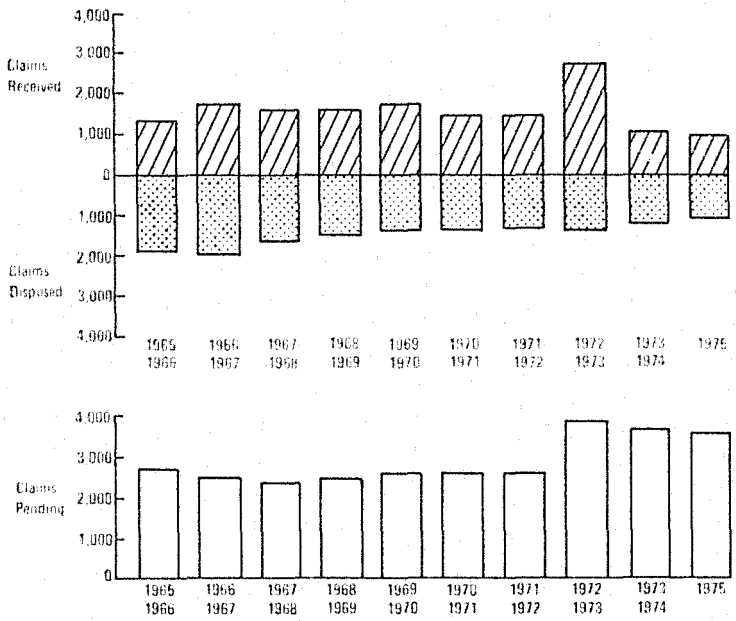
In the 1975 calendar year, the Court of Claims had 17 authorized judges and held 1,364 sessions. One thousand and forty-seven claims were filed and 1,055 claims were disposed of. Seven hundred and twenty-seven of the dispositions were by dismissal and 328 resulted in awards. In addition to the 1,055 claims disposed of, 1,022 motions were decided by the court. The pending caseload at the end of 1975 was 3,590, a reduction of 8 from the 3,598 cases pending at the end of 1974.

Figure 8 shows the volumes of cases received, cases disposed of, and cases pending in the Court of Claims for the last ten years.

3.7 THE SURROGATES' COURTS

Figure 9 indicates that there has been little increase or decrease in the business of the Surrogates' Courts during the last five years. There were 41,228 petitions to probate wills in the 1975 calendar year, a decrease of 501 from the 1973-74 judicial year; 16,074 letters of administration were granted, a decrease of 628 from judicial year 73-74; orders of adoption increased by 46, with 3,605 granted in 1975; and there were 10,675 voluntary accountings, an increase of 1,138 over the 1973-74 judicial year. Additional details of the operations of the Surrogates' Courts are given in Table 42.

Figure 8
THE COURT OF CLAIMS
Claims Received,
Claims Disposed, Claims Pending[1]
*Last Ten Years**



[1] Includes newly filed claims; claims held on calendar in which judgments have been entered after order of severance; and claims restored by order of the Court of Appeals, or by order of the Appellate Divisions, or by order of the Court of Claims.

*The diagram for 1975 is based on the calendar year; the diagrams for the earlier years are based on judicial years, beginning on July 1 of one year and ending on June 30 of the following year.

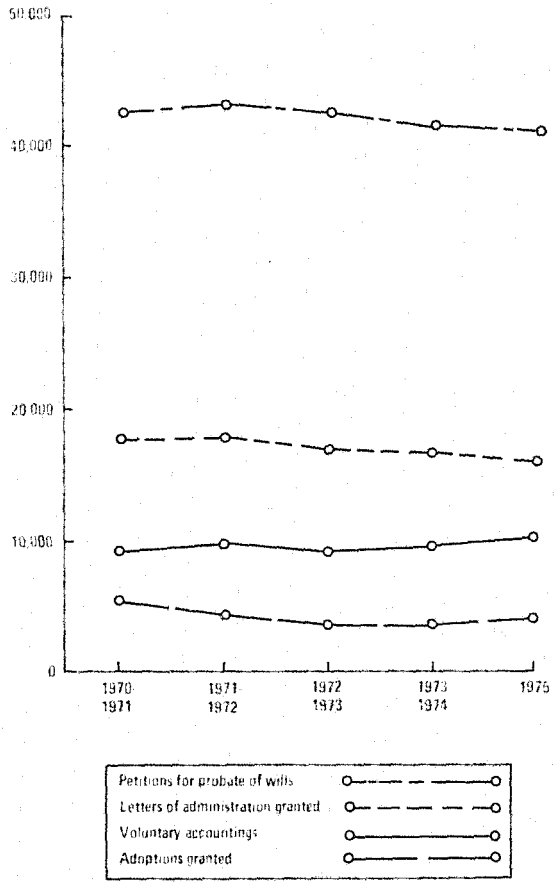
3.8 FAMILY COURT

3.8.1 Overview of the Work of the Courts

Family Courts in New York State have jurisdiction over matters involving children and families. These include cases of juvenile delinquency, child protection, foster care, minors in need of supervision, adoptions, support of dependent relatives, paternity matters, family offenses, and other proceedings.

The statistical system for measuring activity in the Family Court, dating essentially from the Court's establishment on September 1, 1962, remained in effect through December 31, 1974, when it was largely terminated. A new statistical system for reporting activity became effective on January 6, 1975.

Figure 9
THE SURROGATES' COURTS
Selected Items
Last Five Years*



*The diagram for 1975 is based on the calendar year; the diagrams for the earlier years are based on judicial years, beginning on July 1 of one year and ending on June 30 of the following year.

The differences between the old and new systems consist principally of the following:

Item	*Old System*	*New System*
Reporting period	Calendar month	Week (Monday through Sunday)
Original petitions	Included	Included
Modification, violation petitions	Basically excluded	Included
Warrants issued	Not deducted from pending petitions	Deducted from actively pending petitions
Warrants vacated or executed	Not added to pending petitions	Added to actively pending petitions
Petitions without disposition for three years	Deducted from pending petitions	Not deducted from pending petitions

Although the new statistical system measures activity more completely and realistically, there is a break in historical continuity, as the data from the new system cannot be related directly to the old. Therefore, Tables 44 through 76, which remain from the old system, cannot be compared with Table 43, which results from the new.

Despite the problems presented by the change of reporting systems, Table 43 does indicate that there has been a substantial reduction during the 52 weeks ended January 4, 1976, in the backlog of petitions actively pending in the Family Court.

3.8.2 Original Child Protective Petitions Disposed Of

There were 6,437 original child protective petitions disposed of in New York State in 1975. The allegation was either child neglect (but not abuse), or child abuse (but not neglect), or both.

As shown in Table 44, regardless of allegation, in 3,019 (47%) of these 6,437 cases, the child was found by the Court to be neither neglected nor abused, while in 3,046 (47%), there was a finding that the child was only neglected. In 318 (5%) of the cases, there was a finding that the child was only abused, while in 54 (1%) of the petitions, the child was found to be both neglected and abused.

Although the number of dispositions including a finding of child abuse was small, there is great interest in these most serious cases. Hence, the Legislature has directed the Judicial Conference to collect and publish the variety of information on child abuse (allegation and/or finding) discussed below.

3.8.2.1 *Original Child-Abuse Cases Disposed of*

Of the 6,437 original child protective petitions disposed of during 1975, a total of 1,188 included child abuse in either the allegation or the finding or both. Of these 1,188, a total of 762 (64%) were in New York City and 426 (36%), in counties outside New York City.

3.8.2.2 *Age of Child When Petition Filed*

As shown in Tables 45 and 46, of the 1,188 original child protective petitions disposed of in 1975 which included an allegation and/or a finding of child abuse, girls were the subject in 677 (57%) and boys in 511 (43%). This variation is similar to that of the past.

When the petition was filed, the age of the child (when indicated) was six years or younger in 259 (53%) of the 492 boys' petitions, but in only 242 (36%) of the 664 girls'. On the other hand, the age was 13 or older in 67 (14%) of the boys' petitions, as contrasted with 192 (29%) of the girls'.

3.8.2.3 *Allegations of Petitions*

There were 129 boys' original petitions disposed of in which abuse (with or without neglect) was both alleged and found. As shown in Table 47, physical abuse was an allegation in 99 (77%) of these, while sex offense against the boy was an allegation of 28 (21%).

There were 209 girls' original petitions disposed of in which abuse (with or without neglect) was both alleged and found. As shown in Table 48, physical abuse was an allegation in 108 (52%) of these, while sex offense against the girl was an allegation in 89 (43%).

3.8.2.4 *Originators of Petitions*

As was the case in the past, Tables 49 and 50 show that in 1975, public social services agencies were the major originators of original petitions disposed of which included allegations and/or findings of child abuse. In New York City, these agencies brought 575 (75%) of the 762 petitions, and Upstate, 377 (88%) of the 426.

3.8.2.5 *Temporary Removal from Home Prior to Disposition*

As shown in Tables 51 and 52, of the 1,188 children who were the subjects of the original child protective petitions disposed of in 1975 which included abuse as an allegation and/or a finding, 631 (53%) were not temporarily removed from their homes prior to disposition, and 557 (47%) were. Of the latter, 25 (2%) were removed only before the filing of a petition because of emergency circumstances; 131 (11%) both before and after; and 401 (34%) only after the filing of a petition and prior to disposition.

On a statewide basis, when there was temporary removal of a child after petition, the removal was terminated within 30 days

for 119 (22%) of the 532 removed. It was terminated within 90 days for 229 (43%) of the removed. The duration of temporary removal was similar for boys and for girls. However, there was some variation in the duration of temporary removal between New York City and outside. Whereas 60 (31%) of the 196 Upstate temporary removals were terminated within 30 days, only 59 (18%) of the 336 in New York City were so terminated.

Some of the reasons for the durations of temporary removal can be found in the statistics on the length of time between the filing of a petition and the initial fact-finding hearing and between the initial fact-finding hearing and the dispositional hearing, as discussed below.

3 8.2.6 *Length of Time Between Filing of Petition and Initial Fact-Finding Hearing*

As shown in Tables 53 and 54, a fact-finding hearing occured in 903 (76%) of the 1,188 original child abuse (allegation and/or finding) cases disposed of during 1975. In New York City, 525 (69%) of the 762 cases had such a hearing, compared with 378 (89%) of the 426 outside New York City. When there was a fact-finding hearing, it was held within 30 days of the filing of the petition in 401 (44%) of these 903 cases. However, in New York City only 119 (23%) of the 525 cases had the fact-finding hearing within 30 days, as contrasted with 282 (74%) of the 378 cases outside New York City.

In 45 (5%) of these 903 cases with a fact-finding hearing, the hearing was not held until more than one year after filing.

3.8.2.7 *Number of Adjournments Between Filing of Petition and Initial Fact-Finding Hearing*

One reason for the delay in reaching the initial fact-finding hearing in 1975, as shown in Tables 55 and 56, was that 675 (75%) of the 903 original child abuse (allegation and/or finding) cases with a fact-finding hearing that were disposed of had at least one adjournment before the hearing. Fifty-eight (6%) of the 903 had nine or more adjournments.

In New York City, 489 (93%) of the 525 cases had one or more adjournments, and 51 of these (10%) had nine or more. These figures contrast with those from outside the City, where 186 (only 49%) of 378 had one or more adjournments, and seven of these (2%), nine or more.

3.8.2.8 *Length of Time Between Initial Fact-Finding Hearing and Dispositional Hearing*

As shown in Tables 57 and 58, in 302 (33%) of the 903 original child abuse (allegation and/or finding) cases disposed of in 1975 which had a fact-finding hearing, the time between the initial fact-finding hearing and the dispositional hearing was 30 days or less. However, in New York City only 134 (26%) of the 525 cases experienced such a short delay, contrasted with 168 (44%) of the 378 cases outside New York City.

3.8.2.9 *Number of Adjournments Between Initial Fact-Finding Hearing and Dispositional Hearing*

Again, adjournments are one reason for delay in reaching a disposition after a fact-finding hearing has been held, as shown in Tables 59 and 60. Five hundred eighty (64%) of the 903 child abuse (allegation and/or finding) cases disposed of during 1975 which had a fact-finding hearing had one or more adjournments between the initial fact-finding and the dispositional hearings.

3.8.2.10 *Court Findings*

Of the 6,437 original child protective petitions disposed of during 1975, 5,283 (82%) started with allegations of neglect only. As shown in Table 63, 26 of these 5,283 (notwithstanding the allegations) resulted in findings of child abuse only, and eight in findings of both neglect and abuse.

Of the 6,437, 821 (13%) started with allegations of abuse only. As shown in Table 61, 396 (48%) of these 821 resulted in a finding of neither neglect nor abuse, 177 (22%) in a finding of neglect, 225 (27%) in a finding of abuse, and 23 (3%) in a finding of both neglect and abuse. Four hundred thirty-nine (53%) of these 821 findings were based on the establishment of facts sufficient to sustain the petition, while 382 (47%) were based on the consent of all parties.

Of the 6,437, 333 (5%) started with allegations of both neglect and abuse. As shown in Table 62, in 133 (40%) of these 333 cases, the child was found to be neither neglected nor abused; in 110 (33%) the child was found to be neglected only; in 67 (20%) abused only; and in 23 (7%) both neglected and abused. One hundred eighty-three (55%) of the 333 findings cited above were based on the establishment of facts sufficient to sustain the petition, and 150 (45%) were based on the consent of all parties.

3.8.2.11 *Dispositions*

As shown in Tables 64 and 65, of the 1,188 original child abuse (allegation and/or finding) petitions disposed of during 1975, 471 (40%) resulted in a withdrawal, dismissal or suspended judgment; 308 (26%), in the removal of the child from home and placement; 293 (25%), in the release to parent or other person; 92 (8%), in an order of protection; 4, in probation; and 20, in a transfer, consolidation or other.

3.8.2.12 *Age of Petitions Disposed of*

An indication of the age of original child abuse (allegation and/or finding) petitions disposed of during 1975 is given in Table 66. It will be noted that in New York City, 396 (52%) of the 762 cases were filed before 1975, compared with 169 (40%) of 426 outside.

3.8.2.13 *Use of Child Abuse Part*

As shown in Table 67, of the 6,437 original child protective petitions disposed of during 1975, 1,154 (18%) started with allegations that included child abuse. In 25 instances it was not indicated whether or not the Court had a Child Abuse Part. Of the remaining 1,129, in 643 (57%) the cases were heard in a special Child Abuse Part.

3.8.3 Original Persons-in-Need-of-Supervision Petitions Disposed of

During 1975, 8,573 original person-in-need-of-supervision petitions were reported disposed of (consisting of 8,302 PINS petitions, plus 271 PINS petitions substituted for Juvenile Delinquency petitions), regardless of Court finding. Of these 8,573, 2,944 (34%) were in New York City, and 5,629 (66%), outside.

3.8.3.1 *Detention Prior to Disposition*

As shown in Tables 68 and 69, of the 8,573 boys and girls who allegedly needed supervision in the original PINS petitions disposed of in 1975, 6,633 (77%) were not detained prior to disposition, and 1,940 (23%) were. Of the latter, 69 (1%) were detained only before the filing of a petition; 59 (1%) both before and after; and 1,812 (21%) only after the filing of a petition and prior to disposition. Detention of boys and girls was similar.

On a statewide basis, when there was detention of a minor after petition, the detention was terminated within 30 days for 1,060 (57%) of the 1,871 detained. It was terminated within 90 days for 1,582 (85%) of the detainees. The duration of detention was similar for boys and for girls. However, there was substantial variation in the duration of post-disposition detention between New York City and outside. Whereas 693 (72%) of the 966 Upstate detentions were terminated within 30 days, only 367 (41%) of the 905 in New York City were so terminated.

3.8.3.2 *Adjudications and Dispositions*

As shown in Tables 70 and 71, of the 8,573 original PINS petitions disposed of during 1975, 4,218 (49%) resulted in no adjudication that the person was in need of supervision; 414 (5%) did result in such an adjudication, but judgment was suspended or the respondent was discharged with a warning; 2,399 (28%) culminated in probation without placement; and 1,476 (17%) resulted in some form of placement or commitment. In 66 cases (1%), there was an adjudication and discharge to another petition or to a mental hygiene institution or school for defectives.

Dispositions of boys and girls were similar. However, there was substantial variation between New York City and outside:

	NYC	*Upstate*	*State*
No adjudication	1,893 (65%)	2,325 (41%)	4,218 (49%)
Adjudication, judgment suspended/discharged with warning	64 (2%)	350 (6%)	414 (5%)
Adjudication, and probation without placement	569 (19%)	1,830 (33%)	2,399 (28%)
Placement or commitment	388 (13%)	1,088 (19%)	1,476 (17%)
Other	30 (1%)	36 (1%)	66 (1%)
Total	2,944 (100%)	5,629 (100%)	8,573 (100%)

3.8.4 Original Juvenile Delinquency Petitions Disposed of

During 1975, 17,645 original juvenile delinquency petitions were reported disposed of (consisting of 17,916 delinquency petitions, minus 271 delinquency petitions for which there were substituted PINS petitions), regardless of Court findings. Of these 17,645, 7,336 (42%) were in New York City, and 10,309 (58%), outside; 15,791 (89%) involved boys, and 1,854 (11%) involved girls (this contrast continues from the past).

3.8.4.1 *Allegations of Petitions*

As shown in Table 72, the 17,645 original juvenile delinquency petitions disposed of during 1975 included 24,746 allegations. As in the past, the most frequent allegations reported were burglary, larceny (not auto), robbery and assault. Of the 2,429 allegations against girls, larceny (not auto) and assault were the most frequent.

3.8.4.2 *Detention Prior to Disposition*

As shown in Tables 73 and 74, of the 17,645 boys and girls who allegedly were delinquents in the original juvenile delinquency petitions disposed of in 1975, 14,412 (82%) were not detained prior to disposition, and 3,233 (18%) were. Of the latter, 314 (2%) were detained only before the filing of a petition; 318 (2%) both before and after; and 2,601 (14%) only after the filing of a petition and prior to disposition. Detention of boys and girls was similar.

On a statewide basis, where there was detention of a minor after petition, the detention was terminated within 30 days for 2,296 (79%) of the 2,919 detained. It was terminated within 90 days for 2,761 (95%) of the detainees. The duration of detention was somewhat longer for girls than it was for boys. Also, the duration was somewhat longer in New York City than Upstate.

3.8.4.3 *Adjudications and Dispositions*

As shown in Tables 75 and 76, of the 17,645 original juvenile delinquency petitions disposed of during 1975, 11,782 (67%) resulted in no adjudication that the person was a juvenile deliquent; 948 (5%) did result in such an adjudication, but judgment was suspended or the respondent was discharged with a warning; 3,232 (18%) culminated in probation without placement; and 1,360 (8%) resulted in some form of placement or commitment. In 323 cases (2%), there was an adjudication and discharge to another petition or to a mental hygiene institution or school for defectives.

Dispositions of boys and girls were similar. However, there was notable variation between New York City and outside:

	NYC	*Upstate*	*State*
No adjudication	5,620 (76%)	6,162 (60%)	11,782 (67%)
Adjudication, judgment suspended/discharged with warning	219 (3%)	729 (7%)	948 (5%)
Adjudication, and probation without placement	954 (13%)	2,278 (22%)	3,232 (18%)
Placement or commitment	346 (5%)	1,014 (10%)	1,360 (8%)
Other	197 (3%)	126 (1%)	323 (2%)
Total	7,336 (100%)	10,309 (100%)	17,645 (100%)

3.8.5 Law Guardian Program

Table 77 shows that 1,367 law guardians appeared in 14,734 proceedings in the fiscal year ended March 31, 1975. This was a decrease over the previous fiscal year of 142 in the number of law guardians used and a decrease of 4,065 in the number of proceedings in which law guardians appeared. The cost of providing this representation increased to about $69 per proceeding in this fiscal year from about $54 in the last fiscal year. (These figures exclude the costs of legal aid services used in some counties, as shown in Table 77.)

STATISTICAL TABLES

Table 2
THE COURT OF APPEALS
Matters Submitted and Decided
January 1, 1975 through December 31, 1975

Applications Decided (C.P.L. 460.20(3-b))[1]	1,047
Records on Appeal Filed	601
Motions Decided	1,142
Oral Arguments[2]	574
Appeals Decided	548

[1] Applications for leave to appeal in criminal cases; 125 of the 1,047 were granted. The total number of criminal applications assigned during the year was 1190.

[2] Total includes appeals submitted.

Table 3
THE COURT OF APPEALS
Appeals Decided by Nature and Jurisdiction
January 1, 1975 through December 31, 1975

Civil Cases

BASIS OF JURISDICTION	NATURE OF DECISION					Total
	Dismissal	Affirmance	Modification	Reversal	Other	
Reversal, Modification, Dissent in Appellate Division	5	158	8	52	0	223
Constitutional Question	0	21	4	6	0	31
Stipulation for Judgment Absolute	0	1	0	0	0	1
Permission of Appellate Division	1	44	7	11	0	63
Permission of Court of Appeals	1	20	9	5	0	35
Other	1	2	0	4	0	7
Totals	8	246	28	78	0	360

Criminal Cases

BASIS OF JURISDICTION	NATURE OF DECISION					Total
	Dismissal	Affirmance	Modification	Reversal	Other	
Permission of Justice of Appellate Division	1	43	4	12	1	61
Permission of Judge of Court of Appeals	0	86	3	32	3	124
Other	0	1	1	1	0	3
Totals	1	130	8	45	4	188

All Cases

BASIS OF JURISDICTION	NATURE OF DECISION					Total
	Dismissal	Affirmance	Modification	Reversal	Other	
Reversal, Modification, Dissent in Appellate Division	5	161	8	52	0	226
Constitutional Question	0	21	4	6	0	31
Stipulation for Judgment Absolute	0	1	0	0	0	1
Permission of Appellate Division or Justice thereof	2	87	11	23	1	124
Permission of Court of Appeals or Judge thereof	1	103	12	37	3	156
Other	1	3	1	5	0	10
Totals	9	376	36	123	4	548

Table 4
THE COURT OF APPEALS
Opinions
by Type
and by Author
January 1, 1975 through December 31, 1975

Author	*Type of Opinion*			
	Majority Opinions	*Concurrences*	*Dissents*[1]	*Total*
Breitel	34	3	8	45
Jasen	35	0	13	48
Gabrielli	32	2	5	39
Jones	22	2	4	28
Wachtler	21	2	8	31
Fuchsberg	26	8	13	47
Cooke	30	5	9	44
Per Curiam	35	0	0	35
Memorandum . .	127	0	0	127
Total	362	22	60	444

[1] Of the 60 dissents, there were 34 dissents in cases with majority opinions, 20 dissents in cases with memorandum opinions, and 6 dissents in cases with no opinions.

The 34 dissents in cases with majority opinions resulted from 21 cases in which one judge dissented, one case in which one judge concurred in part and dissented in part, and six cases in which there were two judges dissenting.

The 20 dissents in cases with memorandum opinions resulted from thirteen cases in which one judge dissented from a memorandum opinion, two cases in which two judges dissented from a memorandum opinion, and one case in which three judges dissented from a memorandum opinion.

The six dissents in cases with no opinions resulted from six cases in which one judge dissented.

Table 5

APPELLATE DIVISIONS OF THE SUPREME COURT

Matters Submitted and Decided and General Information on Proceedings by Judicial Department

January 1, 1975 through December 31, 1975

DEPARTMENT	Records on Appeal Filed	Motions Decided	Oral Arguments	Dispositions of Judgments or Orders Appealed from[1]	ADMISSIONS TO BAR		ATTORNEY DISCIPLINARY PROCEEDINGS					
					Men	Women	Charges Dismissed	Censures	Suspensions	Struck from Roll	Disbarments	Reinstatements
1st Dept.	1,897	3,449	910	2,210	974	263	1	9	15	8	4	15
2nd Dept.	3,232	5,753	1,237	2,645	1,378	160	1	7	2	8	4	4
3rd Dept.	1,385	2,504	831	1,547	245	25	0	3	0	0	0	1
4th Dept.	915	1,700	816	946	323	54	0	0	1	1	2	1
State Total	7,429	13,406	3,794	7,348	2,920	502	2	19	18	17	10	21

[1] Includes Article 78 and original proceedings; also includes appeals dismissed or withdrawn before argument or submission.

Table 6

APPELLATE DIVISIONS OF THE SUPREME COURT

Dispositions of Judgments or Orders

by Nature

and by Judicial Department

January 1, 1975 through December 31, 1975

Department	NATURE OF DISPOSITION						Total Disposition of Judgments or Orders Appealed from*
	Dismissals	Affirmances	Modifications	New Trials	Reversals Not Including New Trials	Other	
1st Dept.	174	1,352	221	56	255	152	2,210
2nd Dept.	132	1,545	284	96	422	166	2,645
3rd Dept.	11	1,179	112	18	183	44	1,547
4th Dept.	40	618	69	52	155	12	946
TOTAL STATE	357	4,694	686	222	1,015	374	7,348

*Includes Article 78 and original proceedings; also includes appeals dismissed or withdrawn before argument or submission

Table 7
APPELLATE DIVISIONS OF THE SUPREME COURT
Opinions
by Type
and by Judicial Department
January 1, 1975 through December 31, 1975

	TYPE OF OPINION[1]		
	Full Opinion	Per Curiams	Memo Opinion
1st Dept.	117	56	781
2nd Dept. . . .	50	7	1,077
3rd Dept.	169	4	1,277
4th Dept.	146	4	343
Total	482	71	3,478

[1]Concurring and dissenting opinions not included.

Table 8
APPELLATE TERMS OF THE SUPREME COURT
Activity of the Court
by Judicial Department
January 1, 1975 through December 31, 1975

Activity	First Department	Second Department	Total
1. Total appeals received[1]	450	1,727	2,177
a. County Courts	0	123	123
b. The Civil Court of the City of New York	72	350	422
c. The Criminal Court of the City of New York	378	284	662
d. The District Courts	0	583	583
e. Courts in cities outside New York City	0	131	131
f. Town Courts & Village Courts	0	256	256
2. Motions heard or submitted	836	1,674	2,510
3. Total appeals disposed of	437	1,142	1,579
a. Discontinued	11	46	57
b. Dismissed on calendar call under Rule 3 or 8 (Civil)	18	233	251
c. Dismissed on calendar call under C.P.L. 460.70 (Criminal)	0	47	47
d. Remitted	1	0	1
e. Decided after argument or submission	407	816	1,223
4. Total decisions rendered	407	816	1,223
a. Dismissed, discontinued, withdrawn or remanded	4	43	47
b. Affirmed	242	394	636
c. Modified	50	82	132
d. Reversed	111	297	408
5. Opinions filed	0	0	0
6. Per curiam opinions	317	378	695
7. Memoranda written, not filed	91	393	484

[1]Notices of appeal dismissed on calendar call under C.P.L. 460.70 (Criminal): 444 in the Second Department.

Table 9

THE SUPREME COURT WITHIN THE CITY OF NEW YORK — CRIMINAL TERMS

*January 6, 1975 through January 4, 1976**

	New York[3]	Bronx	Kings	Queens	Richmond	Total N.Y.C.
1. Days Sat[1]	7,693	4,908	7,667	3,422	623	24,313
2. Indictments filed	5,945	3,793	5,974	3,407	601	19,720
3. Arraignments	5,675	3,481	6,239	3,411	614	19,420
4. Indictments dismissed by court[2]	1,410	1,236	1,872	1,112	163	5,793
5. Pleas of guilty to felony	3,554	1,780	4,077	1,557	277	11,245
6. Pleas of guilty to misdemeanor	477	240	1,136	553	142	2,548
7. Convictions	486	269	489	230	34	1,508
8. Acquittals	202	194	292	136	20	844
9. Disagreements	48	32	33	18	0	131
10. Trials (proof completed)	645	430	741	324	44	2,184
11. Defendants tried (proof completed)	748	501	880	384	53	2,566
12. Mistrials	51	42	91	7	1	192
13. Eligible youths adjudicated as youthful offenders	463	155	403	407	65	1,493
14. Sentences imposed	4,080	2,029	4,809	2,030	369	13,317

NOTE: The entries in this table are based on the number of defendant-indictments involved, except for items 1 and 9 through 13. This table includes Youthful Offender Proceedings to conform to the revised Criminal Procedure Law, effective September 1, 1971.

[1] Includes days sat by judges temporarily assigned to this Court.

[2] Includes, among others, indictments dismissed in cases initiated prior to the period covered by this table; those indictments dismissed against defendants sentenced on another indictment or disposed of by consolidation; those in which the defendants were civilly committed to the Commissioner of Mental Hygiene or to the Commissioner, Office of Drug Abuse Services; those indictments disposed of by trial order of dismissal; and those abated by the death of the defendant.

[3] Figures for the Centralized Special Narcotics Parts are included in data for New York County.

*Criminal terms begin on the first Monday of the calendar year and end on the Sunday before the first Monday of the succeeding calendar year.

Table 10

THE SUPREME COURT WITHIN THE CITY OF NEW YORK

CRIMINAL TERMS

Dispositions, expressed in terms of defendant-indictments

by Nature of Disposition

*January 6, 1975 through January 4, 1976**

	New York[1]	Bronx	Kings	Queens	Richmond	Total N.Y.C.
Type of Disposition						
Dismissals	1,410	1,236	1,872	1,112	163	5,793
Pleas of Guilty—Felony	3,554	1,780	4,077	1,557	277	11,245
Pleas of Guilty—Misdemeanor	477	240	1,136	553	142	2,548
Convictions	486	269	489	230	34	1,508
Acquittals	202	194	292	136	20	841
Total Dispositions	6,129	3,719	7,866	3,588	636	21,938
Days Sat	7,693	4,908	7,667	3,422	623	24,313
Defendants Tried through Proof Completed	748	501	880	384	53	2,566
Comparative Measures						
Dismissals as % of Disposition	23.0	33.2	23.8	31.0	25.6	26.4
Pleas as % of Dispositions	65.8	54.3	66.3	58.8	65.9	62.9
Verdicts as % of Dispositions	11.2	12.4	9.9	10.2	8.5	10.7
Felony Pleas as % of all Pleas	88.2	88.1	78.2	73.8	66.1	81.5
Dispositions per day sat	.80	.76	1.03	1.05	1.02	.90

[1] Figures for the Centralized Special Narcotics Parts are included in data for New York County.

*Criminal terms begin on the first Monday of the calendar year and end on the Sunday before the first Monday of the succeeding calendar year.

Table 11
Felony Defendants Pending Disposition In Supreme Court in New York City
(expressed in terms of defendant-indictments)
For the Calendar Years Ending December 31, 1974 and 1975

County	Number of Cases Pending as of December 31	
	1974	1975
New York County*	3,794	3,603
Bronx County	2,858	2,966
Kings County	4,324	3,968
Queens County	1,161	1,264
Richmond County	198	237
Total New York City	12,335	12,038

*Figures for the Centralized Special Narcotics Parts are included in data for New York County.

Table 12
Number of Detainees Awaiting Disposition or Sentencing in Supreme Court in the City of New York
(expressed in terms of individual detainees)
End of December, 1975

County	Total Number	Percent of City	Number Detained Over One Year	Percent of City
New York County*	1,120	32.4	123	34.2
Bronx County	963	27.9	107	29.7
Kings County	1,028	29.7	113	31.4
Queens County	304	8.8	17	4.7
Richmond County	42	1.2	0	0.0
Total New York City	3,457	100.0	360	100.0

*Figures for the Centralized Special Narcotics Parts are included in data for New York County.

TABLE 13

THE SUPREME COURT AND THE COUNTY COURTS OUTSIDE THE CITY OF NEW YORK

CRIMINAL TERMS

Indictments filed, Arraignments, Dispositions, Youthful Offenders and Sentences by County, District, and Judicial Department

(expressed in terms of defendant-indictments)

*January 6, 1975 through January 4, 1976**

Department District County	Total of All Defendant Indictments Found by Grand Jury	Total Arraignments	DISPOSITIONS[a]				Trials through Proof Completed	Mistrials	Disagreements	Eligible Youths Adjudicated as Youthful offenders	Sentences Imposed
			Indictments Dismissed by Court[b]	Pleas of Guilty	Acquittals	Convictions					
SECOND DEPT.											
9 Dutchess	295	333	19	212	2	16	16	0	1	54	173
Orange	464	497	93	329	14	11	24	0	1	77	297
Putnam	21	151	30	98	0	0	2	0	1	13	40
Rockland	206	240	97	212	1	15	18	1	1	26	162
Westchester	1,386	1,829	211	1,097	41	117	142	5	7	158	847
10 Nassau	2,647	2,882	580	2,054	49	118	169	6	11	278	1,896
Suffolk	1,808	1,754	158	1,258	17	32	46	7	0	306	876
Total Second Dept.	6,827	7,686	1,188	5,260	127	309	417	19	22	910	4,201
THIRD DEPT.											
3 Albany	289	290	25	237	18	37	64	0	4	7	257
Columbia	104	93	12	82	1	1	7	1	0	25	60
Greene	157	309	1	221	1	2	4	0	0	24	104
Rensselaer	131	174	17	110	3	13	15	0	0	22	79
Schoharie	32	30	5	25	0	0	0	0	0	2	29
Sullivan	81	84	5	60	0	3	4	0	1	10	55
Ulster	158	148	21	103	0	15	17	0	4	25	93
4 Clinton	71	73	71	104	1	5	5	1	0	13	92
Essex	127	88	14	83	0	0	0	0	0	12	84
Franklin	149	204	50	166	1	9	2	0	0	49	110
Fulton	85	93	10	73	1	4	13	0	1	21	53
Hamilton	30	26	13	10	0	0	1	0	0	8	18

	Montgomery	100	123	28	47	0	5	7	0	2	10	43
	St. Lawrence	242	251	112	162	3	8	11	0	1	86	113
	Saratoga	143	169	33	103	2	1	6	0	0	37	72
	Schenectady	359	362	131	167	3	7	13	2	0	92	141
	Warren	91	82	9	65	1	1	2	0	0	14	64
	Washington	56	57	0	45	0	1	2	0	0	14	39
6	Broome	516	552	45	279	3	12	11	1	2	183	243
	Chemung	272	285	9	256	3	21	22	4	0	97	146
	Chenango	108	106	41	45	0	1	1	0	0	14	37
	Cortland	72	62	6	67	1	4	5	0	0	39	43
	Delaware	71	70	17	44	1	2	5	1	0	9	42
	Madison	107	109	15	87	0	4	4	0	2	31	61
	Otsego	63	82	14	41	0	0	1	0	0	5	37
	Schuyler	29	33	6	17	0	0	2	0	0	6	22
	Tioga	64	58	6	45	0	0	3	0	0	26	24
	Tompkins	87	105	31	105	3	10	12	0	0	21	78
Total Third Dept		3,804	4,119	745	3,037	53	157	244	10	17	902	2,419
FOURTH DEPT												
5	Herkimer	32	33	1	19	0	1	1	1	0	4	17
	Jefferson	113	111	29	80	0	5	6	0	1	25	60
	Lewis	58	51	13	43	0	0	0	0	0	12	36
	Oneida	384	308	49	389	7	17	22	5	1	111	257
	Onondaga	587	586	47	531	9	29	43	7	2	146	429
	Oswego	171	228	11	120	4	7	6	0	0	52	81
7	Cayuga	58	64	3	41	0	3	5	0	1	0	41
	Livingston	109	199	10	67	1	3	5	0	0	50	55
	Monroe	1,223	1,648	139	857	31	77	97	4	7	212	685
	Ontario	131	192	28	205	4	2	7	0	0	58	94
	Seneca	29	46	0	16	0	0	0	0	0	2	11
	Steuben	125	180	23	123	0	5	9	0	0	21	91
	Wayne	152	95	9	106	1	9	7	0	0	22	91
	Yates	58	61	8	48	4	6	9	0	0	22	28
8	Allegany	117	115	63	63	0	2	2	1	0	37	46
	Cattaraugus	114	341	23	75	0	0	0	0	0	46	41
	Chautauqua	199	198	97	181	4	6	8	2	0	65	162
	Erie	1,279	1,417	230	813	56	123	180	15	7	142	678
	Genesee	53	57	8	55	1	3	5	0	1	11	40
	Niagara	282	415	62	296	8	27	40	5	0	54	245
	Orleans	93	91	15	56	1	8	10	1	0	16	52
	Wyoming	36	89	2	39	0	4	3	1	0	10	32
Total Fourth Dept		5,403	6,528	1,173	4,219	134	344	465	42	20	1,111	3,273
Total Outside N Y C		16,034	18,333	3,106	12,516	314	800	1,126	71	59	2,923	9,793

[a]Includes indictments disposed of in cases initiated prior to the period covered by this table.
[b]Includes, among others, those indictments dismissed against defendants sentenced on another indictment or disposed of by consolidation, those in which the defendants were civilly committed to the Commissioner of Mental Hygiene or to the Office of Drug Abuse Services, and those abated by the death of the defendant.
*Criminal terms begin on the first Monday of the calendar year and end on the Sunday before the first Monday of the succeeding calendar year.

Table 14

THE SUPREME COURT AND COUNTY COURTS
OUTSIDE THE CITY OF NEW YORK
CRIMINAL TERMS
Dispositions by type
(expressed in terms of defendant-indictments)
*January 6, 1975 through January 4, 1976**

Nature of Disposition	Number	Percent
1. By dismissal of indictment by Court . . .	3,106	18.5
2. By plea of guilty	12,516	74.8
3. By acquittal after trial	314	1.9
4. By conviction after trial	800	4.8
Total Defendant-Indictments Disposed of . .	16,736	100.0

*Criminal terms begin on the first Monday of the calendar year and end on the Sunday before the first Monday of the succeeding calendar year.

Table 15
Number of Detainees Awaiting Disposition and Sentencing in the Supreme Court and County Courts Outside the City of New York
End of December, 1975

Jurisdiction	Number of Detainees	Number Detained Over One Year
Second Department		
Ninth District	258	4
Tenth District	313	16
Total Second Department	571	20
Third Department		
Third District	54	0
Fourth District	39	2
Sixth District*	50	1
Total Third Department	140	3
Fourth Department		
Fifth District	100	0
Seventh District	123	2
Eighth District	174	6
Total Fourth Department	397	8
Grand Total	1,108	31

*Figures not available for Tioga County in the Sixth District.

Table 16
THE SUPREME AND COUNTY COURTS
CRIMINAL PROCEEDINGS
Disposition of Defendants
Who Were Arraigned for Felonies and/or Misdemeanors
by Nature of Disposition and by County
January 1, 1973 through December 31, 1973

COUNTY & REGION	Total Disposed	Convicted and Sentenced		Adjudicated Youthful Offender	Disposed of by Court without Conviction			
					Acquitted			
		By Verdict	By Plea		By Jury	By Non Jury	Dismissed	Other Final Disposition
Total N Y State	32,400	1,333	23,776	3,306	699	178	2,875	233
Total N Y City	20,332	792	15,896	1,456	178	122	1,463	125
Bronx*	3,267	104	2,654	205	68	20	188	28
Kings*	7,864	282	6,331	596	169	51	378	51
New York (Man.)*	3,718	167	3,075	123	78	9	256	30
Queens*	3,772	145	2,749	152	118	33	466	9
Richmond*	598	18	101	63	7	6	96	7
Special Narcotics Court	1,113	76	883	17	38	0	99	0
Total Upstate	12,068	541	7,880	1,850	221	56	1,412	108
Albany	291	21	182	18	8	0	62	0
Allegany	86	0	60	11	3	0	12	0
Broome	426	12	232	125	4	0	47	6
Cattaraugus	110	1	50	32	0	0	27	0
Cayuga	70	5	50	3	1	0	8	0
Chautauqua	166	1	121	16	5	0	21	2
Chemung	214	3	135	68	1	0	4	0
Chenango	51	5	24	16	1	0	5	0
Clinton	92	1	53	11	2	0	19	0
Columbia	84	4	58	15	2	0	5	0
Cortland	55	2	36	16	0	0	1	0
Delaware	88	0	55	21	1	0	11	0
Dutchess	165	11	117	23	3	0	11	0

Erie	936	127	141	97	61	30	180	0
Essex	67	0	61	6	0	0	0	0
Franklin	71	2	46	21	1	0	1	0
Fulton	62	1	56	12	2	0	0	1
Genesee	57	5	52	0	0	0	0	0
Greene	92	0	71	14	1	0	4	0
Hamilton	11	1	6	3	1	0	0	0
Herkimer	43	1	29	5	1	0	5	2
Jefferson	135	2	60	32	0	0	11	0
Lewis	12	0	39	0	1	0	2	0
Livingston	66	1	51	9	1	0	1	0
Madison	71	0	11	26	0	0	1	0
Monroe	677	10	376	64	13	0	96	88
Montgomery	58	8	46	3	0	0	1	0
Nassau	2,818	66	1,985	383	36	9	339	0
Niagara	179	21	121	28	0	0	9	0
Oneida	227	18	137	54	5	0	12	1
Onondaga	481	25	337	82	8	0	29	0
Ontario	61	2	26	27	3	0	3	0
Orange	594	11	251	70	5	0	41	3
Orleans	38	3	13	10	1	0	11	0
Oswego	85	13	41	17	1	0	13	0
Otsego	41	0	28	11	0	0	1	1
Putnam[1]	58	2	51	4	0	0	1	0
Rensselaer	136	2	89	27	2	0	16	0
Rockland	187	7	127	39	2	0	11	1
St. Lawrence	102	5	62	22	1	0	8	1
Saratoga	103	1	73	18	2	0	7	2
Schenectady	168	5	108	37	1	0	17	0
Schoharie	67	1	43	5	0	0	14	4
Schuyler	37	3	16	12	0	0	6	0
Seneca	26	1	18	5	1	0	1	0
Steuben	75	1	58	12	0	0	4	0
Suffolk	1,088	42	732	130	8	7	169	0
Sullivan	60	7	44	1	1	0	6	1
Tioga	44	3	17	18	1	0	5	0
Tompkins	110	4	58	25	4	0	19	0
Ulster	83	3	53	4	2	2	19	0
Warren	93	3	84	4	1	0	1	0
Washington	51	0	32	18	0	0	1	0
Wayne	115	1	65	18	1	0	30	0
Westchester	796	34	604	89	13	8	47	1
Wyoming	35	0	26	3	0	0	6	0
Yates	24	0	17	5	0	0	2	0

SOURCE: This table is furnished by the State of New York Division of Criminal Justice Services, Statistical Analysis Center
*Excludes data on cases handled by the Special Narcotics Court
[1]Putnam County reports not received for July and August 1973

Table 17

THE CRIMINAL COURT OF THE CITY OF NEW YORK

Filings

Arrest Cases[a]

January 1, 1975 through September 30, 1975

Violations	16,038
Misdemeanors	58,299
Felonies	49,265
Other[b]	4,653
Total Arrest Cases	128,255

[a]Preliminary data includes all cases in which an arrest has been made and those arrests in which an Appearance Ticket is subsequently issued in the station-house (except for peddling cases).

[b]Includes Fugitive, Family Court, Criminal Court and Out-of-City Warrants.

Table 18

THE CRIMINAL COURT OF THE CITY OF NEW YORK

Filings

Summons Cases[a]

For the Calendar Year 1975

Traffic	58,403
Non-Traffic	373,860
Total Summonses	432,263

[a]Includes all Non-arrest cases and Arrest cases of Peddling where a Desk Appearance Ticket was issued.

Table 19

THE CRIMINAL COURT OF THE CITY OF NEW YORK

Fines Collected*

Calendar Years 1974 and 1975 Compared

	1974	1975
Arrest Cases	$1,867,814.21	$1,862,533.28
Summons Cases	1,853,957.90	1,602,667.00
Total Fines Collected	$ 3,721,772.11	$3,465,200.28

*City and State fines, excluding fees.

Table 20

THE CRIMINAL COURT OF THE CITY OF NEW YORK — CRIMINAL PROCEEDINGS

Arrest Cases

For the Calendar Year 1975

	New York	Bronx	Kings	Queens	Richmond	Total NYC
1. Judge Days	4,246	3,023	4,162	2,677	460	14,568
2. Calendared Cases	197,813	144,507	196,192	126,999	17,043	682,554
3. Filings	69,864	42,536	54,067	34,813	4,445	205,725
4. Warrants Filed	20,156	12,101	17,269	9,683	1,191	60,400
5. Warrants Executed	15,098	9,691	14,426	7,472	815	47,502
6. Hearings	4,639	3,133	6,280	3,512	668	18,232
7. Motions	119	69	159	185	27	559
8. Trials	284	214	390	447	158	1,493
9. Dismissals	29,516	22,162	24,045	14,746	2,131	92,600
10. Pleas of Guilty	29,555	13,643	24,409	14,900	1,490	83,997
11. Acquittals	176	133	247	355	120	1,029
12. Convictions	129	93	181	218	74	695
13. Referrals to Grand Jury	6,037	3,537	6,306	4,007	540	20,427
14. Other Dispositions[1]	2,633	2,351	3,154	1,771	101	10,010
15. Sentences Imposed	29,831	13,823	23,825	15,001	1,582	84,062
16. Pending Disposition	3,371	3,987	3,060	2,847	516	13,781
17. Pending Sentencing	1,466	695	1,734	456	34	4,385

[1] Includes, among others, abatements by death, commitments to Mental Hygiene and referrals to Family Court.

Table 21

THE CRIMINAL COURT OF THE CITY OF NEW YORK — CRIMINAL PROCEEDINGS

Cases Disposed of by Nature of Disposition

Arrest Cases

Calendar Years 1974 and 1975 Compared

	New York		Bronx		Kings		Queens		Richmond		Total NYC	
	1974	1975	1974	1975	1974	1975	1974	1975	1974	1975	1974	1975
Dismissals	31,747	29,516	17,091	22,162	19,990	24,045	12,896	14,746	2,056	2,131	83,780	92,600
Pleas of Guilty	30,741	29,555	12,866	13,643	18,487	24,409	11,174	14,900	1,481	1,190	74,749	83,997
Acquittals	174	176	198	133	342	247	426	353	112	120	1,252	1,029
Convictions	107	129	126	93	250	181	261	218	85	71	829	695
Referrals to Grand Jury	6,866	6,037	3,370	3,537	6,976	6,306	4,744	4,007	590	540	22,546	20,127
Other Dispositions	2,158	2,633	2,103	2,351	2,727	3,154	1,727	1,771	66	101	8,781	10,010
Total Dispositions	71,793	68,046	35,754	41,919	48,772	58,342	31,228	35,995	4,390	4,456	191,937	208,758
Filings	73,591	69,864	37,105	42,536	49,776	54,067	33,130	34,813	4,663	4,445	198,265	205,725
Dispositions as % of Filings	97.6	97.4	96.4	98.5	98.0	107.9	94.0	103.4	91.2	100.2	96.8	101.5
Dismissals as % of Dispositions	44.2	43.4	47.8	52.9	41.0	41.3	41.3	41.0	46.8	47.8	43.7	44.4
Pleas as % of Dispositions	42.8	43.4	36.0	32.6	37.9	41.8	35.8	41.4	33.7	33.4	38.9	40.2
Verdicts as % of Dispositions	0.4	0.4	0.9	0.5	1.2	0.7	2.2	1.6	4.5	4.4	1.1	0.8
Referrals to Grand Jury as % of Dispositions	9.6	8.9	9.4	8.4	14.3	10.8	15.2	11.1	13.5	12.1	11.7	9.8
Other Dispositions as % of Dispositions	3.0	3.9	5.9	5.6	5.6	5.4	5.5	4.9	1.5	2.3	4.6	4.8

Table 22

Number of Detainees Awaiting Action in the Criminal Court of the City of New York

At the End of Calendar Years 1974 and 1975

	New York		Bronx		Kings		Queens		Richmond		Citywide	
	1974	1975	1974	1975	1974	1975	1974	1975	1974	1975	1974	1975
Awaiting Action in the Criminal Court												
Awaiting Examination.	181	217	292	269	288	266	152	105	14	12	927	869
Awaiting Disposition	76	38	47	17	38	15	91	52	0	1	252	123
Awaiting Sentencing.	13	12	8	24	13	5	6	5	0	0	40	46
Total Criminal Court	270	267	347	310	339	286	249	162	14	13	1,219	1,038
Number Detained over 30 days . . .	29	45	40	63	64	33	30	20	1	2	164	163

Table 23

THE DISTRICT COURTS AND THE COURTS IN CITIES OUTSIDE THE CITY OF NEW YORK—

Criminal Proceedings
Defendants Disposed of
by Offense and Nature of Disposition
and by District and Judicial Department

January 1, 1975 through December 31, 1975

	FELONIES			MISDEMEANORS (Except Motor Vehicle)			ORDINANCES			ALL MOTOR VEHICLE OFFENSES				
	By Waiver	By Hearing	By Dismissal or Withdrawal	By Dismissal	By Trial	By Plea	By Dismissal	By Trial	By Plea	By Dismissal	By Trial	By Plea	Quasi-Criminal Offenses	Total
District 3	59	21	25	499	10	155	15	0	121	552	30	2,379	458	4,634
District 4*	131	54	58	792	36	1,141	115	14	1,080	1,447	40	20,532	1,025	26,495
District 5	377	177	306	1,791	59	2,585	61	12	338	5,080	90	38,951	5,444	55,771
District 6	51	278	70	181	31	834	205	45	973	2,226	1,441	29,194	554	39,383
District 7*	188	389	1,089	2,306	112	1,484	53	11	459	2,022	121	3,028	4,904	16,457
District 8	287	1,427	2,079	6,567	361	4,869	811	55	1,456	3,649	111	16,048	5,928	43,888
District 9*	206	555	183	2,881	69	2,846	250	86	686	25,253	2,742	335,816	12,345	382,220
District 10	1,072	675	2,835	12,552	91	5,625	3,251	252	6,534	95,805	9,785	346,781	10,150	496,011
Department 2	1,878	1,230	3,318	15,153	163	8,471	3,501	340	7,220	119,058	12,527	682,597	22,495	878,231
Department 3	221	353	153	1,772	77	2,130	395	59	2,171	4,225	4,511	52,105	2,037	70,512
Department 4	1,253	2,293	3,471	10,691	632	8,948	925	78	2,244	10,751	629	58,027	16,276	116,116
Total outside NYC	3,351	3,876	6,942	27,809	772	19,839	4,821	477	11,638	134,034	17,660	792,729	40,808	1,064,859

*Data incomplete from Glens Falls City Court and Saratoga Springs City Court in the Fourth District, Corning City Court in the Seventh District and from New Rochelle City Court in the Ninth District.

Excludes criminal proceedings from Albany, Cohoes and Troy in the Third District; Amsterdam and Johnstown in the Fourth District; Auburn and Elmira in the Seventh District and Lockport in the Eighth District.

Table 24
TOWN COURTS AND VILLAGE COURTS
Number of Criminal Cases
by Type
Calendar Years 1973 and 1974 Compared

	Number of Cases	
	1973	1974
Town and Village Ordinances and Vehicle and Traffic Law Title VII (Except §§ 1180*, 1181, 1182, 1190 and 1192)	878,163	886,783
Vehicle and Traffic Law Titles I through VI (except Article 2-A) Titles VII (§§ 1180*, 1181, 1182, 1190, 1192 only), Titles VIII through X and miscellaneous laws	607,367	649,920
Penal Law and Indictable Offenses	76,185	86,874
Other	9,550	11,241
Total Cases	1,571,265	1,634,818

*Except speed limits established under §§ 1643, 1644, 1662-a, 1663 and 1670.

Table 25

THE SUPREME COURT — CIVIL TERMS

Actions Received[1] by Type and by County, District and Judicial Department

*January 1, 1975 through January 2, 1976**

Court	DEPT	Dist	TORT			Contract	Matrimonial	Tax Certiorari	Condemnation	All Other	Total
			Motor Vehicle	Medical Malpractice	Other Tort						
Albany	III	3	577	20	307	299	1,315	716	9	121	3,319
Allegany	IV	8	41	0	12	18	126	0	0	8	205
Bronx	I	1	1,446	52	870	156	3,565	146	10	92	6,337
Broome	III	6	138	7	99	84	998	24	0	51	1,398
Cattaraugus	IV	8	56	1	23	11	377	2	0	19	489
Cayuga	IV	7	45	2	22	12	226	0	6	25	362
Chautauqua	IV	8	92	6	44	44	494	0	0	19	699
Chemung	III	6	156	2	25	11	427	0	3	48	702
Chenango	III	6	33	1	13	23	222	1	0	7	300
Clinton	III	4	60	5	24	30	300	1	0	25	465
Columbia	III	3	50	0	15	12	93	15	0	36	251
Cortland	III	6	35	0	11	10	261	3	0	7	357
Delaware	III	6	30	1	24	21	167	8	0	19	270
Dutchess	II	9	269	6	127	106	834	57	0	40	1,439
Erie	IV	8	2,179	73	913	593	3,841	9	5	14	7,618
Essex	III	4	35	1	18	20	41	9	0	10	136
Franklin	III	4	51	1	12	12	100	1	0	1	181
Fulton	III	4	87	2	63	23	230	5	0	12	430
Genesee	IV	8	17	3	5	18	126	0	0	18	217
Greene	III	3	51	1	18	39	36	1	0	16	162
Hamilton	III	4	0	0	0	0	3	0	0	0	3
Herkimer	IV	5	59	0	42	64	195	3	0	28	391
Jefferson	IV	5	51	1	50	75	329	16	1	18	522
Kings	II	2	3,028	176	1,952	510	7,710	146	17	170	13,739
Lewis	IV	5	16	0	4	8	42	1	0	19	90
Livingston	IV	7	43	0	7	18	122	0	0	13	203
Madison	III	6	11	2	11	23	374	2	0	25	468
Monroe	IV	7	1,084	12	486	611	4,008	6	73	383	6,663
Montgomery	III	4	76	0	32	38	204	0	0	28	378
Nassau	II	10	2,671	79	1,108	778	3,191	133	32	586	8,878
New York	I	1	2,291	181	2,218	2,242	5,697	256	8	121	13,020
Niagara	IV	8	233	4	60	69	1,004	1	0	53	1,424
Oneida	IV	5	214	12	127	222	1,021	106	0	130	1,865
Onondaga	IV	5	553	11	329	497	2,118	116	9	98	3,731

Ontario	IV	7	14	0	22	57	352	1	0	14	490
Orange	II	9	433	12	156	128	760	142	0	58	1,689
Orleans	IV	8	8	0	6	6	97	0	0	8	125
Oswego	IV	5	153	4	40	64	118	1	0	52	732
Otsego	III	6	35	0	16	28	200	3	0	26	363
Putnam	II	9	54	0	82	25	199	2	0	18	380
Queens	II	11	2,370	101	1,302	346	5,170	211	6	137	9,876
Rensselaer	III	3	212	7	85	62	173	10	0	68	617
Richmond	II	2	284	4	128	51	825	6	11	47	1,758
Rockland	II	9	233	10	173	120	630	714	1	51	2,032
St. Lawrence	III	4	76	0	39	28	496	23	0	29	691
Saratoga	III	4	230	2	106	68	135	2	0	14	857
Schenectady	III	4	517	13	220	142	856	95	0	55	1,898
Schoharie	III	3	28	1	20	17	28	1	0	12	107
Schuyler	III	3	5	0	2	13	37	0	0	7	64
Seneca	IV	7	18	2	7	7	88	1	0	4	128
Steuben	IV	7	70	0	60	52	57	0	1	16	256
Suffolk	II	10	1,856	59	576	171	3,151	68	109	167	7,066
Sullivan	III	3	178	2	59	121	273	43	1	71	751
Tioga	III	6	26	1	17	14	110	0	0	4	172
Tompkins	III	6	61	1	32	17	302	0	0	17	160
Ulster	III	3	286	7	69	96	258	46	8	50	817
Warren	III	4	66	0	48	13	442	18	0	8	625
Washington	III	4	51	0	19	13	17	2	0	9	111
Wayne	IV	7	53	0	30	27	412	0	2	11	165
Westchester	II	9	924	11	186	488	2,488	750	1	208	5,389
Wyoming	IV	8	17	0	5	11	159	0	0	6	198
Yates	IV	7	12	0	3	11	18	0	0	3	47
Total District		1	7,737	236	3,088	2,398	9,262	402	18	516	19,657
Total District		2	3,312	180	2,080	361	8,535	152	30	457	15,107
Total District		3	1,379	38	573	670	2,176	832	9	377	6,054
Total District		4	1,249	24	582	445	3,146	159	0	200	5,805
Total District		5	1,681	28	592	908	4,126	243	1	345	7,924
Total District		6	662	15	280	388	5,098	15	3	148	6,589
Total District		7	1,369	16	637	828	5,714	8	76	169	9,117
Total District		8	2,673	87	1,068	770	6,224	5	5	179	11,005
Total District		9	2,013	69	1,024	867	4,911	1,665	5	385	10,939
Total District		10	1,527	138	1,681	1,252	6,941	202	141	1,053	13,941
Total District		11	2,370	101	1,302	346	5,170	211	6	127	9,976
Total Department	I		7,737	236	3,088	2,398	9,262	402	18	516	19,657
Total Department	II		12,222	488	6,090	2,826	25,560	2,263	182	2,332	51,963
Total Department	III		3,190	77	1,435	1,503	8,120	1,036	12	775	16,148
Total Department	IV		5,123	131	2,297	2,506	16,064	254	82	989	27,446
Total New York City			9,419	517	6,470	3,105	22,967	798	54	1,410	44,740
Total outside NYC			14,853	415	6,440	6,128	36,339	3,157	240	3,202	70,774
Total New York State			24,272	932	12,910	9,233	59,306	3,955	294	1,612	115,514

*Weekly reporting period, last week of December ended on Friday, January 2, 1976.
[1]Total of new actions plus restorations plus transfers into these Courts from other Courts plus and/or minus transfers within Court.

Table 26

THE SUPREME COURT — CIVIL TERMS

Actions Disposed of by Type and by County, District and Judicial Department

*January 1, 1975 through January 2, 1976**

Court	DEPT	Dist.	TORT			Contract	Matrimonial	Tax Certiorari	Condemnation	All Other	Total
			Motor Vehicle	Medical Malpractice	Other Tort						
Albany	III	3	582	11	222	213	1,268	389	1	113	2,829
Allegany	IV	8	27	1	9	6	123	0	0	4	170
Bronx	I	1	2,378	91	1,231	147	3,498	1,199	19	163	8,726
Broome	III	6	168	6	89	74	1,118	22	0	51	1,528
Cattaraugus	IV	8	47	1	17	13	368	3	0	16	465
Cayuga	IV	7	51	2	19	31	204	0	0	35	342
Chautauqua	IV	8	55	3	30	18	608	0	0	6	720
Chemung	III	6	129	2	11	32	484	0	0	35	693
Chenango	III	6	30	0	9	19	237	1	0	4	298
Clinton	III	4	39	1	18	20	283	0	0	25	386
Columbia	III	3	32	0	12	17	61	4	0	21	150
Cortland	III	6	40	0	4	30	246	1	0	5	326
Delaware	III	6	13	2	11	24	190	1	0	24	274
Dutchess	II	9	336	3	100	67	780	13	0	21	1,355
Erie	IV	8	809	13	385	133	3,560	2	6	850	5,710
Essex	III	4	29	0	27	11	54	2	0	10	135
Franklin	III	4	52	0	21	12	93	0	0	2	180
Fulton	III	4	72	6	13	25	258	2	0	1	410
Genesee	IV	8	30	1	5	14	121	0	0	8	189
Greene	III	3	60	0	15	34	52	0	0	14	175
Hamilton	III	4	0	0	0	0	3	0	0	0	3
Herkimer	IV	5	68	0	31	63	196	2	0	21	381
Jefferson	IV	5	48	0	28	35	205	3	0	20	129
Kings	II	2	2,499	238	1,621	167	7,395	154	25	373	12,469
Lewis	IV	5	15	0	1	12	40	0	0	11	80
Livingston	IV	7	48	0	1	21	114	0	0	17	201
Madison	III	6	35	5	33	57	365	11	0	16	522
Monroe	IV	7	1,192	10	412	116	3,592	27	17	116	6,082
Montgomery	III	4	67	2	31	15	174	0	0	25	314
Nassau	II	10	2,639	83	957	799	3,112	16	14	577	8,197
New York	I	1	2,138	183	2,222	2,482	5,239	1,659	13	599	14,535
Niagara	IV	8	276	2	42	57	1,013	0	0	89	1,477
Oneida	IV	5	320	11	86	191	937	28	0	104	1,677

Onondaga	IV	5	733	8	270	434	2,101	13	0	79	3,638
Ontario	IV	7	46	2	16	37	360	0	0	24	485
Orange	II	9	354	5	97	99	765	119	3	31	1,170
Orleans	IV	8	19	0	2	6	99	0	0	9	135
Oswego	IV	5	148	3	35	49	377	11	0	19	642
Otsego	III	6	36	0	11	36	199	3	0	20	305
Putnam	II	9	128	5	32	188	188	0	1	60	602
Queens	II	11	2,014	99	1,035	251	5,232	155	18	338	9,142
Rensselaer	III	3	233	1	42	58	276	11	0	22	646
Richmond	II	2	300	13	139	11	778	17	18	36	1,315
Rockland	II	9	387	14	195	123	567	684	0	49	2,019
St. Lawrence	III	4	73	4	26	23	423	3	0	23	575
Saratoga	III	4	269	1	88	58	369	0	0	14	899
Schenectady	III	4	418	7	119	110	726	38	0	16	1,164
Schoharie	III	3	25	1	16	13	36	0	0	19	110
Schuyler	III	3	12	0	3	14	41	1	2	5	81
Seneca	IV	7	15	3	1	6	79	2	0	8	114
Steuben	IV	7	67	0	53	37	531	0	2	12	722
Suffolk	II	10	1,894	64	466	402	3,136	1	14	322	6,299
Sullivan	III	3	157	0	56	95	258	18	8	49	641
Tioga	III	6	31	0	5	13	133	0	0	18	200
Tompkins	III	6	67	2	18	54	305	0	0	7	453
Ulster	III	6	298	2	64	76	241	25	2	10	718
Warren	III	4	78	1	17	39	269	0	0	43	447
Washington	III	4	52	0	10	8	96	0	0	8	174
Wayne	IV	7	42	1	20	25	316	0	2	4	410
Westchester	II	9	1,427	51	592	416	2,431	132	20	625	5,694
Wyoming	IV	8	15	1	1	10	144	0	0	3	174
Yates	IV	7	11	1	3	9	82	0	1	21	128
Total District		1	4,516	274	3,153	2,629	8,717	2,858	32	762	23,241
Total District		2	2,799	261	1,760	211	8,173	171	43	387	13,805
Total District		3	1,387	15	427	506	2,195	450	11	308	5,299
Total District		4	1,149	25	400	330	2,848	47	0	197	4,991
Total District		5	1,332	22	454	784	3,946	57	0	258	6,853
Total District		6	561	17	197	353	3,319	13	2	185	4,677
Total District		7	1,472	19	548	612	5,188	29	52	564	8,484
Total District		8	1,278	34	494	257	6,034	5	6	960	9,064
Total District		9	2,632	78	1,016	893	4,751	1,278	21	489	11,138
Total District		10	4,533	147	1,423	1,201	6,248	17	58	869	14,496
Total District		11	2,014	99	1,035	251	5,232	155	18	338	9,142
Total Department	I	.	4,516	274	3,153	2,629	8,717	2,858	32	762	23,241
Total Department	II	.	11,978	585	5,234	2,556	24,384	1,621	140	2,083	48,581
Total Department	III	.	3,037	57	1,024	1,189	8,362	538	13	690	14,970
Total Department	IV	.	4,082	65	1,496	1,653	15,169	91	58	1,788	24,401
Total New York City	.	.	9,329	634	6,248	3,091	22,122	3,184	93	1,487	46,188
Total outside NYC	.	.	14,346	347	4,969	4,936	31,509	1,924	150	3,836	65,005
Total New York State	.	.	23,675	981	11,207	8,027	56,631	5,108	243	5,323	111,193

*Weekly reporting period, last week of December ended on Friday, January 2, 1976.

Table 27

THE SUPREME COURT — CIVIL TERMS

Actions Disposed of by Stage and Nature and by County, District, Judicial Department, and Region

*January 1, 1975 through January 2, 1976**

Court	DEPT	Dist	BEFORE TRIAL							DURING TRIAL					AFTER TRIAL							GRAND TOTAL
			Settled or Discontinued	Default or Consent Judgment	Marked off Calendar	Transferred, Consolidated or Referred to Referee or Arbitration	Dismissed	Other	Total	Settled or Discontinued	Default or Consent Judgment	Dismissed	Other	Total	Settled or Discontinued	Default or Consent Judgment	Dismissed	Decision of Court	Verdict of Jury	Other	Total	
Albany	III	3	1,132	10	212	67	31	0	1,452	97	1	2	9	109	8	0	1	1,190	64	5	1,268	2,829
Allegany	IV	8	42	0	5	1	0	0	48	4	0	0	0	4	0	1	0	112	5	0	118	170
Bronx	I	1	2,775	20	1,042	921	18	3	4,779	187	4	3	0	194	22	1	46	3,601	79	4	3,753	8,726
Broome	III	6	249	18	97	55	3	0	422	15	1	0	0	16	0	0	0	1,061	29	0	1,090	1,528
Cattaraugus	IV	8	63	1	66	2	0	0	132	3	0	1	0	4	0	0	1	320	6	2	329	465
Cayuga	IV	7	85	26	31	10	3	0	155	5	0	1	1	7	0	1	1	172	6	0	180	342
Chautauqua	IV	8	120	0	18	7	2	2	149	10	0	0	0	10	0	0	1	553	7	0	561	720
Chemung	III	6	153	0	102	10	8	0	273	5	0	0	0	5	4	0	0	399	12	0	415	693
Chenango	III	6	40	2	35	5	0	0	82	2	0	0	1	3	0	1	0	207	5	0	213	298
Clinton	III	4	57	25	28	5	1	3	119	10	4	1	1	16	0	0	0	258	2	0	260	395
Columbia	III	3	40	1	14	6	0	0	61	9	0	0	0	9	2	0	0	75	3	0	80	150
Cortland	III	6	56	3	24	2	0	0	85	9	0	0	0	9	0	0	0	232	0	0	232	326
Delaware	III	6	22	12	14	8	12	1	69	0	0	0	0	0	0	1	0	197	4	0	202	271
Dutchess	II	9	375	0	48	81	44	5	553	44	0	2	0	46	23	0	0	715	16	0	754	1,353
Erie	IV	8	1,252	26	233	467	7	2	1,987	107	1	8	9	125	18	0	33	3,447	125	5	3,628	5,740
Essex	III	4	61	1	12	5	2	1	82	3	0	0	0	3	5	0	0	39	4	0	48	133
Franklin	III	4	61	0	22	3	0	1	87	12	0	0	0	12	1	0	1	69	9	1	81	180
Fulton	III	4	88	1	24	18	0	2	133	21	0	0	0	21	4	1	0	244	7	0	256	410
Genesee	IV	8	55	9	9	0	0	1	74	1	1	0	0	2	3	0	1	98	5	0	107	183
Greene	III	3	71	1	6	14	1	2	95	3	0	0	0	3	9	0	0	58	10	0	77	175
Hamilton	III	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	0	0	3	3
Herkimer	IV	5	139	3	55	3	0	1	201	2	1	1	0	4	5	0	0	168	9	0	182	387
Jefferson	IV	5	74	4	55	10	1	0	144	15	0	0	0	15	0	0	0	267	3	0	270	429
Kings	IV	2	2,829	15	450	1,116	76	8	4,494	450	1	11	11	473	70	0	34	7,194	182	13	7,493	12,460
Lewis	IV	5	2	0	4	2	0	1	9	25	2	0	0	27	9	0	0	35	0	0	44	80
Livingston	IV	7	53	12	12	4	0	0	81	7	1	0	0	8	0	0	0	101	11	0	112	201
Madison	III	6	65	6	66	4	4	0	145	10	0	0	0	10	0	0	2	358	6	1	367	522

Monroe	IV	7	1,634	4	924	194	9	24	2,789	123	0	15	9	147	48	2	47	2,914	129	6	3,146	6,082
Montgomery	III	4	92	0	44	9	0	21	166	3	0	0	0	3	5	0	1	132	7	0	145	314
Nassau	II	10	3,389	72	435	180	31	31	4,138	384	1	23	9	417	33	2	18	3,344	244	1	3,642	8,197
New York	I	1	3,547	70	2,149	1,853	163	65	7,847	656	7	15	3	681	70	3	30	5,640	240	4	5,987	14,515
Niagara	IV	8	303	20	31	31	23	26	434	20	0	1	1	22	12	8	22	948	30	1	1,021	1,477
Oneida	IV	5	504	53	202	33	4	0	796	21	1	4	1	27	1	0	4	833	16	0	854	1,677
Onondaga	IV	5	968	161	382	69	2	8	1,590	36	1	3	0	40	1	0	1	1,967	38	1	2,008	3,638
Ontario	IV	7	82	5	14	5	3	1	110	9	0	1	0	10	0	0	0	356	9	0	365	485
Orange	II	9	457	14	76	105	20	10	682	57	1	0	1	59	4	0	2	689	34	0	729	1,470
Orleans	IV	8	33	1	1	0	1	0	36	3	0	0	0	3	0	0	0	93	3	0	96	135
Oswego	IV	5	188	16	34	4	3	1	246	26	0	1	0	27	2	0	0	358	9	0	369	642
Otsego	III	6	54	8	40	5	4	2	113	2	0	0	0	2	2	0	0	180	8	0	190	305
Putnam	II	9	88	134	14	46	7	19	308	35	0	1	0	36	16	0	0	233	9	0	258	602
Queens	II	11	1,729	19	808	256	71	11	2,894	758	7	7	13	785	96	0	23	5,119	214	11	5,463	9,142
Rensselaer	III	3	260	4	24	17	37	0	342	12	1	4	9	17	1	3	4	262	17	0	287	646
Richmond	II	2	212	3	42	207	13	2	479	34	0	3	0	37	0	0	0	810	19	0	829	1,345
Rockland	II	9	1,102	5	70	115	5	9	1,306	31	0	7	1	39	27	0	2	606	39	0	674	2,019
St. Lawrence	III	4	136	2	50	3	0	0	191	18	0	0	0	18	0	0	0	355	9	2	366	575
Saratoga	III	4	318	8	82	19	4	0	431	21	0	0	1	22	14	2	2	416	12	0	446	899
Schenectady	III	4	440	4	120	93	7	2	666	92	1	0	2	95	0	2	0	672	29	0	703	1,464
Schoharie	III	3	52	0	8	3	1	0	64	6	0	0	0	8	0	0	0	34	4	0	38	110
Schuyler	III	6	25	0	6	4	0	0	35	2	0	0	0	2	0	0	0	44	0	0	44	81
Seneca	IV	7	15	7	8	0	0	0	30	2	0	0	0	2	0	0	0	76	6	0	82	114
Steuben	IV	7	118	6	34	11	1	0	170	15	0	0	0	15	3	0	2	526	7	0	537	722
Suffolk	II	10	2,270	15	227	239	11	7	2,769	112	0	8	6	126	20	1	10	3,240	127	6	3,494	6,299
Sullivan	III	3	301	2	36	2	0	0	341	21	0	1	0	22	0	0	1	256	21	0	278	641
Tioga	III	6	46	2	10	0	0	1	59	5	0	0	0	5	0	0	0	132	4	0	136	200
Tompkins	III	6	93	6	32	11	0	0	142	3	0	0	0	3	0	1	0	297	10	0	308	453
Ulster	III	3	288	0	98	2	0	0	388	115	0	3	0	118	3	0	1	190	48	0	242	748
Warren	III	4	127	0	80	15	4	4	230	11	0	0	0	11	0	0	0	198	7	1	206	447
Washington	III	4	60	0	25	0	0	0	85	10	2	0	0	12	0	0	0	77	0	0	77	174
Wayne	IV	7	64	1	32	4	0	0	101	0	0	0	0	0	0	0	0	298	11	0	309	410
Westchester	II	9	1,735	26	219	350	21	241	2,592	191	2	10	3	206	15	2	31	2,692	91	65	2,896	5,694
Wyoming	IV	8	27	1	1	1	0	0	30	2	0	0	0	2	1	0	0	139	2	0	142	174
Yates	IV	7	17	0	8	4	1	2	32	3	0	0	0	3	0	0	0	87	6	0	93	128
Total District		1	6,322	90	3,191	2,774	181	68	12,626	843	11	18	3	875	92	4	76	9,241	319	8	9,740	23,241
Total District		2	3,041	18	492	1,323	89	10	4,973	484	1	14	11	510	70	0	34	8,004	201	13	8,322	13,805
Total District		3	2,144	18	398	111	70	2	2,743	265	2	10	9	286	23	3	7	2,065	167	5	2,270	5,299
Total District		4	1,440	41	487	170	18	34	2,190	201	7	1	4	213	29	5	4	2,463	86	4	2,591	4,994
Total District		5	1,875	237	732	121	10	11	2,986	125	5	9	1	140	18	0	5	3,628	75	1	3,727	6,853
Total District		6	803	57	426	104	31	4	1,425	53	1	0	1	55	6	3	2	3,107	78	1	3,197	4,677
Total District		7	2,068	61	1,063	232	17	27	3,468	164	1	17	10	192	50	3	50	4,530	185	6	4,924	8,484
Total District		8	1,895	58	364	509	33	31	2,890	150	2	10	10	172	34	9	58	5,710	183	8	6,002	9,064
Total District		9	3,757	179	427	697	97	284	5,441	358	3	20	5	386	85	2	35	4,935	189	65	5,311	11,138
Total District		10	5,659	87	662	419	42	38	6,907	496	1	31	15	543	53	3	28	6,584	371	7	7,046	14,496
Total District		11	1,729	19	808	256	71	11	2,894	758	7	7	13	785	96	0	23	5,119	214	11	5,463	9,142
Total Department	I		6,322	90	3,191	2,774	181	68	12,626	843	11	18	3	875	92	4	76	9,241	319	8	9,740	23,241
Total Department	II		14,186	303	2,389	2,695	299	343	20,215	2,096	12	72	44	2,224	304	5	120	24,642	975	96	26,142	48,581
Total Department	III		4,387	116	1,311	385	119	40	6,358	519	10	11	14	554	58	11	13	7,635	331	10	8,058	14,970
Total Department	IV		5,838	356	2,159	862	60	69	9,344	439	8	36	21	504	102	12	113	13,868	443	15	14,553	24,401
Total New York City			11,092	127	4,491	4,353	341	89	20,493	2,085	19	39	27	2,170	258	4	133	22,364	734	32	23,525	45,188
Total outside NYC			19,641	738	4,559	2,363	318	431	28,050	1,812	22	98	55	1,987	298	28	189	33,022	1,334	97	34,968	65,005
Total New York State			30,733	865	9,050	6,716	659	520	48,543	3,897	41	137	82	4,157	556	32	322	55,386	2,068	129	58,493	111,193

*Weekly reporting period; last week of December ended on Friday, January 2, 1976.

TABLE 28

THE SUPREME COURT — CIVIL TERMS

Actions Received, Disposed and Change in Pending and Projected Average Age by County, District, Judicial Department and Region

*January 1, 1975 through January 2, 1976**

Court	DEPT	Dist	Beginning Pending			Reverted[1]			Disposed			Adjustments by Courts			Ending Pending			Change in Pending						Projected Average Age (Months)
																		Actions			Percent			
			Non-Matrimonial	Matrimonial	Total	Non-Matrimonial	Matrimonial	Total	Non-Matrimonial	Matrimonial	Total	Non-Matrimonial	Matrimonial	Total	Non-Matrimonial	Matrimonial	Total	Non-Matrimonial	Matrimonial	Total	Non-Matrimonial	Matrimonial	Total	
Albany	III	3	1,386	47	1,433	2,034	1,315	3,349	1,761	1,268	3,029	+2	+27	+29	1,861	321	1,982	+475	+74	+549	+34.3	+157.4	+38.3	12
Allegany	IV	8	17	2	19	79	126	205	47	123	170	0	+1	+1	49	6	55	+32	+4	+36	+188	+200	+189	8
Bronx	I	1	5,190	508	5,698	2,772	1,665	6,437	5,228	3,448	8,720	-21	-84	-105	2,713	193	3,204	-2,477	-17	-2,494	-48	-8	-44	9
Broome	III	6	145	170	315	100	998	1,398	110	1,118	1,528	+178	0	+178	313	50	363	+168	-120	+48	+116	-71	+15	7
Cattaraugus	IV	8	67	2	69	112	377	489	97	368	465	-17	0	-17	65	11	76	-2	+9	+7	-3	+450	+10	8
Cayuga	IV	7	42	2	44	136	226	362	138	204	342	-2	-21	-23	38	4	42	-4	+1	-3	-10	+50	-7	3
Chautauqua	IV	8	164	17	175	205	495	690	112	608	720	-9	+167	+158	248	64	312	+84	+47	+131	+51	+182	+78	22
Chemung	III	6	298	22	320	275	427	702	209	484	693	+28	+65	+93	392	42	434	+94	+20	+114	+32	+95	+33	20
Chenango	III	6	14	2	16	78	222	300	63	235	298	0	+15	+15	29	4	34	+1	+2	+3	+107	+100	+100	1
Clinton	III	4	58	15	73	165	300	465	112	283	395	11	-4	7	100	28	128	+42	+13	+57	+72	+87	+75	8
Columbia	III	3	42	2	44	158	93	251	80	61	150	3	+1	4	108	35	144	+66	+33	+100	+160	+1,650	+227	12
Cortland	III	6	34	3	37	96	261	357	80	246	326	+2	-3	-1	52	15	67	+18	+12	+30	+53	+400	+81	6
Delaware	III	6	35	10	45	102	167	270	81	190	271	+22	+22	+44	78	9	88	+14	-1	+13	+40	-10	+96	8
Dutchess	II	9	564	141	705	611	841	1,452	573	780	1,353	-55	-20	-75	571	175	746	+7	+34	+41	+1	+24	+6	12
Erie	IV	8	6,009	288	6,297	3,807	3,841	7,648	2,180	3,560	5,740	154	264	418	7,185	301	7,488	+1,176	+17	+1,193	+20	+6	+19	16
Essex	III	4	79	9	88	102	41	146	79	54	133	-5	+8	+3	97	7	104	+18	-2	+16	+23	-22	+18	13
Franklin	III	4	96	2	97	81	100	181	87	93	180	+2	-3	-1	91	4	95	-5	+2	-3	-4	+200	-2	13
Fulton	III	4	132	14	146	200	250	450	152	258	410	+19	+28	+47	199	34	233	+67	+20	+87	+51	+143	+60	13
Genessee	IV	8	36	7	43	91	126	217	62	121	183	+1	+14	+15	66	17	83	+30	+10	+38	+83	+143	+88	10
Greene	III	3	76	12	88	126	36	162	123	52	175	+17	+12	+29	96	8	104	+20	-4	+16	+26	-33	+18	8
Hamilton	III	4	0	0	0	0	3	3	0	3	3	0	0	0	0	0	0	0	0	0	0	0	0	0
Herkimer	IV	7	138	14	152	196	195	391	191	196	387	+3	+1	+4	146	14	160	+8	0	+8	+6	0	+5	9
Jefferson	IV	5	123	64	187	195	329	522	151	295	429	+17	+3	+20	220	101	320	+106	+37	+143	+86	+58	+76	16
Kings	II	2	3,928	726	4,654	6,039	7,710	13,749	5,065	7,395	12,460	+193	+191	+384	4,980	1,032	6,012	+1,052	+306	+1,358	+27	+70	+33	11
Lewis	IV	5	9	0	9	48	42	90	40	40	80	+1	-1	0	18	1	19	+9	+1	+10	+100	0	+111	1
Livingston	IV	7	55	8	63	81	122	203	87	114	201	-1	+5	+4	48	13	67	-7	+5	-2	-13	+63	-3	7
Madison	III	6	28	16	44	189	374	563	152	367	519	-2	+1	-1	55	21	76	+30	+5	+35	+120	+31	+73	3
Monroe	IV	7	2,927	298	3,225	2,658	1,008	6,666	2,580	3,502	6,082	+112	293	185	3,117	811	3,928	+190	+213	+403	+6	+71	+12	14
Montgomery	III	4	145	16	161	173	295	468	140	174	314	1	12	13	179	53	232	+34	+37	+71	+23	+106	+32	14
Nassau	II	10	6,252	227	6,479	5,387	3,491	8,878	5,085	3,112	8,197	+202	+13	+215	6,756	623	7,377	+504	+396	+898	+8	+174	+14	15
New York	I	1	6,228	623	6,851	7,623	5,697	13,320	9,290	5,219	14,511	+280	-65	+215	4,843	1,031	5,869	-1,385	+411	-982	-22	+66	-14	7

Niagara	IV	8	594	38	632	420	1,004	1,424	466	1,011	1,477	+61	+11	+101	641	42	683	+47	+1	+51	+8	+11	+8	16
Oneida	IV	5	617	95	712	841	1,624	1,865	749	945	1,677	+31	57	23	752	125	877	+135	+30	+165	+22	+32	+23	11
Onondaga	IV	5	2,536	229	2,765	1,606	2,118	3,724	1,537	2,101	3,638	223	+11	212	2,362	277	2,639	151	+28	126	6	+12	5	19
Ontario	IV	7	23	3	26	138	352	490	125	360	485	+1	+18	+19	37	15	50	+14	+10	+24	+61	+333	+92	3
Orange	II	9	714	91	805	929	760	1,689	705	765	1,470	29	10	39	918	76	994	+201	1	+180	+29	16	+23	14
Orleans	IV	8	18	6	24	78	97	175	36	99	135	1	1	2	61	3	12	9	3	12	50	50	50	5
Oswego	IV	5	162	69	231	311	118	429	95	317	412	+1	19	18	212	91	303	+59	+22	+72	+31	+32	+31	8
Otsego	III	6	12	8	20	103	200	303	106	139	305	+7	+10	+17	16	19	65	+4	+13	+15	+19	+138	+30	3
Putnam	II	9	117	0	117	183	199	380	113	188	602	+174	+3	+177	88	12	100	54	+12	17	10	0	32	3
Queens	II	11	1,691	631	2,322	1,806	5,170	9,976	3,910	5,232	9,142	51	124	175	2,539	445	2,984	+845	196	+659	+50	29	+28	6
Rensselaer	III	3	391	5	399	411	173	617	179	276	455	32	+27	+59	136	29	165	+12	+24	+66	+11	+190	+17	13
Richmond	II	2	318	99	417	538	825	1,378	507	778	1,285	+9	+1	+10	296	147	0	25	+18	+23	8	+18	+6	6
Rockland	II	9	826	70	896	1,402	630	2,032	1,152	567	2,019	13	22	9	761	111	872	65	+41	24	8	+59	3	7
St. Lawrence	III	4	72	13	85	195	196	391	152	124	276	+8	17	9	125	49	162	+51	+26	+77	+71	+200	+91	8
Saratoga	III	1	178	48	226	422	135	557	130	169	299	16	+13	+27	154	57	211	24	+9	15	5	+19	3	13
Schenectady	III	4	1,103	64	1,168	1,032	856	1,888	758	726	1,484	+11	78	64	1,122	116	1,238	+818	+52	+870	+29	+81	+32	21
Schoharie	III	3	19	3	22	79	28	107	74	36	110	2	+1	+1	22	1	23	+3	2	+1	+16	67	+5	3
Schuyler	III	6	15	2	17	27	37	64	37	41	81	+3	+6	+9	8	1	9	7	1	8	17	50	47	4
Seneca	IV	7	13	0	13	59	89	148	87	79	174	+2	1	+1	19	9	28	+6	9	+15	+16	0	+115	5
Steuben	IV	7	82	3	85	198	557	756	193	551	744	+10	29	+13	130	0	130	+48	3	+45	+59	100	+53	7
Suffolk	II	10	1,967	225	2,192	3,610	3,153	7,763	3,163	3,136	6,299	+61	32	73	1,723	510	2,233	251	+295	+51	5	+127	+1	18
Sullivan	III	3	285	0	285	178	273	451	263	258	521	+10	2	+8	190	13	203	+105	+13	+118	+37	0	+11	11
Tioga	III	6	58	19	77	92	110	202	67	133	200	1	+1	+2	52	13	65	6	6	12	10	32	16	10
Tompkins	III	6	90	2	92	158	302	460	148	305	453	+10	+10	+14	115	35	150	+25	+13	+38	+28	+650	+41	8
Ulster	III	3	153	91	244	559	278	837	307	241	548	67	19	86	138	29	167	15	2	17	3	6	1	11
Warren	III	4	113	17	130	183	142	325	128	269	397	+2	175	168	125	15	140	+42	2	+30	+11	12	+8	8
Washington	III	4	48	11	59	94	17	111	28	96	124	1	+82	+81	61	11	72	+15	+3	+18	+31	+27	+31	9
Wayne	IV	7	13	4	17	123	312	435	91	319	410	2	16	28	35	14	49	+23	+10	+32	+169	+250	+188	3
Westchester	II	9	2,723	91	2,814	2,901	2,488	5,389	2,265	2,431	5,091	+125	+247	+660	2,781	385	3,166	+61	+291	+305	+2	+324	+13	10
Wyoming	IV	8	10	2	12	39	159	198	30	141	171	15	0	15	1	17	31	6	+15	+9	60	+750	+75	3
Yates	IV	7	13	4	17	29	18	47	16	82	128	+15	+63	+78	11	3	14	2	1	3	15	25	18	3
Total District		1	11,418	1,131	12,549	10,295	9,262	19,657	11,524	8,717	20,241	+259	151	+108	7,548	1,525	9,073	3,870	+394	3,476	44	+35	28	8
Total District		2	1,216	825	5,071	6,572	8,595	15,167	5,642	8,373	13,905	+87	+192	+279	5,273	1,179	6,452	+1,927	+554	+1,581	+24	+67	+31	10
Total District		3	2,695	100	2,795	3,878	2,176	6,054	3,194	2,195	5,389	77	+155	+78	3,632	256	3,888	+497	+136	+633	+26	+136	+30	12
Total District		4	2,321	209	2,530	2,669	3,146	5,815	2,116	2,848	4,964	+16	18	132	2,853	319	3,202	+529	+140	+669	+23	+67	+26	14
Total District		5	3,585	471	4,056	3,198	1,126	7,324	2,907	1,916	4,823	141	62	199	3,749	589	4,338	+154	+118	+272	+4	+25	+7	15
Total District		6	736	254	1,010	1,491	3,098	4,589	1,578	3,313	4,891	+252	+116	+398	1,141	179	1,320	+485	75	+410	+51	+90	+31	8
Total District		7	3,166	322	3,488	3,103	3,771	6,874	3,246	3,188	6,434	+160	284	124	3,433	564	3,997	+242	+109	+351	+8	+55	+15	12
Total District		8	6,915	356	7,271	1,781	6,221	11,002	3,030	6,031	9,061	101	83	184	8,263	465	8,728	+1,350	+107	+1,457	+20	+30	+20	30
Total District		9	1,971	393	5,367	6,028	1,911	10,939	5,107	1,731	11,138	+525	+186	+711	5,122	759	881	+148	+366	+514	+3	+93	+10	9
Total District		10	11,209	452	11,661	8,937	6,941	15,941	8,218	6,218	14,496	179	17	196	11,179	1,131	12,610	+270	+679	+949	+2	+150	+8	17
Total District		11	1,691	631	2,325	1,806	5,170	8,976	3,910	5,232	9,142	51	124	175	2,539	445	2,984	+845	196	+659	+50	29	+28	6
Total Department	I		11,418	1,131	12,549	10,295	9,262	19,657	11,524	8,717	20,241	+259	151	+108	7,548	1,525	9,073	3,870	+394	3,476	44	+35	28	8
Total Department	II		22,123	2,301	24,424	26,103	25,560	51,963	21,197	21,581	42,778	+81	+247	+321	24,413	3,714	28,127	+2,290	+1,113	+3,703	+10	+61	+15	12
Total Department	III		5,735	563	6,298	8,028	8,429	16,457	6,608	8,362	14,970	+191	+143	+334	7,346	764	8,110	+1,611	+201	+1,812	+28	+36	+29	12
Total Department	IV		13,666	1,149	14,815	11,382	16,004	27,386	9,233	15,168	24,401	381	439	823	15,137	1,616	17,053	+1,771	+167	+2,238	+13	+41	+15	19
Total New York City			17,358	2,587	19,945	21,773	22,967	44,740	24,006	22,122	46,128	+295	83	+212	15,360	3,349	18,709	1,998	+762	1,236	12	+29	6	8
Total outside NYC			35,584	2,557	38,141	31,435	36,339	70,774	30,396	34,509	65,005	139	117	256	39,394	4,270	43,664	+3,800	+1,715	+5,513	+11	+67	+14	15
Total New York State			52,942	5,144	58,086	53,208	59,306	115,514	54,562	56,631	111,193	+156	200	44	54,744	7,619	62,363	+1,802	+2,475	+4,277	+5	+48	+7	12

*Weekly reporting period, last week of December ended on Friday, January 2, 1976.
[1] Total of new actions plus restorations plus transfers into these Courts from other courts.
[2] Projected Average Age is shown for nonmatrimonial cases only.

Table 29
THE COUNTY COURTS — CIVIL TERMS
Actions Received[1] by Type
and by County, District and Judicial Department
*January 1, 1975 through January 2, 1976**

Court	DEPT.	Dist.	TORT			Contract	Tax Certiorari	Condemnation	All Other	Total
			Motor Vehicle	Medical Malpractice	Other Tort					
Albany	III	3	36	1	24	38	0	0	2	101
Allegany	IV	8	3	0	0	1	0	0	1	5
Broome	III	6	19	0	3	67	0	0	9	89
Cattaraugus	IV	8	4	0	4	10	0	0	1	22
Cayuga	IV	7	6	0	0	9	0	0	6	21
Chautauqua	IV	8	2	0	3	11	0	0	6	22
Chemung	III	6	5	0	5	14	0	0	1	25
Chenango	III	6	7	0	3	10	0	0	1	21
Clinton	III	4	1	0	3	4	0	0	3	11
Columbia	III	3	3	0	1	3	0	0	2	9
Cortland	III	6	2	0	0	2	0	0	0	4
Delaware	III	6	5	0	3	5	0	0	2	15
Dutchess	II	9	12	0	12	75	0	0	1	130
Erie	IV	8	3	0	1	8	0	0	12	24
Essex	III	4	0	0	0	5	0	0	3	8
Franklin	III	4	0	0	4	2	0	0	5	11
Fulton	III	4	18	0	8	14	0	0	2	42
Genesee	IV	8	5	0	1	7	0	0	1	14
Greene	III	3	4	0	0	18	0	0	9	31
Hamilton	III	4	2	0	1	1	0	0	1	5
Herkimer	IV	5	6	0	3	15	0	0	1	25
Jefferson	IV	5	4	0	5	41	0	0	6	56
Lewis	IV	5	2	0	1	2	0	0	2	7
Livingston	IV	7	3	0	1	18	0	0	10	32
Madison	III	6	0	0	1	2	0	0	1	4
Monroe	IV	7	11	0	3	9	0	0	6	29
Montgomery	III	4	14	0	5	6	0	0	7	32
Nassau	II	10	0	0	0	0	0	0	0	0
Niagara	IV	8	0	0	0	0	0	0	0	0

Oneida	IV	5	0	0	0	1	0	0	0	1
Onondaga	IV	5	0	0	0	0	0	0	0	0
Ontario	IV	7	3	0	4	19	0	0	1	27
Orange	II	9	152	0	37	103	0	0	4	296
Orleans	IV	8	0	0	0	1	0	0	0	1
Oswego	IV	5	32	0	12	40	0	0	8	91
Otsego	III	6	7	0	5	16	0	0	6	34
Putnam	II	9	17	0	5	20	0	0	5	47
Rensselaer	III	3	16	1	4	15	0	0	0	36
Rockland	II	9	195	1	90	113	0	3	68	470
St. Lawrence	III	4	44	0	52	88	0	0	19	203
Saratoga	III	4	29	0	19	53	0	0	11	112
Schenectady	III	4	57	0	35	39	0	0	12	143
Schoharie	III	3	0	0	2	4	0	0	2	8
Schuyler	III	6	1	0	0	8	0	0	2	11
Seneca	IV	7	1	0	2	4	0	0	4	11
Steuben	IV	7	8	0	9	25	0	0	3	45
Suffolk	II	10	56	0	22	42	0	0	0	120
Sullivan	III	3	2	0	0	0	0	0	0	2
Tioga	III	6	0	0	0	1	0	0	0	1
Tompkins	III	6	2	0	2	25	0	0	0	29
Ulster	III	3	10	0	5	19	0	0	4	38
Warren	III	4	5	0	7	52	0	0	1	65
Washington	III	4	2	0	3	6	0	0	2	13
Wayne	IV	7	2	0	0	8	0	0	1	11
Westchester	II	9	516	0	109	188	0	0	57	870
Wyoming	IV	8	0	0	1	2	0	0	2	5
Yates	IV	7	1	0	2	5	0	0	2	10
Total District		3	71	2	36	97	0	0	19	225
Total District		4	172	0	137	270	0	0	66	645
Total District		5	44	0	20	99	0	0	17	180
Total District		6	39	0	22	150	0	0	22	233
Total District		7	35	0	21	97	0	0	33	186
Total District		8	17	0	10	40	0	0	26	93
Total District		9	922	1	253	499	0	3	135	1,813
Total District		10	56	0	22	42	0	0	0	120
Total Department	II		978	1	275	541	0	3	135	1,933
Total Department	III		282	2	195	517	0	0	107	1,103
Total Department	IV		96	0	51	236	0	0	76	459
Total outside NYC			1,356	3	521	1,294	0	3	318	3,495

Note: There are no County Courts in New York City.
*Weekly reporting period, last week of December ended on Friday, January 2, 1976.
[1]Total of new actions plus restorations plus transfers into these Courts from other courts plus and/or minus transfers within Court.

Table 30
THE COUNTY COURTS — CIVIL TERMS
Actions Disposed of by Type
and by County, District and Judicial Department
*January 1, 1975 through January 2, 1976**

Court	DEPT.	Dist.	TORT			Contract	Tax Certeriorari	Condemnation	All Other	Total
			Motor Vehicle	Medical Malpractice	Other Tort					
Albany	III	3	37	0	10	46	0	0	3	96
Allegany	IV	8	0	0	0	1	0	0	0	1
Broome	III	6	10	0	1	57	9	0	8	76
Cattaraugus	IV	8	5	0	2	8	0	0	1	16
Cayuga	IV	7	8	0	0	11	0	0	2	21
Chautauqua	IV	8	5	1	3	17	0	0	4	35
Chemung	III	6	14	0	2	8	0	0	8	32
Chenango	III	6	6	0	3	13	0	0	1	23
Clinton	III	4	4	0	2	5	0	0	5	16
Columbia	III	3	8	0	2	14	0	0	8	32
Cortland	III	6	1	0	0	5	0	0	0	6
Delaware	III	6	4	0	4	6	0	0	2	16
Dutchess	II	9	66	1	31	0	0	0	0	107
Erie	IV	8	0	0	0	8	1	0	6	15
Essex	III	4	2	0	0	9	0	0	7	18
Franklin	III	4	1	0	2	0	0	0	3	6
Fulton	III	4	14	0	9	10	2	0	1	36
Genesee	IV	8	2	0	2	7	0	0	1	12
Greene	III	3	2	0	0	23	0	0	6	31
Hamilton	III	4	1	0	0	2	0	0	3	6
Herkimer	IV	5	7	0	2	18	0	0	2	29
Jefferson	IV	5	3	0	4	38	0	0	6	51
Lewis	IV	5	5	0	0	2	0	0	1	8
Livingston	IV	7	4	0	3	5	0	0	6	18
Madison	III	6	0	0	1	2	0	0	3	6
Monroe	IV	7	64	0	20	55	0	0	11	150
Montgomery	III	4	16	0	12	11	0	0	7	46
Nassau	II	10	6	3	5	4	0	0	5	20

Niagara	IV	8	6	0	0	3	0	0	0	0	9
Oneida	IV	5	0	0	0	9	0	0	0	0	9
Onondaga	IV	5	3	0	3	7	0	0	0	0	13
Ontario	IV	7	8	0	1	27	0	0	4	10	50
Orange	II	9	97	0	33	56	3	0	7	193	389
Orleans	IV	8	1	0	0	1	0	0	0	0	2
Oswego	IV	5	10	0	1	13	0	0	1	31	56
Otsego	III	6	3	0	5	11	0	0	5	24	48
Putnam	II	9	15	0	8	14	0	0	19	56	112
Rensselaer	III	3	6	0	16	8	0	0	2	32	64
Rockland	II	9	224	1	82	94	0	2	63	166	632
St. Lawrence	III	4	59	0	19	79	0	0	20	207	384
Saratoga	III	4	45	1	18	54	0	0	4	122	244
Schenectady	III	4	69	0	20	49	0	0	0	138	276
Schoharie	III	3	1	0	4	2	0	0	4	11	22
Schuyler	III	6	0	0	0	10	0	0	1	11	22
Seneca	IV	7	2	0	1	6	0	0	0	9	18
Steuben	IV	7	2	0	7	27	0	0	0	36	72
Suffolk	II	10	54	0	16	42	0	0	2	104	208
Sullivan	III	3	4	0	4	12	0	0	8	28	56
Tioga	III	6	0	0	1	3	0	0	0	4	8
Tompkins	III	6	1	0	2	12	0	0	3	18	36
Ulster	III	3	2	0	1	3	0	0	0	6	12
Warren	III	4	3	0	0	43	0	0	12	58	116
Washington	III	4	1	0	4	3	0	0	3	8	16
Wayne	IV	7	2	0	1	4	0	0	1	8	16
Westchester	II	9	614	0	128	148	0	0	77	967	1,934
Wyoming	IV	8	0	0	0	4	0	0	0	4	8
Yates	IV	7	1	0	1	3	0	0	0	5	10
Total District		3	61	0	37	108	0	0	31	237	474
Total District		4	215	1	113	262	0	0	70	661	1,322
Total District		5	36	0	13	87	0	0	13	139	278
Total District		6	39	0	19	127	0	0	51	216	432
Total District		7	91	0	34	138	0	0	24	287	574
Total District		8	13	1	13	46	1	0	11	85	170
Total District		9	1,016	2	282	321	0	2	166	1,789	3,578
Total District		10	50	0	21	46	0	0	7	124	248
Total Department	II		1,066	2	303	367	0	2	173	1,913	3,826
Total Department	III		315	1	169	497	0	0	132	1,114	2,228
Total Department	IV		130	1	60	271	1	0	18	511	1,022
Total outside NYC			1,511	4	532	1,135	1	2	353	3,538	7,076

Note: There are no County Courts in New York City
*Weekly reporting period, last week of December ended on Friday, January 2, 1976

CONTINUED

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TABLE 31
THE COUNTY COURTS — CIVIL TERMS
Actions Disposed of by Stage and Nature
and by County, District, and Judicial Department
*January 1, 1975 through January 2, 1976**

Court	DEPT	Dist.	BEFORE TRIAL							DURING TRIAL					AFTER TRIAL							GRAND TOTAL
			Settled or Discontinued	Default or Consent Judgment	Marked off Calendar	Transferred, Consolidated or Referred to Referee or Arbitration	Dismissed	Other	Total	Settled or Discontinued	Default or Consent Judgment	Dismissed	Other	Total	Settled or Discontinued	Default or Consent Judgment	Dismissed	Decision of Court	Verdict of Jury	Other	Total	
Albany	III	3	69	0	24	2	1	0	95	0	0	0	0	0	0	0	0	1	0	0	1	96
Allegany	IV	8	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
Broome	III	6	13	1	1	57	0	6	72	0	0	0	0	0	0	0	0	2	2	0	1	76
Cattaraugus	IV	8	10	0	1	0	0	0	11	0	1	1	0	2	0	0	0	3	0	0	3	16
Cayuga	IV	7	12	2	3	1	0	0	18	1	0	0	0	1	0	0	0	1	1	0	2	21
Chautauqua	IV	8	17	0	2	7	0	0	29	1	0	0	0	1	0	0	0	2	1	2	5	35
Chemung	III	6	18	2	3	9	0	0	32	0	0	0	0	0	0	0	0	6	0	0	0	32
Chenango	III	6	14	1	3	1	0	0	19	0	0	0	1	1	0	0	0	0	3	0	3	23
Clinton	III	4	1	1	10	1	0	2	15	0	0	0	1	1	0	0	0	0	0	0	0	16
Columbia	III	3	20	2	3	0	0	0	25	0	0	0	0	0	0	0	0	0	7	0	7	32
Cortland	III	6	5	0	0	0	0	0	5	0	0	0	0	0	0	0	0	0	1	0	1	6
Delaware	III	6	2	0	0	0	0	0	2	0	0	0	0	0	2	1	0	1	14	0	14	16
Dutchess	II	9	98	0	0	1	0	1	100	3	0	0	0	3	1	0	0	1	2	0	1	107
Erie	IV	8	2	6	11	0	0	0	13	1	0	0	0	1	0	0	0	1	6	0	1	15
Essex	III	4	6	0	2	4	2	0	14	2	0	0	0	2	0	0	0	2	0	0	2	18
Franklin	III	4	5	0	0	1	0	0	6	0	0	0	0	0	0	0	0	0	0	0	0	6
Fulton	III	4	24	0	1	2	0	0	27	3	2	0	0	5	1	0	0	2	1	0	4	36
Genesee	IV	8	5	1	0	0	0	0	6	1	1	0	0	2	0	0	0	1	5	0	4	12
Greene	III	3	21	1	1	0	0	3	26	2	0	0	0	2	0	0	0	1	3	0	4	32
Hamilton	III	4	2	0	1	0	0	1	4	1	0	0	0	1	0	0	0	0	1	0	1	6
Herkimer	IV	5	27	0	2	0	0	0	29	0	0	0	0	0	0	0	0	0	0	0	0	29
Jefferson	IV	5	23	4	8	0	0	0	35	2	0	0	0	2	0	0	0	0	7	7	14	51
Lewis	IV	5	4	0	1	0	0	0	5	0	0	0	0	0	0	0	0	0	1	0	1	6
Livingston	IV	7	6	2	1	1	0	4	14	0	0	0	0	0	0	0	0	0	2	2	4	18

Madison	III	6	5	0	0	0	0	0	5	1	0	0	0	1	0	0	0	0	0	0	0	1	6
Monroe	IV	7	4	0	2	140	0	0	146	2	0	0	1	5	0	0	0	1	9	0	1	1	159
Montgomery	III	4	20	0	7	4	2	0	33	3	0	0	2	5	0	0	0	1	9	0	19	16	16
Nassau	II	10	2	0	13	1	1	0	20	0	0	0	0	0	0	0	0	0	0	0	0	0	20
Niagara	IV	8	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oneida	IV	5	0	0	0	9	0	0	9	0	0	0	0	0	0	0	0	0	0	0	0	0	9
Onondaga	IV	5	8	0	0	7	0	0	15	0	0	0	0	0	0	0	0	0	0	0	0	0	13
Ontario	IV	7	19	8	1	0	1	0	29	2	0	0	0	2	0	0	0	1	5	1	0	0	40
Orange	II	9	141	10	7	0	9	0	176	8	0	1	6	15	0	0	0	1	0	1	0	2	193
Orleans	IV	8	2	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	2
Oswego	IV	5	29	0	1	1	0	0	31	0	0	0	0	0	0	0	0	0	0	0	0	0	31
Otsego	III	6	10	1	4	0	0	0	15	3	0	0	0	3	0	0	0	4	2	0	6	24	24
Putnam	II	9	21	14	0	6	0	0	41	6	0	0	0	6	0	0	0	6	3	0	9	56	56
Rensselaer	III	3	8	2	14	0	0	4	28	0	0	0	0	0	0	0	0	0	3	1	1	32	32
Rockland	II	9	382	9	7	18	3	2	421	15	0	0	0	15	0	0	0	21	9	0	30	466	466
St. Lawrence	III	4	45	0	4	2	0	0	51	16	0	0	0	16	1	0	0	94	45	0	140	207	207
Saratoga	III	4	66	5	13	2	1	6	93	12	0	0	1	13	3	0	1	9	2	0	16	122	122
Schenectady	III	4	59	1	4	50	0	8	122	9	0	1	0	10	0	0	0	2	4	0	6	138	138
Schoharie	III	3	4	0	0	0	0	0	4	5	0	0	0	5	0	0	0	4	0	0	4	11	11
Schuyler	III	6	9	0	0	0	0	2	11	0	0	0	0	0	0	0	0	0	0	0	0	11	11
Seneca	IV	7	7	0	0	1	0	0	8	0	0	0	0	0	0	0	0	1	0	0	1	9	9
Steuben	IV	7	11	6	11	1	0	1	33	0	0	0	0	0	0	0	0	2	0	0	3	36	36
Suffolk	II	10	57	8	4	10	18	1	98	0	0	0	0	0	0	0	0	1	5	0	6	101	101
Sullivan	III	3	7	0	19	1	1	0	28	0	0	0	0	0	0	0	0	0	0	0	0	28	28
Tioga	III	6	4	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	4	4
Tompkins	III	6	12	0	1	1	0	1	15	0	0	0	0	0	0	0	0	1	2	0	3	18	18
Ulster	III	3	4	0	0	0	0	2	6	0	0	0	0	0	0	0	0	0	0	0	0	6	6
Warren	III	4	36	3	8	1	0	0	48	5	0	2	0	7	0	0	1	1	1	0	3	58	58
Washington	III	4	4	0	3	0	0	0	7	0	0	0	0	0	0	0	0	1	1	0	1	8	8
Wayne	IV	7	3	0	2	0	0	0	5	0	0	0	0	0	0	0	0	1	2	0	3	8	8
Westchester	II	9	590	2	16	268	11	0	917	14	0	2	0	16	0	0	0	26	8	0	34	967	967
Wyoming	IV	8	2	1	1	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	4	4
Yates	IV	7	4	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	1	0	1	5	5
Total District		3	133	5	61	3	1	9	212	5	0	0	0	5	0	0	0	13	6	1	20	237	
Total District		4	268	10	53	67	5	17	420	61	2	4	1	68	5	3	2	112	64	0	183	661	
Total District		5	89	4	12	17	0	0	122	2	3	0	2	7	0	0	0	8	7	0	15	139	
Total District		6	92	5	12	68	0	3	180	4	0	0	1	5	2	1	0	14	11	0	31	216	
Total District		7	69	18	20	144	1	5	257	5	9	0	1	6	0	0	2	12	10	2	24	287	
Total District		8	39	2	15	7	0	3	66	3	2	1	0	6	0	0	0	7	4	2	13	85	
Total District		9	1,232	35	60	302	23	3	1,655	46	0	3	6	55	1	0	0	55	23	0	79	1,789	
Total District		10	59	8	17	14	19	1	118	0	0	0	0	0	0	0	0	1	5	0	6	124	
Total Department	II		1,291	43	77	316	42	4	1,773	46	0	3	6	55	1	0	0	56	28	0	85	1,913	
Total Department	III		493	20	126	138	6	29	812	60	2	4	2	68	7	1	2	139	84	1	234	1,114	
Total Department	IV		197	24	47	168	1	8	445	10	2	1	1	14	0	0	2	27	21	2	52	511	
Total outside NYC			1,981	87	250	622	49	41	3,030	116	4	8	9	137	8	1	4	222	133	3	371	3,538	

*Weekly reporting period, last week of December ended on Friday, January 2, 1976
Note: There are no County Courts in New York City.

TABLE 32

THE COUNTY COURTS — CIVIL TERMS

Actions Received, Disposed and Change in Pending and Projected Average Age by County, District and Judicial Department

*January 1, 1975 through January 2, 1976**

Court	DEPT.	Dist.	Beginning Pending	Total Received[1]	Total Disposed	Adjustments By Court	Ending Pending	Change in Pending		Projected Avg. Age (mos.)
								Actions	Percent	
Albany	III	3	145	101	96	−28	122	−23	−16	17
Allegany	IV	8	2	5	1	−1	5	+3	+150	42
Broome	III	6	35	89	76	−2	46	+11	+31	6
Cattaraugus	IV	8	12	22	16	−5	13	+1	+8	9
Cayuga	IV	7	5	21	21	−2	3	−2	−40	2
Chautauqua	IV	8	10	22	35	+10	7	−3	−30	3
Chemung	III	6	70	25	32	+1	64	−6	−9	25
Chenango	III	6	6	21	23	+1	5	−1	−17	3
Clinton	III	4	20	11	16	0	15	−5	+25	13
Columbia	III	3	30	9	32	+19	26	−4	−13	11
Cortland	III	6	3	4	6	0	1	−2	−67	1
Delaware	III	6	9	15	16	+2	10	+1	+11	7
Dutchess	II	9	449	130	107	+64	536	+87	+19	55
Erie	IV	8	3	24	15	+2	14	+11	+367	7
Essex	III	4	17	8	18	0	7	−10	−59	8
Franklin	III	4	0	11	6	0	5	+5	0	5
Fulton	III	4	28	42	36	+21	55	+27	+96	14
Genesee	IV	8	5	14	12	−1	6	+1	+20	6
Greene	III	3	23	31	32	+4	26	+3	+13	9
Hamilton	III	4	5	5	6	+1	5	0	0	10
Herkimer	IV	5	4	25	29	+5	5	+1	+25	2
Jefferson	IV	5	27	56	51	0	32	+5	+19	7
Lewis	IV	5	1	7	6	0	2	+1	+100	3
Livingston	IV	7	5	32	18	−8	11	+6	+120	5
Madison	III	6	9	4	6	+3	10	+1	+11	19
Monroe	IV	7	121	29	150	0	-	−121	−100	5
Montgomery	III	4	70	32	46	+1	57	−13	−19	17
Nassau	II	10	25	0	20	−2	3	−22	−88	8

Niagara	IV	8	0	0	0	0	–	0	0	0
Oneida	IV	5	25	1	9	+7	24	−1	−4	33
Onondaga	IV	5	21	0	13	−1	7	−14	−67	13
Ontario	IV	7	32	27	40	+3	22	−10	−31	8
Orange	II	9	580	296	193	+46	729	+149	+26	41
Orleans	IV	8	1	1	2	+3	3	+2	+200	12
Oswego	IV	5	37	91	31	−55	42	+5	+14	15
Otsego	III	6	4	34	24	0	14	+10	+250	5
Putnam	II	9	47	47	56	+52	90	+13	+81	15
Rensselaer	III	3	35	36	32	+11	50	+15	+43	16
Rockland	II	9	857	470	466	−42	819	−38	−4	22
St. Lawrence	III	4	24	203	207	−13	7	−17	−71	1
Saratoga	III	4	119	112	122	−1	108	−11	−9	11
Schenectady	III	4	114	143	138	+3	122	+8	+7	10
Schoharie	III	3	6	8	11	+3	6	0	0	7
Schuyler	III	6	2	11	11	+4	6	+4	+200	4
Seneca	IV	7	3	11	9	0	5	+2	+67	5
Steuben	IV	7	10	45	36	−4	15	+5	+50	4
Suffolk	II	10	74	120	104	+7	97	+23	+31	10
Sullivan	III	3	66	2	28	+7	47	−19	−29	24
Tioga	III	6	33	1	1	0	30	−3	−9	95
Tompkins	III	6	14	29	18	−5	20	+6	+43	11
Ulster	III	3	137	38	6	−50	119	−18	−13	256
Warren	III	4	18	65	58	+6	31	+13	+72	5
Washington	III	4	10	13	8	−1	14	+4	+50	18
Wayne	IV	7	1	11	8	+11	15	+14	+1,400	12
Westchester	II	9	1,656	870	967	−294	1,265	−391	−24	18
Wyoming	IV	8	4	5	4	−1	4	0	0	12
Yates	IV	7	1	10	5	−1	5	+4	+400	7
Total District		3	442	225	237	34	396	−16	−10	21
Total District		4	425	645	661	+17	426	+1	0	8
Total District		5	115	180	139	−44	112	−3	−3	10
Total District		6	185	233	216	+4	206	+21	+11	11
Total District		7	178	186	287	−1	76	−102	−57	5
Total District		8	37	93	85	+7	52	+15	+41	6
Total District		9	3,589	1,813	1,789	−174	3,439	−150	−4	24
Total District		10	99	120	124	+5	100	+1	+1	10
Total Department	II		3,688	1,933	1,913	−169	3,539	−149	−4	23
Total Department	III		1,052	1,103	1,111	−13	1,028	−24	−2	11
Total Department	IV		330	459	511	−38	240	−90	−27	7
Total outside NYC			5,070	3,495	3,538	−220	4,807	−263	−5	17

*Weekly reporting period; last week of December ended on Friday, January 2, 1976.
[1] Total of new actions plus restorations plus transfers into these Courts from other courts.
Note: There are no County Courts in New York City.

Table 33
THE CIVIL COURT OF THE CITY OF NEW YORK
Actions and Special Proceedings Received[1]
by Type
and by County
January 1, 1975 through December 31, 1975

County	CIVIL ACTION PARTS — ACTIONS				HOUSING PART — ACTIONS & SPECIAL PROCEEDINGS TO:										Grand Total
	Tort	Commercial	Equity	Total	Impose Penalties	Recover Costs	Enforce Liens	Issue Injunctions	Appoint Receiver	Remove Violations of Record	Compel Compliance	Fuel Adjustment Pass Along	Article 7a Proceedings	Total	
Bronx[2]	5,405	1,218	0	6,623	87	16	0	24	2	0	49	5	14	197	6,820
Kings	15,912	5,655	1	21,568	131	1	0	0	2	0	148	2	11	295	21,863
New York	19,296	12,698	0	31,994	121	60	0	20	6	6	325	11	36	585	32,579
Queens	11,847	4,426	0	16,273	13	3	0	4	0	2	29	28	1	80	16,353
Richmond	880	572	0	1,452	12	0	0	0	0	8	0	0	0	20	1,472
Total New York City	53,340	24,569	1	77,910	364	80	0	48	10	16	551	46	62	1,177	79,087
Bronx Arbitration	1,113	756	0	1,869	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	

[1] Total of new actions and special proceedings plus restorations plus transfers from other Courts plus and/or minus transfers within Court.
[2] Not including Compulsory Arbitration.

Table 34
THE CIVIL COURT OF THE CITY OF NEW YORK
Actions and Special Proceedings Disposed of by Stage and Nature and by County
January 1, 1975 through December 31, 1975

A CIVIL ACTION PARTS

County	BEFORE TRIAL				DURING TRIAL		AFTER TRIAL		Interim Dispositions	Adjustments by Court	Total
	Settled, Discontinued or Dismissed	Default Judgment	Marked off Calendar[1]	Consent Judgment	Settled or Discontinued	Dismissed	Decision of Court	Verdict of Jury	Disagreement or Mistrial		
Bronx[2]	5,659	543	518	3	238	14	118	143	10		7,346
Kings	16,293	1,486	1,384	23	603	29	575	355	46		20,794
New York	23,296	2,498	2,942	49	369	54	1,402	510	46		31,166
Queens	11,238	1,002	2,887		340	24	342	212	58		16,103
Richmond	960	112	120	1	35	4	68	42	8		1,350
Total New York City	57,446	5,741	7,851	76	1,585	125	2,505	1,262	168		76,759
Bronx Arbitration											1,855

[1]Includes 15 cases that went to the military reserve calendar

[2]Not including Compulsory Arbitration

B HOUSING PART

County	BEFORE TRIAL			DURING TRIAL		AFTER TRIAL		Interim Dispositions	Adjustments by Court	Total
	Settled, Discontinued or Dismissed	Default Judgment	Marked off Calendar	Settled or Discontinued	Dismissed	Decision of Court	Verdict of Jury	Disagreement or Mistrial		
Bronx	45	22	19	41	1	37				165
Kings	128	12		40		85				265
New York	313	43		36	3	186				611
Queens	58	7	3	1		7				76
Richmond	19									19
Total New York City	593	84	72	118	4	315				1,136

TABLE 35

THE CIVIL COURT OF THE CITY OF NEW YORK

Actions and Special Proceedings Received, Disposed and Change in Pending and Projected Average Age by Part and by County

January 1, 1975 through December 31, 1975

County	Beginning Pending			Received[1]			Disposed			Adjustments by Court			Ending Pending[3]			Change in Pending						Projected Avg. (mos.)
																Numbers			Percent			
	Civil Action Parts	Housing Part	Total	Civil Action Parts	Housing Part	Total	Civil Action Parts	Housing Part	Total	Civil Action Parts	Housing Part	Total	Civil Action Parts	Housing Part	Total	Civil Action Parts	Housing Part	Total	Civil Action Parts	Housing Part	Total	Civil Action Parts
Bronx[2]	2,091	30	2,121	6,623	197	6,820	7,318	165	7,511		+13	+13	1,368	62	1,430	-723	+32	691	-35	+107	-33	3
Kings	3,593	10	3,603	21,568	295	21,863	20,794	265	21,059				4,367	53	4,420	+774	+43	+817	+22	+430	+23	2
New York	6,220	85	6,305	31,994	585	32,579	31,166	611	31,777				7,048	59	7,107	+828	-26	+802	+13	-31	+13	3
Queens	3,481	1	3,482	16,273	80	16,353	16,303	76	16,379				3,651	5	3,656	+170	+4	+174	+5	+400	+4	3
Richmond	512	0	512	1,452	20	1,472	1,450	19	1,469				614	1	615	+102	+1	+103	+20	0	+20	5
Total New York City	15,897	126	16,023	77,910	1,177	79,087	76,759	1,136	77,895		+13	+13	17,048	180	17,228	+1,151	+54	+1,205	+7	+43	+8	3
Bronx Arbitration	421			1,869			1,855						435									3

[1] Total of new actions and special proceedings plus restorations plus transfers from other Courts plus and/or minus transfers within Court

[2] Not including Compulsory Arbitration

[3] The ending pending actions of the Civil Action Parts consisted of 10,573 jury and 6,475 non jury; the ending pending actions and special proceedings of the Housing Part were 1 jury and 179 non jury

TABLE 36
THE CIVIL COURT OF THE CITY OF NEW YORK
Summary Proceedings Received, Disposed and Change in Pending by Calendar and by County
January 1, 1975 through December 31, 1975

County	Beginning Pending			Received[1]			Disposed			Adjustments by Court			Ending Pending[3]			Change in Pending					
																Numbers			Percent		
	Jury	Non-Jury	Total	Jury	Non-Jury	Total	Jury	Non-Jury	Total	Jury	Non-Jury	Total	Jury	Non-Jury	Total	Jury	Non-Jury	Total	Jury	Non-Jury	Total
Bronx[2]	15	1,565	1,580	−2	22,731	22,729	1	23,041	23,042	...	.....	...	12	1,255	1,267	−3	−310	−313	−20	−20	−20
Kings	65	1,551	1,616	133	23,755	23,888	50	22,537	22,587	...	−1,431	−1,431	148	1,338	1,486	+83	−213	−130	+128	−14	−8
New York	12	746	758	253	20,493	20,746	205	21,072	21,277	...	.....	...	60	167	227	+48	−579	−531	+400	−78	−70
Queens	3	52	55	8	7,647	7,655	7	7,577	7,584	...	.....	....	4	122	126	+1	+70	+71	+33	+135	+129
Richmond	1	32	33	1	801	802	2	814	816	...	.....	...	0	19	19	−1	−13	−14	−100	−41	−42
Total New York City	96	3,946	4,042	393	75,427	75,820	265	75,041	75,306	...	−1,431	−1,431	224	2,901	3,125	+128	−1,045	−917	+133	−26	−23

[1]Total of new summary proceedings plus restoration plus and/or minus transfers within Court.
[2]Not including Compulsory Arbitration.
[3]The ending pending jury proceedings consisted of 204 Housing Part and 20 Non-Housing, the ending pending non-jury summary proceedings were 2,374 Housing Part and 527 Non-Housing.

Table 37
THE CIVIL COURT OF THE CITY OF NEW YORK
Summary Proceedings Disposed of by Stage and Nature and by County
January 1, 1975 through December 31, 1975

County	BEFORE TRIAL					DURING TRIAL		AFTER TRIAL		Interim Dispositions	Adjustments by Court	Total
	Settled, Discontinued or Dismissed	Default-no Inquest	Inquest by Court	Marked off Calendar	Referred to Referree	Settled or Discontinued	Dismissed	Decision of Court	Verdict of Jury	Disagreement or Mistrial		
Bronx	12,822	5,747	113	128	....	1	14	4,217	....	....	....	23,042
Kings	11,463	3,696	466	35	3	1,894	339	4,689	2	4	- 4	22,587
New York	15,598	3,982	463	151	5	113	86	817	8	54	....	21,277
Queens	4,661	964	459	23	....	779	7	676	..	15	....	7,584
Richmond	399	59	43	2	....	....	....	312	1	....	....	816
Total New York City	44,943	14,448	1,544	339	8	2,787	446	10,711	11	73	- 4	75,306

Table 38
THE CIVIL COURT OF THE CITY OF NEW YORK
SPECIAL TERM PART I
Dispositions of Contested Motions by Nature and by Type
January 1, 1975 through December 31, 1975

Type of Motion	Total on Calendar	Ad-journed	With-drawn or Marked off Calendar	Granted	Denied
1. Summary judgment	7,062	2,402	569	2,755	1,337
2. Judgment on pleadings	1,412	502	190	479	240
3. Bring in additional parties	733	220	87	333	93
4. Examination before trial	6,793	2,318	651	2,998	826
5. Bills of particulars	18,109	4,476	2,317	10,519	797
6. Security for costs	425	115	64	183	63
7. Dismiss for lack of prosecution	3,071	1,157	363	1,285	266
8. Preference	55	14	15	14	12
9. Change of venue	471	138	38	232	63
10. Interpleader	162	37	17	83	25
11. Discontinue	287	86	46	117	38
12. Stay	411	95	39	200	77
13. Consolidated	2,249	498	133	1,404	214
14. Re-argue	577	118	33	248	178
15. Restore	6,283	1,381	291	3,807	804
16. Open default	3,599	966	232	2,102	299
17. Vacate notice of examination before trial	756	177	93	343	143
18. Vacate subpoena or order in enforcement proceedings	48	14	6	22	6
19. Appoint receiver	71	22	2	39	8
20. Direct payments out of income	269	74	34	133	28
21. Direct garnishee to turn over funds	486	78	37	322	49
22. Miscellaneous	11,491	3,793	1,082	4,996	1,620
Total New York City	64,820	18,681	6,339	32,614	7,186

Table 39
THE CIVIL COURT OF THE CITY OF NEW YORK

SPECIAL TERM PART II
Ex Parte Orders
by County
and by Type
January 1, 1975 through December 31, 1975

	Bronx	Kings	New York	Queens	Richmond	Total N.Y.C.
1. Orders to show cause signed	2,497	3,146	3,701	2,584	476	12,404
2. Action for recovery of a chattel	4,221	7,994	11,727	50	0	23,992
3. Orders for leave to compromise	3,524	2,345	1,059	1,791	273	8,992
4. Enforcement proceedings	831	669	3,061	1,031	176	5,768
5. Bonds and undertakings	90	7,994	539	0	29	8,652
6. Contempt motions	436	299	780	439	15	1,969
7. Hearings on sufficiency of service	160	311	625	44	6	1,146
8. Change of name	139	265	352	177	36	969
9. Orders of attachment issued	75	0	219	26	4	324
10. Warrants of seizure issued	91	0	361	0	0	452
11. Orders of arrest issued	0	0	9	0	0	9
12. Receivers appointed	0	0	0	1	0	1
13. Miscellaneous orders	3,310	7,220	19,310	3,005	581	33,426
Total Ex Parte Orders	15,374	30,243	41,743	9,148	1,596	98,104

Table 40

THE DISTRICT COURTS AND THE COURTS IN CITIES OUTSIDE THE CITY OF NEW YORK

CIVIL TERMS

Actions and Summary Proceedings Received and Disposed by District and Judicial Department

January 1, 1975 through December 31, 1975

	District and Department	Received[t]	Disposed
District	3	11,867	9,532
	4*	2,350	2,199
	5	8,057	7,995
	6	6,236	5,966
	7*	7,418	6,959
	8	18,642	18,922
	9*	11,821	12,140
	10	57,711	57,435
Department	II	69,532	69,575
	III	20,453	17,697
	IV	34,117	33,876
Total outside of NYC		124,102	121,148

[t]Total of new actions, summary proceedings, restorations, and transfers from other courts.

*Data incomplete from Glens Falls City Court and Saratoga Springs City Court in the Fourth District, Corning City Court in the Seventh District and from New Rochelle City Court in the Ninth District.

TABLE 41
THE DISTRICT COURTS
AND THE COURTS IN CITIES OUTSIDE
THE CITY OF NEW YORK — CIVIL PROCEEDINGS
Intake and Dispositions
January 1, 1975 through December 31, 1975

DEPARTMENT DISTRICT COUNTY	COURT	COURT		COUNTY TOTAL		DISTRICT TOTAL	
		IN	OUT	IN	OUT	IN	OUT
II 9 Dutchess	Beacon Municipal Ct	140	127				
	Poughkeepsie City Ct	1,261	1,127	1,397	1,254		
Orange	Middletown City Ct *	476	478				
	Newburgh City Ct	356	311				
	Port Jervis City Ct	79	78	811	771		
Westchester	Mt. Vernon City Ct *	2,006	2,075				
	New Rochelle City Ct *	761	1,160				
	Peekskill City Ct *	224	227				
	Rye City Ct	52	54				
	White Plains City Ct	310	294				
	Yonkers City Ct *	3,131	3,132				
	Yonkers Justice Ct	2,398	2,745	9,633	10,113	11,841	12,149
10 Nassau	Glen Cove City Ct	491	473				
	Long Beach City Ct *	861	863				
	Nassau County Dist. Ct *	29,282	29,145	30,614	30,581		
Suffolk	Suffolk County Dist. Ct *	27,067	26,954	27,067	26,954	57,711	57,535
III 3 Albany	Albany City Ct	4,888	4,856				
	Cohoes City Ct	182	190				
	Watervliet City Ct	59	68	5,108	5,114		
Columbia	Hudson City Ct	1,053	1,049	1,053	1,049		
Rensselaer	Rensselaer City Ct	78	78				
	Troy City Ct	5,710	5,173	5,788	5,251		
Ulster	Kingston City Ct	118	118	118	118	11,067	9,532
4 Clinton	Plattsburgh City Ct	164	152	169	152		
Fulton	Gloversville City Ct	77	72				
	Johnstown City Ct	14	8	90	80		
Montgomery	Amsterdam City Ct	323	269	323	269		
St. Lawrence	Ogdensburg City Ct	80	91	80	91		

Saratoga	Mechanicville City Ct	[illegible]	[illegible]	[illegible]	[illegible]		
	Saratoga Springs City Ct [1]	[illegible]	[illegible]	[illegible]	[illegible]		
Schenectady	Schenectady City Ct	3,113	3,113	3,113	3,113		
Warren	Glens Falls City Ct [1]	119	76	119	76	2,124	2,124
Broome	Binghamton City Ct	3,450	3,450	3,450	3,450		
Chemung	Elmira City Ct	1,963	[illegible]	1,963	[illegible]		
Chenango	Norwich City Ct	213	162	213	162		
Cortland	Cortland City Ct	330	328	330	328		
Madison	Oneida City Ct	0	0				
	Oneida Justice Ct	73	73	73	73		
Otsego	Oneonta City Ct	93	93	93	93		
Tompkins	Ithaca City Ct	203	203	203	203	8,236	8,236
Herkimer	Little Falls City Ct	26	29	26	29		
Jefferson	Watertown City Ct	870	867	870	867		
Oneida	Rome City Ct *	0	0				
	Sherrill City Ct	0	0				
	Utica City Ct *	1,442	1,295	1,442	1,295		
Onondaga	Syracuse Municipal Ct *	5,631	5,631	5,631	5,631		
Oswego	Fulton City Ct	93	90				
	Oswego City Ct	90	90	183	180	8,062	8,000
Cayuga	Auburn City Ct	699	642	699	642		
Monroe	Rochester City Ct *	6,564	6,753	6,564	6,753		
Ontario	Canandaigua City Ct	87	91				
	Geneva City Ct	49	50	136	141		
Steuben	Corning City Ct [1]	21	19				
	Hornell City Ct	8	4	29	23	7,418	6,959
Cattaraugus	Olean City Ct	476	466				
	Salamanca City Ct	149	124	625	590		
Chautauqua	Dunkirk City Ct	920	775				
	Jamestown City Ct	2,700	2,685	3,620	3,460		
Erie	Buffalo City Ct * [2]	12,119	12,616				
	Lackawanna City Ct	781	819				
	Tonawanda City Ct	416	449	13,016	13,944		
Genesee	Batavia City Ct	213	207	213	207		
Niagara	Lockport City Ct	176	208				
	Niagara Falls City Ct *	913	859				
	North Tonawanda City Ct	361	294	1,450	1,362	18,612	18,922
	TOTAL OUTSIDE N Y C	124,102	121,138	124,102	121,138	124,102	121,138

*These courts consider as incoming cases either those in which issue has been joined or those in which notice of trial or inquest has been filed, in addition to small claims and summary proceedings where such cases are handled by the court. All of the other courts list as cases as before the court when a summons is issued.

[1] Data incomplete from Glens Falls City Court and Saratoga Springs City Court in the Fourth District, Corning City Court in the Seventh District and from New Rochelle City Court in the Ninth District.

[2] Includes cases disposed by the Court in which notice of trial or inquest had not been filed. These cases were settled, discontinued or dismissed on call.

[3] The jurisdiction of the Oneida Justice Court is limited to civil matters; the Oneida City Court exercised only its criminal jurisdiction.

Table 42
THE SURROGATES' COURTS
Proceedings by Type and by County, District and Judicial Department
January 1, 1975 through December 31, 1975

Court	PROBATE PROCEEDINGS							ADMINISTRATOR PROCEEDINGS		ACCOUNTING PROCEEDINGS*			GUARDIANSHIP PROCEEDINGS		ADOPTION PROCEEDINGS	OTHER PROCEEDINGS	
	Petitions for probate of wills	Wills admitted to probate where no objections filed	Wills rejected after inquiry (1408 S C P A)	Wills Admitted Where Objections Filed: Objections withdrawn, settled or dismissed: Before trial	Wills Admitted Where Objections Filed: Objections withdrawn, settled or dismissed: During trial	Wills Admitted Where Objections Filed: After trial of objections	Wills rejected after trial of objections	Letters issued upon wills	Letters of administration granted	Affidavits filed for settlement of small estates	Voluntary accountings filed	Petitions for compulsory accountings	Decrees on accountings	Letters of guardianship granted	Contested guardianship trials	Orders of adoption granted	Orders of compromise re death actions	Other contested matters tried
FIRST DEPT.																	
1. Bronx	1,395	1,217	0	4	2	0	0	1,596	1,131	531	185	62	259	320	3	213	60	111
New York	4,158	3,453	8	26	5	7	7	1,986	2,015	365	1,982	120	1,336	363	1	192	167	849
Total 1st Department	5,553	4,670	8	30	7	7	7	6,582	3,146	896	1,567	182	1,595	696	4	405	227	960
SECOND DEPT.																		
2. Kings	3,328	3,055	7	9	0	56	0	3,502	2,171	661	734	76	649	714	24	340	179	122
Richmond	485	464	1	4	3	0	0	514	249	63	42	6	27	98	0	91	20	33
9. Dutchess	548	506	0	6	0	0	0	592	221	70	159	5	131	90	0	17	31	20
Orange	706	648	0	4	0	0	0	752	216	66	86	2	86	67	0	16	18	1
Putnam	126	127	0	0	0	0	0	137	40	14	12	0	14	24	0	39	1	10
Rockland	372	362	0	2	0	0	0	160	125	48	28	5	26	91	0	71	12	0
Westchester	2,228	2,270	3	23	0	1	1	2,625	560	247	345	39	271	296	7	79	55	2
10. Nassau	3,225	3,020	0	26	6	2	0	3,294	918	235	380	63	270	871	0	473	121	84
Suffolk	1,989	1,993	0	15	0	1	1	2,275	751	224	282	13	163	313	0	387	66	16
11. Queens	3,595	3,559	0	22	0	17	0	1,196	1,839	189	577	18	309	375	0	238	194	0
Total 2nd Department	16,602	16,004	12	111	9	77	2	18,287	7,090	2,116	2,640	227	1,977	2,729	25	1,471	709	287
THIRD DEPT.																		
3. Albany	787	862	0	0	0	0	0	862	286	134	226	4	207	106	0	69	17	0
Columbia	207	180	0	0	0	0	0	216	80	17	50	1	51	10	0	1	3	7
Greene	132	144	0	0	0	0	0	145	52	20	38	0	32	6	0	3	7	0
Rensselaer	440	440	0	0	0	0	0	361	150	58	117	0	117	39	0	51	5	0
Schoharie	94	94	0	0	0	0	0	94	37	18	27	0	23	3	0	0	2	1
Sullivan	258	251	0	2	0	0	0	252	121	23	30	0	38	29	0	0	2	12
Ulster	632	474	0	0	0	0	0	485	133	66	180	19	114	19	0	42	18	0

4. Clinton	159	159	0	0	0	0	0	147	57	26	14	1	4	26	0	66	4	1
Essex	119	124	0	0	0	2	1	137	32	11	6	3	10	6	0	1	4	1
Franklin	116	122	0	0	0	12	0	126	50	14	30	0	34	–	0	36	2	2
Fulton	192	194	0	0	0	0	0	207	60	22	41	4	15	16	0	23	3	0
Hamilton	30	27	0	0	0	0	0	32	6	3	11	0	6	0	0	5	1	0
Montgomery	209	206	0	0	0	0	0	215	66	30	75	3	73	16	0	28	4	0
St. Lawrence	273	234	0	0	0	0	0	299	129	36	128	2	128	26	0	87	1	610
Saratoga	319	302	0	2	0	0	0	325	122	61	86	0	60	46	0	75	19	0
Schenectady	507	510	0	13	3	0	0	539	178	90	169	9	118	52	0	16	9	17
Warren	203	202	0	0	0	0	0	220	89	7	284	1	291	25	0	5	1	4
Washington	160	160	0	0	0	0	0	162	65	11	17	1	45	19	1	7	4	0
6. Broome	532	528	0	3	0	0	0	587	130	50	260	7	156	38	0	0	0	0
Chemung	331	328	1	0	0	0	0	353	86	38	84	4	80	24	0	0	3	2
Chenango	193	180	0	1	0	0	0	182	41	20	36	0	47	13	0	0	3	1
Cortland	176	176	0	0	0	0	0	176	32	16	17	3	18	0	0	0	0	0
Delaware	240	233	1	1	0	0	1	245	60	23	17	0	107	10	0	0	2	0
Madison	224	223	0	0	1	1	1	256	61	11	51	1	35	6	0	0	4	2
Otsego	228	237	0	1	0	0	0	270	50	28	54	0	52	2	0	3	1	1
Schuyler	66	51	0	0	0	0	0	65	22	17	12	1	26	1	0	0	0	0
Tioga	103	103	0	1	0	0	0	97	43	1	3	1	24	17	0	0	2	0
Tompkins	260	222	0	0	0	0	0	245	51	8	35	0	55	1	0	0	4	0
Total 3rd Department	7,190	6,966	2	24	1	15	1	7,488	2,246	838	2,211	83	2,050	689	1	528	14	694
FOURTH DEPT																		
5. Herkimer	246	237	0	1	0	0	0	264	71	31	67	3	30	16	0	0	1	1
Jefferson	269	255	0	1	0	0	0	293	70	1	31	13	29	19	0	0	0	5
Lewis	84	84	0	0	0	0	0	95	27	0	20	0	24	3	0	0	0	0
Oneida	865	888	0	2	1	1	0	908	247	37	147	8	147	63	0	113	15	0
Onondaga	1,388	1,416	1	3	0	4	0	1,525	423	240	342	7	240	130	0	0	11	52
Oswego	248	237	0	0	0	0	0	267	66	28	122	2	111	24	0	2	13	2
7. Cayuga	270	271	0	3	0	1	0	269	73	13	141	7	130	20	0	36	8	6
Livingston	192	188	0	0	0	0	0	193	35	10	21	0	17	18	0	2	4	0
Monroe	2,168	2,191	0	36	6	0	0	2,286	185	226	687	9	309	252	0	120	23	11
Ontario	324	315	0	0	0	0	0	317	81	42	75	2	73	26	0	14	10	0
Seneca	110	109	0	0	0	0	0	107	31	21	38	2	45	13	0	0	0	3
Steuben	328	329	0	0	0	0	0	334	111	15	54	3	52	29	0	26	5	10
Wayne	256	249	0	0	0	0	0	259	55	28	51	0	118	10	0	83	8	0
Yates	138	138	0	0	0	0	0	138	28	1	21	0	22	5	0	0	1	0
8. Allegany	154	156	0	0	0	0	0	156	58	9	55	0	55	14	0	0	1	0
Cattaraugus	276	276	0	1	0	0	0	317	120	22	110	3	139	30	0	7	17	33
Chautauqua	512	512	0	0	0	0	0	633	132	60	127	5	121	59	0	83	11	12
Erie	2,739	3,305	11	19	7	4	2	3,195	1,058	636	1,655	11	689	666	5	334	82	381
Genesee	237	223	0	1	0	0	0	228	50	11	62	0	60	9	0	29	3	0
Niagara	805	765	0	0	0	0	0	765	268	89	277	2	277	83	0	39	16	0
Orleans	134	133	0	0	0	0	0	136	46	7	16	0	15	21	0	0	5	0
Wyoming	140	141	0	0	0	0	0	147	46	5	47	1	47	11	0	0	5	1
Total 4th Department	11,833	12,418	12	67	14	10	2	13,162	3,586	1,555	4,251	113	2,825	1,181	14	998		550
Total State	41,228	40,058	34	232	31	109	11	15,519	16,071	5,105	10,675	635	8,447	5,189	44	3,605	1,373	2,191

*Includes accountings filed in small estates

[1]There were 7,412 where no objections were filed and 1,035 where objections were withdrawn, settled or dismissed – 655 before trial, 224 during trial and 156 after trial

[2]In addition, 9 letters of guardianship were denied

[3]In addition, 40 petitions for adoption were denied, dismissed or withdrawn

Table 43
Original and Petitions Added, Deducted Type of
January 6, 1975 through

		New York City						
				Petitions Deducted During Period				
Original Case Prefix	Type of Proceeding	Petitions Actively Pending at Beginning of Period	Petitions Added During Period	Withdrawn or Dismissed	Other Deductions	Total	Recount Adjustment	Petitions Actively Pending at End of Period
B	Permanent Neglect	200	294	66	284	350	50	294
N	Child Protective—Neglect	5,720	4,252	1,506	6,231	7,867	527	1,618
N	Child Protective—Abuse	371	787	93	329	422	186	722
D	Juvenile Delinquency	6,382	12,843	6,540	9,785	16,321	616	3,522
S	Person in Need of Supervision	1,005	5,817	2,622	5,694	8,316	1,563	1,089
A	Adoption	270	731	18	574	592	219	190
G	Guardianship	176	125	25	324	349	−70	182
R	Supreme Court Referral	179	242	102	250	352	140	109
V	Custody of Minors	323	2,056	633	821	1,454	−224	721
K	Foster Care Review	2,610	3,836	125	2,396	2,521	−2,337	1,588
L	Approval Foster Care Placement	699	5,523	100	5,497	5,597	232	857
H	Physically Handicapped	311	3,959	69	3,681	3,750	104	449
Q	Mental Defective	2	1	4	11	15	12	0
O	Family Offense	2,360	7,287	1,159	1,431	8,584	−43	1,980
P	Paternity	8,889	9,606	5,188	6,005	11,193	−5,642	1,360
F	Support	9,842	20,744	17,109	16,187	33,296	5,482	2,777
U	Uniform Support of Dependent's Law	5,801	8,442	7,317	6,672	13,989	982	1,836
M	Consent to Marry	14	263	346	173	519	227	15
—	Supplementary (Viols./Mods. of Orders/Disp.)	4,340	11,245	670	7,238	7,908	−8,525	5,162
C,W	Other	6	139	632	5,784	6,416	5,962	1
	Total	50,108	102,884	47,801	79,450	127,251	−2,229	23,572

*Weekly reporting periods began on the first Monday of one year and ended on the Sunday preceding the first Monday of the following year

FAMILY COURT
Supplementary Petitions and Actively Pending, by Proceeding
*January 4, 1976**

Upstate New York							New York State						
		Petitions Deducted During Period							Petitions Deducted During Period				
Petitions Actively Pending at Beginning of Period	Petitions Added During Period	Withdrawn or Dismissed	Other Deductions	Total	Recount Adjustment	Petitions Actively Pending at End of Period	Petitions Actively Pending at Beginning of Period	Petitions Added During Period	Withdrawn or Dismissed	Other Deductions	Total	Recount Adjustment	Petitions Actively Pending at End of Period
206	523	119	375	486	6	251	196	918	176	659	835	56	545
1,874	2,741	995	2,923	3,918	21	718	7,594	6,973	2,591	9,134	11,725	−506	2,336
236	484	119	396	515	−50	155	407	1,271	212	725	937	146	877
3,886	11,276	3,899	9,728	13,627	819	2,334	10,248	24,121	10,435	19,513	29,948	1,435	5,856
1,646	6,403	1,802	6,890	8,692	1,465	822	3,641	12,260	4,424	12,581	17,008	3,028	1,911
1,516	3,029	117	3,234	3,351	−115	879	1,586	3,769	135	3,808	3,943	−334	1,089
32	177	10	136	146	−7	61	213	602	35	460	495	−77	243
350	1,107	251	1,097	1,348	−2	87	529	1,349	453	1,147	1,600	118	196
862	3,701	1,155	2,215	3,370	−344	851	1,185	5,780	1,788	3,036	4,824	−569	1,572
611	2,905	90	2,986	3,076	156	596	3,221	6,741	215	5,382	5,597	−2,181	2,184
631	3,752	143	3,867	4,010	96	469	1,330	7,273	243	7,364	7,607	328	1,326
345	3,426	63	2,329	2,383	−719	669	689	7,585	132	6,001	6,133	−823	1,118
0	7	11	10	21	18	4	2	8	15	21	36	30	4
2,943	15,899	7,622	8,598	16,220	−243	2,479	5,403	23,136	11,772	13,032	24,804	−276	3,459
5,419	11,256	2,505	10,197	12,702	102	4,375	14,068	20,862	7,693	16,202	23,895	−5,240	5,735
8,950	26,641	10,275	20,528	30,853	1,775	6,503	18,797	47,375	27,384	36,765	64,149	7,257	9,280
4,102	14,945	3,055	11,827	14,882	1,934	2,429	9,903	24,385	10,772	17,499	28,271	−952	4,065
13	239	37	218	255	10	37	57	502	385	391	774	267	52
6,846	58,977	11,031	51,314	62,345	8,636	11,914	10,996	76,222	11,701	58,552	70,253	111	17,076
375	4,611	536	8,047	8,583	4,264	667	381	5,060	1,168	13,831	14,999	10,226	668
49,428	172,091	43,826	140,956	190,782	14,263	36,000	90,596	271,975	91,627	226,106	318,033	12,034	59,572

Table 44
FAMILY COURT
Court Findings in Child Protective Proceedings, by Sex
January 1, 1975 through December 31, 1975

Region County	BOYS							GIRLS						
	Total	Court Findings at Dispositional Hearing				Court Findings Based on		Total	Court Findings at Dispositional Hearing				Court Findings Based on	
		Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties		Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties
Total New York State	3,186	122	1,526	21	1,517	1,438	1,748	3,251	196	1,520	33	1,502	1,452	1,799
Total New York City	1,740	86	911	15	728	878	862	1,684	133	829	28	691	845	839
New York	428	1	255	12	160	239	189	411	7	228	20	186	219	222
Kings	367	34	219		114	171	196	369	57	208	1	103	177	192
Queens	338	13	176	1	148	150	188	298	17	168		113	132	166
Bronx	528	32	233	2	261	283	215	522	48	211	7	256	298	224
Richmond	79	6	28		45	35	14	54	4	14		36	19	35
Total Upstate	1,446	36	615	6	789	560	886	1,567	63	691	5	808	607	960
Albany	24	3	21			21		35	1	34			35	
Allegany	2				2		2	3				3		3
Broome	35		10		25	30	5	37		10		27	33	4
Cattaraugus	17		8		9	9	8	22	1	6		15	12	10
Cayuga	6			1	5	3	3	6			1	5	2	4
Chautauqua	33		21		9	10	23	43		24		20	10	33
Chemung	31	1	8		22	10	21	29	3	14		10	18	11
Chenango	12		8		4	9	3	7	1	1		2	6	1
Clinton	15		8		7	13	2	23	1	14		8	20	3
Columbia	5		1		1		5	4	2	1		1	2	2
Cortland	3		2		1		3	2		2				2

Delaware	8	1	4		3	5	3	21		11		10	10	11
Dutchess	33		7		26	6	27	59	1	16		39	16	43
Erie	119	2	106		11	63	86	158	1	113		41	80	78
Essex	2		2				2	6		3		3	2	4
Franklin	30		15		15	14	16	19		11		8	8	11
Fulton	23	1	11		11	5	18	25		12		11	5	21
Genesee	14		1		13		14	18	1			17	1	17
Greene	4				4		4	10		3		7	3	7
Hamilton	3				3	2	1							
Herkimer	6		3		3	1	5	5		3		2	1	1
Jefferson	19	1	1		17	2	17	20	2	5		13	3	17
Lewis	5		1		1	1	1	3		3			3	
Livingston	1		2		2	2	2	8	5	1		2	6	2
Madison	2				2	2		4		3		1	4	
Monroe	40		18		22	23	17	74		33		41	15	29
Montgomery	12				12		12	9				9		9
Nassau	112	1	95	1	15	24	88	138		118	2	18	22	116
Niagara	27	2	17		8	9	18	22	5	10		7	10	12
Oneida	26	1	9		13	16	10	21	6	4		11	11	10
Onondaga	123	11	31		81	33	90	93	7	19		67	21	72
Ontario	8		5		3	6	2	11	2	5		4	6	5
Orange	22	1	8		13	8	14	35	2	10		23	11	21
Orleans														
Oswego	52		31		21	30	22	26	3	11		12	13	13
Otsego	10		8		2	7	3	6		4		2	4	2
Putnam	4				4		4	3		1		2	1	2
Rensselaer	12	1	6		5	7	5	20	3	5		12	9	11
Rockland	8	1	2		5	3	5	16		5		11	6	10
St. Lawrence	54		23	3	28	27	27	61		20	2	39	25	36
Saratoga	17		6		11	6	11	16	1	4		11	5	11
Schenectady	32		13		19	6	26	25		16		9	2	23
Schoharie	12		5		7	1	11	12		7		5	4	8
Schuyler														
Seneca	8		1		7	5	3	6		2		4	3	3
Steuben	50		5		15	19	31	53		5		48	18	35
Suffolk	158		23		135	59	99	146	1	12		133	43	103
Sullivan	13		3		10	3	10	9	1	3		5	3	6
Tioga	12	1	8		3	7	5	19	1	14		4	5	14
Tompkins	7		6		1	6	1	6		5		1	6	
Ulster	12		1	1	10		12	17		1		13	1	16
Warren	4				4	2	2	6		1		5	2	4
Washington	13	2	7		5	2	11	23	1	15		7		23
Wayne	9		2		7		9	16	2	12		2	11	5
Westchester	96	3	32		61	29	67	99	1	51		47	27	72
Wyoming	6				6	6		7		1		6	6	1
Yates	2		1		1	2		4		2		2	4	

Table 45
FAMILY COURT
The Age of Children in Child Protective Proceedings Involving Child Abuse (Boys Only)
Child's Age When Petition Filed (Last Birthday)
January 1, 1975 through December 31, 1975

Region / County	Total	Under 1	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16 or Over	Not Known
Total New York State	511	40	48	38	39	38	23	33	24	26	32	28	26	30	30	22	12	3	19
Total New York City	348	32	26	25	21	29	14	22	16	21	25	15	19	18	23	12	10	3	17
New York	37	5	7	..	2	5	1	3	...	1	1	.	2	2	3	2			
Kings	75	5	9	5	3	7	3	2	2	4	4	6	1	2	9	4	1	1	4
Queens	37	5	...	4	...	4	2	4	5	2	2	1	2	...	1	1	.	...	1
Bronx	183	15	10	15	16	13	6	11	9	10	16	8	10	13	8	5	7	2	9
Richmond	16	2	.	1	...	..	2	2	...	1	2	.	1	1	2	.	2	...	.
Total Upstate	163	8	22	13	18	9	9	11	8	5	7	13	7	12	7	10	2	.	2
Albany	3	...	1	...	...	1	...	...	...	...	...	1	...	...	...	...	...	...	...
Allegany	2	1	...	...	...	...	1	...	...	...	...	...	...	...	...	...	...	...	...
Broome	2	...	...	...	...	...	...	...	...	1	...	...	...	...	...	...	...	...	1
Cattaraugus	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Cayuga	2	...	2	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Chautauqua	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Chemung	3	...	...	..	1	...	1	...	...	...	...	1	...	...	1	1	...	...	...
Chenango	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Clinton	1	...	1	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Columbia	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Cortland	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Delaware	1	...	1	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Dutchess	8	4	1	...	...	...	...	1	...	...	...	1	1	...	...	...	...	...	...
Erie	26	1	5	4	5	1	1	1	1	1	1	1	1	...	3	...	...	...	...
Essex	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Franklin	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Fulton	2	...	1	...	...	...	...	...	1	...	...	...	...	...	...	...	...	...	...

Genesee	6		1	1				1			1	1						1						
Greene																								
Hamilton																								
Herkimer																								
Jefferson	2			1			1																	
Lewis																								
Livingston																								
Madison																								
Monroe	1				1																			
Montgomery																								
Nassau	2													2										
Niagara	3		1	1					1															
Oneida	17	1		1	2	1	2	2	1	1	1	2	1		2									
Onondaga	26		3	3	3	3		3	1		3	1			3	1		1					1
Ontario	1								1															
Orange	8	1	2		1		2					1					1							
Orleans																								
Oswego	1							1	2	1														
Otsego	1																1							
Putnam																								
Rensselaer	3										1						2							
Rockland	2																2							
St. Lawrence	6		3	1			1								1									
Saratoga																								
Schenectady	3					1						1				1								
Schoharie																								
Schuyler																								
Seneca	1														1									
Steuben	1			1																				
Suffolk	12				5	1		1		1		2			2									
Sullivan	2														2									
Tioga	2															1	1							
Tompkins																								
Ulster	2													1	1									
Warren																								
Washington	2																2							
Wayne																								
Westchester	3					1						1	1											
Wyoming	1							1																
Yates																								

Table 46
FAMILY COURT
The Age of Children in Child Protective Proceedings Involving Child Abuse (Girls Only)
Child's Age When Petition Filed (Last Birthday)
January 1, 1975 through December 31, 1975

Region County	Total	Under 1	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16 or Over	Not Known
Total New York State	677	49	29	32	33	25	44	30	47	38	37	40	31	37	58	51	54	29	13
Total New York City	414	31	17	22	16	17	31	22	30	25	24	28	18	18	33	27	21	23	11
New York	65	6	3	6	1	1	2	6	4	1	3	8	1	2	6	6	2	3	1
Kings	101	6	3	4	3	1	6	1	7	9	5	7	1	1	7	5	5	11	7
Queens	16	1	2	2	2	1	1	1	2	1	1	5	1	3	1	6	1	3	. .
Bronx	190	17	9	10	7	8	18	11	15	13	12	7	12	9	15	7	11	6	3
Richmond	12	1	. .	. .	. .	. .	1	. .	2	1	. .	1	. .	. .	1	3	2	. .	. .
Total Upstate	263	18	12	10	17	8	13	8	17	13	13	12	13	19	25	24	33	6	2
Albany	1	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Allegany	3	. .	1	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .
Broome	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	1	. .	. .
Cattaraugus	3	. .	1	. .	1	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .
Cayuga	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .	. .	. .
Chautauqua	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Chemung	9	. .	. .	. .	1	. .	. .	. .	1	. .	1	. .	. .	2	1	2	1	. .	. .
Chenango	1	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Clinton	5	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	2	1	. .	. .
Columbia	3	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	2	. .	. .
Cortland	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Delaware	5	. .	. .	1	. .	1	. .	. .	. .	. .	. .	. .	1	1	. .	1	. .	. .	. .
Dutchess	23	2	2	1	. .	. .	. .	. .	1	1	3	2	1	2	1	1	3	3	. .
Erie	36	3	1	1	3	2	3	1	3	2	2	1	2	. .	3	2	3	. .	1
Essex	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .
Franklin	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Fulton	2	. .	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	1	. .	. .

Genesee	1																1						
Greene	2									1	1												
Hamilton																							
Herkimer																							
Jefferson	6				1		1								2	2							
Lewis																							
Livingston	6					1		1			2		1			1							
Madison																							
Monroe	7		1						1	1		2				1	1						
Montgomery																							
Nassau	8								2			1			2			3					
Niagara	8		1					1		1	1				1		1	2					
Oneida	11			1	1	2	1			1						1	1	3					
Onondaga	20	1		2	1	2	4		1		1		2					2					1
Ontario	4									1	1				1		1						
Orange	16	2	1		1					1	1					3	2	2		1			
Orleans																							
Oswego	7								2								2						
Otsego																							
Putnam																							
Rensselaer	12							1	1	1		1	1	2	1	2	2						
Rockland	1													1									
St. Lawrence	3			2													1						
Saratoga	5							1		1	1	1				1							
Schenectady	7	1						1	1	1			1				2						
Schoharie																							
Schuyler																							
Seneca	2				1											1							
Steuben	1												1	1	1			1					
Suffolk	17	2	1	1	2			1	2	1		1	1	1		1	2		1				
Sullivan	5	1			1		1	1										1					
Tioga	2															2							
Tompkins																							
Ulster	1													1									
Warren	1													1									
Washington	3						1											1		1			
Wayne	2															1	1						
Westchester	4				2							2											
Wyoming	5	1					1		1			1				1							
Yates	1						1																

Table 47
FAMILY COURT
Reasons for Petitions in Child Protective Proceedings Involving Child Abuse (Boys Only)
January 1, 1975 through December 31, 1975

Region County	Total Reasons (Child Abuse Only)*	REASONS FOR PETITIONS													
		Child Abuse			Neglected Child										
		Physical Abuse	Risk of Physical Injury	Sex Offense against Child	Impairment of Mental, Emotional or Physical Health	Inadequate Food, Shelter or Clothing	Inadequate Educational Care	Inadequate Medical or Surgical Care	Abandonment or Desertion	Parental Use of Drugs	Parental Alcoholism	Parental Sexual Misconduct	Parental Mental Illness	Parental Fighting	Other
Total New York State	142	99	15	28	26	10	6	3	1	1	9	1	8		1
Total New York City	101	72	13	19	17	9	5	1	1	1	9		8		
New York	16	9	2	5	3	2				2	1		1		
Kings	39	24	1	5	8	1	3				2		3		
Queens	11	7	2	2	1				1						
Bronx	11	26	8	7	2	6	2	1		2	3		4		
Richmond	6	6													
Total Upstate	38	27	2	9	9	1	1	2				1			1
Albany	3	3			2										
Allegany															
Broome															
Cattaraugus															
Cayuga	1	1													
Chautauqua															
Chemung	1	1													
Chenango															
Clinton															
Columbia															
Cortland															

Delaware	1	1													
Dutchess															
Erie	2	2													
Essex															
Franklin															
Fulton	1	1													
Genesee															
Greene															
Hamilton															
Herkimer															
Jefferson	1	1													
Lewis															
Livingston															
Madison															
Monroe															
Montgomery															
Nassau					2	1	1								
Niagara	2			2											
Oneida	4	2		2											
Onondaga	11	8	2	1								1			
Ontario															
Orange	2	1		1											
Orleans															
Oswego															
Otsego															
Putnam															
Rensselaer	1			1											
Rockland	1	1													
St. Lawrence	2	2			1			2							1
Saratoga															
Schenectady															
Schoharie															
Schuyler															
Seneca															
Steuben															
Suffolk															
Sullivan															
Tioga	1	1													
Tompkins															
Ulster					1										
Warren															
Washington	2			2											
Wayne															
Westchester	2	2			3										
Wyoming															
Yates															

*Due to the reporting of multiple reasons for petitions, the number of reasons exceeds the number of petitions reported as initially disposed

Table 48
FAMILY COURT
Reasons for Petitions in Child Protective Proceedings Involving Child Abuse (Girls Only)
January 1, 1975 through December 31, 1975

Region County	Total Reasons (Child Abuse Only)*	REASONS FOR PETITIONS													
		Child Abuse			Neglected Child										
		Physical Abuse	Risk of Physical Injury	Sex Offense against Child	Impairment of Mental, Emotional Or Physical Health	Inadequate Food, Shelter Or Clothing	Inadequate Educational Care	Inadequate Medical or Surgical Care	Abandonment or Desertion	Parental Use of Drugs	Parental Alcoholism	Parental Sexual Misconduct	Parental Mental Illness	Parental Fighting	Other
Total New York State	221	108	27	89	38	12	10	1		8	13	1	5		1
Total New York City	155	90	23	42	29	12	10	1		8	13		3		
New York	28	18	2	8	3	1				1	1		1		
Kings	50	21	10	16	19	1	7	1			8		2		
Queens	17	10	2	5	2										
Bronx	56	41	9	13	3	7	3	2		7	1		1		
Richmond	1	1													
Total Upstate	69	18	1	47	9			1				1			1
Albany	1	1													
Allegany															
Broome															
Cattaraugus	1			1											
Cayuga	1	1													
Chautauqua															
Chemung	5	2		3											
Chenango	1	1													
Clinton	1			1											
Columbia	2			2											
Cortland															

Delaware																
Dutchess	4			4												
Erie	4	1		3	1											
Essex																
Franklin																
Fulton																
Genesee	1			1												
Greene																
Hamilton																
Herkimer																
Jefferson	2	1		1												
Lewis																
Livingston	5	1	1	3												
Madison																
Monroe																
Montgomery																
Nassau	1			1	2											
Niagara	5			5												
Oneida	6			6												
Onondaga	8	3	2	3	1											
Ontario	3	1	1	1	1											
Orange	4	2		2												
Orleans																
Oswego	3			3												
Otsego																
Putnam																
Rensselaer	3			3												
Rockland																
St. Lawrence	1	1			1			1								1
Saratoga	1	1														
Schenectady																
Schoharie																
Schuyler																
Seneca																
Steuben																
Suffolk	1	1														
Sullivan	1	1														
Tioga	1			1												
Tompkins																
Ulster																
Warren																
Washington	1			1												
Wayne	2			2	3								1			
Westchester	1				1											
Wyoming																
Yates																

*Due to the reporting of multiple reasons for petitions, the number of reasons exceeds the number of petitions reported as initially disposed.

Table 49
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Boys Only)
Types of Petitioners
January 1, 1975 through December 31, 1975

Region County	Total	PETITION ORIGINATED BY													
		Respondent's Parent	Respondent's Child	Respondent's Spouse or Former Spouse	Other Members of Respondent's Family or Household	Corporation Counsel/ County Attorney	Assistant District Attorney	Police or Peace Officer	Public Social Services Agency	Public Health Agency	Authorized Private Agency	School (On Court's Motion)	Hospital (On Court's Motion)	Private Medical Doctor (On Court's Motion)	Other
Total New York State	511	9	3	28	2	8	.....	13	407	2	20	.....	.....	.....	19
Total New York City	348	8	.....	23	2	8	.....	11	258	2	18	.....	.....	.....	18
New York	37	3	.....	.....	.....	.....	.....	1	30	.....	1	.....	.....	.....	2
Kings	75	.....	.....	.....	.....	.....	.....	2	57	.....	16	.....	.....	.....	.....
Queens	37	.....	.....	2	.....	.....	.....	.....	34	.....	1	.....	.....	.....	.....
Bronx	183	3	.....	16	2	8	.....	7	129	2	.....	.....	.....	.....	16
Richmond	16	2	.....	5	.....	.....	.....	1	8	.....	.....	.....	.....	.....	.....
Total Upstate	163	1	3	5	.....	.....	.....	2	149	.....	2	.....	.....	.....	1
Albany	3	.....	2	.....	.....	.....	.....	.....	1	.....	.....	.....	.....	.....	.....
Allegany	2	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	.....	.....	1
Broome	2	.....	.....	.....	.....	.....	.....	.....	2	.....	.....	.....	.....	.....	.....
Cattaraugus	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Cayuga	2	.....	.....	.....	.....	.....	.....	.....	2	.....	.....	.....	.....	.....	.....
Chautauqua	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Chemung	5	.....	.....	.....	.....	.....	.....	.....	5	.....	.....	.....	.....	.....	.....
Chenango	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Clinton	1	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	.....	.....	.....
Columbia	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Cortland	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Delaware	1	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	.....	.....	.....
Dutchess	8	.....	.....	.....	.....	.....	.....	.....	8	.....	.....	.....	.....	.....	.....

Erie	26								26							
Essex																
Franklin																
Fulton	2								2							
Genesee	6								6							
Greene																
Hamilton																
Herkimer																
Jefferson	2								2							
Lewis																
Livingston																
Madison																
Monroe	1								1							
Montgomery																
Nassau	2								2							
Niagara	3								3							
Oneida	17								17							
Onondaga	26								26							
Ontario	1								1							
Orange	8								8							
Orleans																
Oswego	4		1	2					1							
Otsego	1								1							
Putnam																
Rensselaer	3								3							
Rockland	2								2							
St. Lawrence	6								6							
Saratoga																
Schenectady	3								3							
Schoharie																
Schuyler																
Seneca	1								1							
Steuben	1								1							
Suffolk	12	1		3			1		5		2					
Sullivan	2						1		1							
Tioga	2								2							
Tompkins																
Ulster	2								2							
Warren																
Washington	2								2							
Wayne																
Westchester	3								3							
Wyoming	1								1							
Yates																

Table 50
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Girls Only)
Types of Petitioners
January 1, 1975 through December 31, 1975

Region County	Total	PETITION ORIGINATED BY													
		Respondent's Parent	Respondent's Child	Respondent's Spouse or Former Spouse	Other Members of Respondent's Family or Household	Corporation Counsel/ County Attorney	Assistant District Attorney	Police or Peace Officer	Public Social Services Agency	Public Health Agency	Authorized Private Agency	School (On Court's Motion)	Hospital (On Court's Motion)	Private Medical Doctor (On Court's Motion)	Other
Total New York State	677	10	...	30	8	12	...	15	545	4	27	1	...	...	25
Total New York City	414	7	...	19	4	10	...	6	317	4	26	1	...	...	20
New York	65	4	...	...	...	...	...	1	55	...	4	1	...	...	...
Kings	101	...	...	...	...	3	...	1	72	2	22	...	...	...	1
Queens	46	...	...	3	3	...	...	...	39	...	...	...	...	...	1
Bronx	190	2	...	12	1	7	...	4	144	2	...	...	...	...	18
Richmond	12	1	...	4	...	...	...	...	7	...	...	...	...	...	...
Total Upstate	263	3	...	11	1	2	...	9	228	...	1	...	...	...	5
Albany	1	...	...	...	...	...	...	...	1	...	...	...	...	...	...
Allegany	3	...	...	...	...	...	...	...	1	...	...	...	...	...	2
Broome	2	...	...	...	...	...	...	...	2	...	...	...	...	...	...
Cattaraugus	3	...	...	...	...	...	...	1	2	...	...	...	...	...	...
Cayuga	1	...	...	...	...	...	...	...	1	...	...	...	...	...	...
Chautauqua	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Chemung	9	...	...	...	...	...	...	...	9	...	...	...	...	...	...
Chenango	1	...	...	...	...	...	...	...	1	...	...	...	...	...	...
Clinton	5	...	...	1	...	...	...	...	4	...	...	...	...	...	...
Columbia	3	...	...	...	...	...	...	...	3	...	...	...	...	...	...
Cortland	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Delaware	5	...	...	...	...	...	...	...	5	...	...	...	...	...	...
Dutchess	23	...	...	...	...	...	...	...	23	...	...	...	...	...	...

Erie	36			1					34						1
Essex	1							1							
Franklin															
Fulton	2								2						
Genesee	1								1						
Greene	2								2						
Hamilton															
Herkimer															
Jefferson	6								6						
Lewis															
Livingston	6								6						
Madison															
Monroe	7			4					2						1
Montgomery															
Nassau	8								8						
Niagara	8								8						
Oneida	11			1					10						
Onondaga	20								20						
Ontario	4								4						
Orange	16								16						
Orleans															
Oswego	4			1					3						
Otsego															
Putnam															
Rensselaer	12								12						
Rockland	1														1
St. Lawrence	3								3						
Saratoga	5								5						
Schenectady	7				3				4						
Schoharie															
Schuyler															
Seneca	2				1				1						
Steuben	4								4						
Suffolk	17			2				6	8		1				
Sullivan	5								5						
Tioga	2								2						
Tompkins															
Ulster	1			1											
Warren	1							1							
Washington	3								3						
Wayne	2								2						
Westchester	4					2			2						
Wyoming	5	3							2						
Yates	1								1						

Table 51
FAMILY COURT
Temporary Removal of Children in Child Protective Proceedings Involving Child Abuse (Boys Only)
January 1, 1975 through December 31, 1975

Region County	Total*	No Temporary Removal	Temporary Removal		Length of Removal Between Petition and Disposition								
			Before Petition	Between Petition and Disposition	1-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366-730 Days	731 Days Or More
Total New York State	511	260	78	238	14	10	7	19	46	50	69	20	3
Total New York City	348	193	18	154	8	6	6	7	30	31	48	17	1
New York	37	19	1	18	1	1	1	...	5	4	5	1	...
Kings	75	37	13	37	2	1	2	...	5	10	14	3	...
Queens	37	18	...	19	1	...	1	1	8	5	3	...	...
Bronx	183	111	4	72	2	2	2	6	12	9	25	13	1
Richmond	16	8	...	8	2	2	...	...	...	3	1	...	...
Total Upstate	163	67	60	84	6	4	1	12	16	19	21	3	2
Albany	3	2	...	1	...	...	...	...	...	...	...	1	...
Allegany	2	2	...	...	...	...	...	...	...	...	...	...	...
Broome	2	2	...	...	...	...	...	...	...	...	...	...	...
Cattaraugus	...	...	...	...	...	...	...	...	...	...	...	...	...
Cayuga	2	...	2	2	...	...	...	...	1	1	...	...	...
Chautauqua	...	...	...	...	...	...	...	...	...	...	...	...	...
Chemung	5	5	...	...	...	...	...	...	...	...	...	...	...
Chenango	...	...	...	...	...	...	...	...	...	...	...	...	...
Clinton	1	...	1	1	...	...	...	...	1	...	...	...	...
Columbia	...	...	...	...	...	...	...	...	...	...	...	...	...
Cortland	...	...	...	...	...	...	...	...	...	...	...	...	...
Delaware	1	...	1	1	...	...	...	...	...	1	...	...	...
Dutchess	8	5	2	3	...	...	...	...	...	2	1	...	...
Erie	26	9	5	17	...	2	1	3	3	3	5	...	...
Essex	...	...	...	...	...	...	...	...	...	...	...	...	...

Franklin														
Fulton	2	2												
Genesee	6		5	1	1									
Greene														
Hamilton														
Herkimer														
Jefferson	2	1	1	1						1				
Lewis														
Livingston														
Madison														
Monroe	1	1												
Montgomery														
Nassau	2	1	1	1							1			
Niagara	3	1	2	2						2				
Oneida	17	8	9	8		1		6	1					
Onondaga	26	4	15	20					7	4	6	1	2	
Ontario	1	1												
Orange	8	3	1	5				3	2					
Orleans														
Oswego	4	3	1	1						1				
Otsego	1		1	1	1									
Putnam														
Rensselaer	3	2		1	1									
Rockland	2	1		1						1				
St. Lawrence	6		2	6						1	5			
Saratoga														
Schenectady	3	3												
Schoharie														
Schuyler														
Seneca	1		1											
Steuben	1		1	1	1									
Suffolk	12	7	4	3	1						1	1		
Sullivan	2	2												
Tioga	2	1	1	1		1								
Tompkins														
Ulster	2		1	2	1				1					
Warren														
Washington	2		2	2						2				
Wayne														
Westchester	3		3	2							2			
Wyoming	1	1												
Yates														

*The sum of columns 2, 3 and 4 exceeds the total whenever there was temporary removal both before and after petition. There were 65 such instances statewide (boys).

Table 52
FAMILY COURT
Temporary Removal of Children in Child Protective Proceedings Involving Child Abuse (Girls Only)
January 1, 1975 through December 31, 1975

Region County	Total*	No Temporary Removal	Temporary Removal		Length of Removal Between Petition and Disposition								
			Before Petition	Between Petition and Disposition	1-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366-730 Days	731 Days Or More
Total New York State	677	371	78	294	18	13	15	23	64	73	62	22	4
Total New York City	414	231	12	182	10	6	7	9	36	46	51	16	1
New York	65	35	2	30	3	....	1	1	6	7	9	3	.....
Kings	101	55	6	46	....	....	....	1	5	21	15	4	.....
Queens	46	22	.....	24	3	2	2	2	9	2	2	2	.....
Bronx	190	113	4	76	4	3	4	5	16	11	25	7	1
Richmond	12	6	.....	6	....	1	....	....	....	5	....	....	.....
Total Upstate	263	140	66	112	8	7	8	14	28	27	11	6	3
Albany	1	1	.....	.....	....	....	....	....	....	....	....	....	.....
Allegany	3	2	.....	1	....	....	....	....	1	....	....	....	.....
Broome	2	2	.....	.....	....	....	....	....	....	....	....	....	.....
Cattaraugus	3	2	1	1	....	....	....	....	1	....	....	....	.....
Cayuga	1	.....	1	1	....	....	....	....	....	1	....	....	.....
Chautauqua	.....	.....	.....	.....	....	....	....	....	....	....	....	....	.....
Chemung	9	7	1	1	....	....	....	....	1	....	....	....	.....
Chenango	1	.....	1	.....	....	....	....	....	....	....	....	....	.....
Clinton	5	3	2	2	....	....	....	....	2	....	....	....	.....
Columbia	3	.....	.....	3	....	....	1	....	2	....	....	....	.....
Cortland	.....	.....	.....	.....	....	....	....	....	....	....	....	....	.....
Delaware	5	.....	5	5	....	....	....	3	....	2	....	....	.....
Dutchess	23	7	6	16	....	2	2	5	....	1	4	2	.....
Erie	36	22	1	14	....	1	....	1	6	3	1	....	2
Essex	1	1	.....	.....	....	....	....	....	....	....	....	....	.....

Franklin									1					
Fulton	2	1	1	1					1					
Genesee	1			1					2					
Greene	2		2	2										
Hamilton														
Herkimer														
Jefferson	6	5	1	1						1				
Lewis														
Livingston	6	3	3	3					1	2				
Madison														
Monroe	7	7												
Montgomery														
Nassau	8	5	3	2						2				
Niagara	8	1	6	7			2	1		4				
Oneida	11	9	2	2				1	1					
Onondaga	20	8	7	10					1	5	2	1	1	
Ontario	4	4												
Orange	16	7	3	9	1	1		1	3	3				
Orleans														
Oswego	4	4												
Otsego														
Putnam														
Rensselaer	12	7	1	4	3			1						
Rockland	1	1												
St. Lawrence	3		1	3				1			2			
Saratoga	5	3		2					2					
Schenectady	7	3	3	4	1		1		1			1		
Schoharie														
Schuyler														
Seneca	2	1		1								1		
Steuben	4	1	1	3						1	1	1		
Suffolk	17	10	5	4			1		1	1	1			
Sullivan	5	2	1	3	1	2								
Tioga	2	2												
Tompkins														
Ulster	1	1												
Warren	1	1												
Washington	3	1	2	2	2									
Wayne	2	1	1	1			1							
Westchester	4	1	3	2					1	1				
Wyoming	5	4	1											
Yates	1		1	1		1								

*The sum of columns 2, 3 and 4 exceeds the total whenever there was temporary removal both before and after petition. There were 66 such instances statewide (girls).

Table 53
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Boys Only)
Length of Time Between Filing of Petition and Initial Fact-Finding Hearing
January 1, 1975 through December 31, 1975

Region County	Total	0-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366-730 Days	731 or More Days	Number of Cases Without IFH
Total New York State	511	111	18	16	21	69	67	57	14	7	131
Total New York City	348	31	3	12	15	59	61	48	9	.....	110
New York	37	4	...	....	1	8	6	6	4	....	8
Kings	75	5	....	5	4	23	25	10	1	....	2
Queens	37	....	....	2	2	5	10	2	.....	.....	16
Bronx	183	7	3	5	8	23	20	29	4	.....	84
Richmond	16	15	....	.....	.....	.....	.....	1	.....	.....	.....
Total Upstate	163	80	15	4	6	10	6	9	5	7	21
Albany	3	....	.....	.....	.....	1	1	.....	1	.....	.....
Allegany	2	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
Broome	2	1	.....	1	.....	.....	.....	.....	.....	.....	.....
Cattaraugus	...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Cayuga	2	.....	.....	.....	.....	2	.....	.....	.....	.....	.....
Chautauqua	...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Chemung	5	2	3	.....	.....	.....	.....	.....	.....	.....	.....
Chenango	...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Clinton	1	.....	.....	.....	1	.....	.....	.....	.....	.....	.....
Columbia	...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Cortland	...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Delaware	1	.....	.....	.....	.....	1	.....	.....	.....	.....	.....
Dutchess	8	8	.....	.....	.....	.....	.....	.....	.....	.....	.....
Erie	26	24	.....	1	.....	1	.....	.....	.....	.....	.....
Essex	...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Franklin											
Fulton	2	2									
Genesee	6		5								1
Greene											
Hamilton											
Herkimer											
Jefferson	2						1				1
Lewis											
Livingston											
Madison											
Monroe	1										1
Montgomery											
Nassau	2	2									
Niagara	3				1	2					
Oneida	17	12	5								
Onondaga	26				1	1	1	6		2	15
Ontario	1	1									
Orange	8	5			3						
Orleans											
Oswego	4	4									
Otsego	1	1									
Putnam											
Rensselaer	3	3									
Rockland	2	1					1				
St. Lawrence	6	5						1			
Saratoga											
Schenectady	3										3
Schoharie											
Schuyler											
Seneca	1			1							
Steuben	1	1									
Suffolk	12					2	2		3	5	
Sullivan	2	1	1								
Tioga	2		1	1							
Tompkins											
Ulster	2	2									
Warren											
Washington	2	2									
Wayne											
Westchester	3							2	1		
Wyoming	1	1									
Yates											

Table 54
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Girls Only)
Length of Time Between Filing of Petition and Initial Fact-Finding Hearing
January 1, 1975 through December 31, 1975

Region County	Total	0-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366-730 Days	731 or More Days	Number of Cases Without IFH
Total New York State	677	139	35	31	30	198	85	71	19	5	151
Total New York City	414	29	7	9	13	81	72	61	15		127
New York	65	2			2	18	9	11	6		17
Kings	101	11	1	1	4	29	27	18	2		5
Queens	16	1	1	3		7	12	3	1		18
Bronx	190	3	5	2	7	27	24	29	6		87
Richmond	12	12									
Total Upstate	263	110	28	22	17	27	13	10	4	5	27
Albany	1						1				
Allegany	3	3									
Broome	2	1		1							
Cattaraugus	3		1	1							1
Cayuga	1					1					
Chautauqua											
Chemung	9	5	2	2							
Chenango	1			1							
Clinton	5				1	2	2				
Columbia	5	2		1							
Cortland											
Delaware	5				3	2					
Dutchess	23	16	6						1		
Erie	36	25	2	1	2	6					
Essex	1						1				
Franklin											

Fulton	2			2								
Genesee	1				1							
Greene	2					2						
Hamilton												
Herkimer												
Jefferson	6					1	1					4
Lewis												
Livingston	6	6										
Madison												
Monroe	7			1		1		2				3
Montgomery												
Nassau	8	2	3	1	1			1				
Niagara	8			3	1	1						
Oneida	11	10	1									
Onondaga	20				2	1	1	3			1	12
Ontario	4	2	1			1						
Orange	16	7	1	3	5							
Orleans												
Oswego	4	1	3									
Otsego												
Putnam												
Rensselaer	12	10	1									1
Rockland	1										1	
St. Lawrence	3	2	1									
Saratoga	5		1	2	1	1						
Schenectady	7	1	1			2						3
Schoharie												
Schuyler												
Seneca	2						1	1				
Steuben	4	1		2								1
Suffolk	17	1	1			3	1	2	3	3		
Sullivan	5	5										
Tioga	2		1	1								
Tompkins												
Ulster	1											1
Warren	1	1										
Washington	3	2										1
Wayne	2	2										
Westchester	4		1				2	1				
Wyoming	5	5										
Yates	1		1									

Table 55
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Boys Only)
Number of Adjournments Between Filing of Petition and Initial Fact-Finding Hearing*
January 1, 1975 through December 31, 1975

Region / County	NUMBER OF ADJOURNMENTS											
	Total	None	1	2	3	4	5	6	7	8	9	Over 9
Total New York State	380	93	52	55	26	32	55	24	12	10	5	16
Total New York City	238	17	23	12	20	29	53	22	11	4	4	13
New York	29	1	6	5	1	5	5	3	2	.	1	.
Kings	73	6	7	10	3	8	21	7	1	3	1	6
Queens	21	.	.	2	5	2	5	1	.	.	2	4
Bronx	99	10	8	23	10	13	13	8	8	1	.	3
Richmond	16	.	2	2	1	1	7	3	.	.	.	.
Total Upstate	142	76	29	13	6	3	2	2	1	6	1	3
Albany	3	.	.	1	.	.	.	1	1	.	.	.
Allegany	2	.	2	.	.	.	.	.	.	.	.	.
Broome	2	2	.	.	.	.	.	.	.	.	.	.
Cattaraugus	.	.	.	.	.	.	.	.	.	.	.	.
Cayuga	2	.	2	.	.	.	.	.	.	.	.	.
Chautauqua	.	.	.	.	.	.	.	.	.	.	.	.
Chemung	5	5	.	.	.	.	.	.	.	.	.	.
Chenango	.	.	.	.	.	.	.	.	.	.	.	.
Clinton	1	1	.	.	.	.	.	.	.	.	.	.
Columbia	.	.	.	.	.	.	.	.	.	.	.	.
Cortland	.	.	.	.	.	.	.	.	.	.	.	.
Delaware	1	1	.	.	.	.	.	.	.	.	.	.
Dutchess	3	2	.	1	.	.	.	.	.	.	.	.
Erie	26	25	1	.	.	.	.	.	.	.	.	.
Essex	.	.	.	.	.	.	.	.	.	.	.	.
Franklin	.	.	.	.	.	.	.	.	.	.	.	.

Fulton	2	2										
Genesee	3			3								
Greene												
Hamilton												
Herkimer												
Jefferson	1				1							
Lewis												
Livingston												
Madison												
Monroe												
Montgomery												
Nassau	2	1					1					
Niagara	3	3										
Oneida	17	8	8	1								
Onondaga	11			1		1				6	1	2
Ontario	1		1									
Orange	8	7	1									
Orleans												
Oswego	4	4										
Otsego	1		1									
Putnam												
Rensselaer	3	2	1									
Rockland	2		1	1								
St. Lawrence	6	5	1									
Saratoga												
Schenectady												
Schoharie												
Schuyler												
Seneca	1	1										
Steuben	1	1										
Suffolk	12		1	3	4	2	1					1
Sullivan	2	2										
Tioga	2		2									
Tompkins												
Ulster	2	2										
Warren												
Washington	2		2									
Wayne												
Westchester	3	1			1			1				
Wyoming	1	1										
Yates												

*This table includes only cases in which there was an initial fact-finding hearing

Table 56
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Girls Only)
Number of Adjournments Between Filing of Petition and Initial Fact-Finding Hearing*
January 1, 1975 through December 31, 1975

Region / County	NUMBER OF ADJOURNMENTS											
	Total	None	1	2	3	4	5	6	7	8	9	Over 9
Total New York State	523	135	86	74	47	38	48	26	14	18	9	28
Total New York City	287	19	23	47	37	35	40	26	13	13	8	26
New York	48	. .	9	5	3	7	9	5	2	5	2	1
Kings	96	10	5	12	10	15	10	8	3	8	. .	15
Queens	28	. .	. .	1	8	5	1	1	4	. .	3	5
Bronx	103	9	8	26	14	8	16	10	4	. .	3	5
Richmond	12	. .	1	3	2	. .	4	2	. .	. .	. .	. .
Total Upstate	236	116	63	27	10	3	8	. .	1	5	1	2
Albany	1	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Allegany	3	. .	3	. .	. .	. .	. .	. .	. .	. .	. .	. .
Broome	2	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Cattaraugus	2	2	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Cayuga	1	. .	1	. .	. .	. .	. .	. .	. .	. .	. .	. .
Chautauqua	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Chemung	9	9	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Chenango	1	1	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Clinton	5	3	2	. .	. .	. .	. .	. .	. .	. .	. .	. .
Columbia	3	3	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Cortland	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Delaware	5	3	. .	2	. .	. .	. .	. .	. .	. .	. .	. .
Dutchess	23	11	11	1	. .	. .	. .	. .	. .	. .	. .	. .
Erie	36	29	7	. .	. .	. .	. .	. .	. .	. .	. .	. .
Essex	1	. .	. .	1	. .	. .	. .	. .	. .	. .	. .	. .
Franklin	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .

Fulton	2		2									
Genesee	1			1								
Greene	2		2									
Hamilton												
Herkimer												
Jefferson	2	1			1							
Lewis												
Livingston	6	1		3	2							
Madison												
Monroe	4	1		1						2		
Montgomery												
Nassau	8	1			1	2	3					1
Niagara	8	8										
Oneida	11	4	3	4								
Onondaga	8			2		1	1			3		1
Ontario	4	1	2	1								
Orange	16	10	6									
Orleans												
Oswego	4	2	2									
Otsego												
Putnam												
Rensselaer	11	1	5	4	1							
Rockland	1			1								
St. Lawrence	3	3										
Saratoga	5	2	3									
Schenectady	4	1	2				1					
Schoharie												
Schuyler												
Seneca	2	1	1									
Steuben	3	1	1	1								
Suffolk	17	1	4	4	5		1		1		1	
Sullivan	5	3	1				1					
Tioga	2		2									
Tompkins												
Ulster												
Warren	1	1										
Washington	2	2										
Wayne	2	1	1									
Westchester	4	1	1	1			1					
Wyoming	5	5										
Yates	1		1									

*This table includes only cases in which there was an initial fact-finding hearing.

Table 57
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Boys Only)
Length of Time Between Initial Fact-Finding Hearing and Dispositional Hearing
January 1, 1975 through December 31, 1975

Region County	Total	0-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366-730 Days	731 or More Days	Number Of Cases Without IFH
Total New York State	511	95	8	13	1	97	84	13	21	18	131
Total New York City	348	55	.	.	.	61	65	32	10	15	110
New York	37	12	.	.	.	4	6	3	2	2	8
Kings	75	22	.	.	.	23	16	7	3	3	2
Queens	37	5	.	.	.	8	2	5	1	.	16
Bronx	183	13	.	.	.	21	31	16	5	10	84
Richmond	16	3	.	.	.	2	10	1	.	.	.
Total Upstate	163	40	8	13	1	36	19	11	11	3	21
Albany	3	2	.	.	.	.	1	.	.	.	.
Allegany	2	.	1	1	.	.	.	.	.	.	.
Broome	2	2	.	.	.	.	.	.	.	.	.
Cattaraugus	.	.	.	.	.	.	.	.	.	.	.
Cayuga	2	1	.	1	.	.	.	.	.	.	.
Chautauqua	.	.	.	.	.	.	.	.	.	.	.
Chemung	5	.	.	.	.	4	.	1	.	.	.
Chenango	.	.	.	.	.	.	.	.	.	.	.
Clinton	1	.	.	.	.	1	.	.	.	.	.
Columbia	.	.	.	.	.	.	.	.	.	.	.
Cortland	.	.	.	.	.	.	.	.	.	.	.
Delaware	1	.	.	.	.	1	.	.	.	.	.
Dutchess	8	.	.	.	.	3	.	1	4	.	.
Erie	26	2	2	4	1	5	6	4	.	2	.
Essex	.	.	.	.	.	.	.	.	.	.	.

Franklin												
Fulton	2	2										
Genesee	6									5		1
Greene												
Hamilton												
Herkimer												
Jefferson	2					1						1
Lewis												
Livingston												
Madison												
Monroe	1											1
Montgomery												
Nassau	2						1	1				
Niagara	3	1				2						
Oneida	17	2	3	6		1	5			2		15
Onondaga	26	3				6					1	
Ontario	1											
Orange	8	2				5	1					
Orleans												
Oswego	4					3	1					
Otsego	1		1									
Putnam												
R nsselaer	3	1				2						
Rockland	2	1				1						
St. Lawrence	6						2	4				
Saratoga												
Schenectady	3											3
Schoharie												
Schuyler												
Seneca	1	1										
Steuben	1	1										
Suffolk	12	12										
Sullivan	2	2										
Tioga	2	2										
Tompkins												
Ulster	2	1				1						
Warren												
Washington	2						2					
Wayne												
Westchester	3	2	1									
Wyoming	1			1								
Yates												

Table 58
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Girls Only)
Length of Time Between Initial Fact-Finding Hearing and Dispositional Hearing
January 1, 1975 through December 31, 1975

Region County	Total	0-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366-730 Days	731 or More Days	Number Of Cases Without IFH
Total New York State	677	146	16	12	11	139	101	53	18	24	154
Total New York City	411	75	.	2	2	77	76	30	9	16	127
New York	65	18	.	.	1	9	10	6	1	3	17
Kings	101	18	.	2	.	38	20	8	2	8	5
Queens	46	7	.	.	.	12	1	6	2	.	18
Bronx	190	31	.	.	.	18	36	9	4	5	87
Richmond	12	1	.	.	1	.	9	1	.	.	.
Total Upstate	263	71	16	10	9	62	28	23	9	8	27
Albany	1	1	.	.	.	.	.	.	.	.	.
Allegany	3	.	.	2	.	1	.	.	.	.	.
Broome	2	2	.	.	.	.	.	.	.	.	.
Cattaraugus	3	.	1	.	.	1	.	.	.	.	1
Cayuga	1	.	.	1	.	.	.	.	.	.	.
Chautauqua	.	.	.	.	.	.	.	.	.	.	.
Chemung	9	.	.	.	.	6	1	1	.	1	.
Chenango	1	1	.	.	.	.	.	.	.	.	.
Clinton	5	2	.	.	.	1	2	.	.	.	.
Columbia	3	1	.	.	.	.	2	.	.	.	.
Cortland	.	.	.	.	.	.	.	.	.	.	.
Delaware	5	3	.	.	.	2	.	.	.	.	.
Dutchess	23	.	3	2	3	5	.	6	1	.	.
Erie	36	9	1	2	1	15	3	1	.	1	.
Essex	1	.	.	.	.	.	.	1	.	.	.

Franklin												
Fulton	2					2						
Genesee	1				1							
Greene	2		2									
Hamilton												
Herkimer												
Jefferson	6	2										1
Lewis												
Livingston	6					3	3					
Madison												
Monroe	7	1										3
Montgomery												
Nassau	8						2	4	2			
Niagara	8	3				5						
Oneida	11		1	1	1	3	5					
Onondaga	20	1				3			1			12
Ontario	4	1						1		2		
Orange	16	6	2	1		3	1					
Orleans												
Oswego	1		1			3						
Otsego												
Putnam												
Rensselaer	12	3				3		5				1
Rockland	1	1										
St. Lawrence	3				1			2				
Saratoga	5					2	2	1				
Schenectady	7	3					1					3
Schoharie												
Schuyler												
Seneca	2				1					1		
Steuben	4						2		1			1
Suffolk	17	17										
Sullivan	5	2	2			1						
Tioga	2	2										
Tompkins												
Ulster	1											1
Warren	1	1										
Washington	3	1				1						1
Wayne	2				1	1						
Westchester	4	1					1	1	1			
Wyoming	5	1	3	1								
Yates	1					1						

Table 59
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Boys Only)
Number of Adjournments Between Initial Fact-Finding Hearing and Dispositional Hearing*
January 1, 1975 through December 31, 1975

Region County	NUMBER OF ADJOURNMENTS											
	Total	None	1	2	3	4	5	6	7	8	9	Over 9
Total New York State	380	131	82	56	18	21	11	11	6	6	6	25
Total New York City	238	69	50	41	13	12	9	3	5	6	4	23
New York	29	15	5	2	1		2	1				3
Kings	73	22	16	10	6	3	3	2	1	1	1	6
Queens	21	5	4	4	2		1		3	2		
Bronx	99	16	23	26	3	9	1		1	3	3	14
Richmond	16	11	2	2	1							
Total Upstate	142	62	32	12	5	12	2	11	1		2	
Albany	3		1	1				1				
Allegany	2	2										
Broome	2	2										
Cattaraugus												
Cayuga	2	1	1									
Chautauqua												
Chemung	3	1	2									
Chenango												
Clinton	1		1									
Columbia												
Cortland												
Delaware	1	1										
Dutchess	8			1		3	1		1		2	
Erie	26	2	13	3	2	1		2				
Essex												
Franklin												

Fulton	2	2										
Genesee	5					5						
Greene												
Hamilton												
Herkimer												
Jefferson	1		1									
Lewis												
Livingston												
Madison												
Monroe												
Montgomery												
Nassau	2	2										
Niagara	3	1	2									
Oneida	17	7	4	4	2							
Onondaga	11	3		1				7				
Ontario	1	1										
Orange	8	5	2		1							
Orleans												
Oswego	4	4										
Otsego	1	1										
Putnam												
Rensselaer	3	3										
Rockland	2		2									
St. Lawrence	6			1			4	1				
Saratoga												
Schenectady												
Schoharie												
Schuyler												
Seneca	1	1										
Steuben	1	1										
Suffolk	12	12										
Sullivan	2	2										
Tioga	2	2										
Tompkins												
Ulster	2	2										
Warren												
Washington	2		2									
Wayne												
Westchester	3	2		1								
Wyoming	1		1									
Yates												

*This table includes only cases in which there was an initial fact finding hearing

Table 60
FAMILY COURT
Child Protective Proceedings Involving Child Abuse (Girls Only)
Number of Adjournments Between Initial Fact-Finding Hearing and Dispositional Hearing*
January 1, 1975 through December 31, 1975

Region County	NUMBER OF ADJOURNMENTS											
	Total	None	1	2	3	4	5	6	7	8	9	Over 9
Total New York State	523	192	120	71	33	24	17	15	11	6	8	23
Total New York City	287	89	17	52	19	17	14	6	12	6	5	20
New York	48	19	11	1	3	.	5	2	1	1	1	1
Kings	96	20	9	23	11	10	5	4	.	3	1	10
Queens	28	7	8	4	1	.	1	.	5	1	.	1
Bronx	103	36	18	21	4	7	2	.	3	1	3	8
Richmond	12	7	1	3	.	.	1	.	.	.	.	.
Total Upstate	236	103	73	19	14	7	3	9	2	.	3	3
Albany	1	1	.	.	.	.	.	.	.	.	.	.
Allegany	3	2	.	1	.	.	.	.	.	.	.	.
Broome	2	2	.	.	.	.	.	.	.	.	.	.
Cattaraugus	2	.	2	.	.	.	.	.	.	.	.	.
Cayuga	1	.	1	.	.	.	.	.	.	.	.	.
Chautauqua	.	.	.	.	.	.	.	.	.	.	.	.
Chemung	9	3	5	.	1	.	.	.	.	.	.	.
Chenango	1	.	1	.	.	.	.	.	.	.	.	.
Clinton	5	4	1	.	.	.	.	.	.	.	.	.
Columbia	3	1	2	.	.	.	.	.	.	.	.	.
Cortland	.	.	.	.	.	.	.	.	.	.	.	.
Delaware	5	5	.	.	.	.	.	.	.	.	.	.
Dutchess	23	.	.	5	1	1	1	5	1	.	1	2
Erie	36	7	19	1	2	1	.	1	.	.	2	.
Essex	1	1	.	.	.	.	.	.	.	.	.	.
Franklin	.	.	.	.	.	.	.	.	.	.	.	.

Fulton	2		2										
Genesee	1		1										
Greene	2		2										
Hamilton													
Herkimer													
Jefferson	2	2											
Lewis													
Livingston	6	1	1			1							
Madison													
Monroe	4	4											
Montgomery													1
Nassau	8	2	2		3								
Niagara	8	4	4										
Oneida	11	4	4		3								
Onondaga	8	4		2					2				
Ontario	4	3		1									
Orange	16	11	4	1									
Orleans													
Oswego	4		3		1								
Otsego													
Putnam													
Rensselaer	11	9	2										
Rockland	1		1										
St. Lawrence	3	1						1	1				
Saratoga	5	2	1	2									
Schenectady	4	3		1									
Schoharie													
Schuyler													
Seneca	2	2											
Steuben	3		1			1		1					
Suffolk	17	12	3	2						1			
Sullivan	5	3	2										
Tioga	2	1	1										
Tompkins													
Ulster													
Warren	1	1											
Washington	2	1	1										
Wayne	2	2											
Westchester	4	3	1										
Wyoming	5	1	4										
Yates	1	1											

*This table includes only cases in which there was an initial fact finding hearing

Table 61
FAMILY COURT
Court Findings in Child Protective Proceedings Involving Child Abuse, by Sex
Reason for Petition Abuse Only
January 1, 1975 through December 31, 1975

Region County	Boys							Girls						
	Total	Court Findings at Dispositional Hearing				Court Findings Based on		Total	Court Findings at Dispositional Hearing				Court Findings Based on	
		Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties		Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties
Total New York State	344	83	84	7	170	175	169	477	142	93	16	226	264	213
Total New York City	219	54	56	5	104	117	102	258	85	51	14	108	148	110
New York	15	....	1	3	11	8	7	31	4	2	10	15	22	9
Kings	40	20	10	...	10	19	21	50	27	17	...	6	26	24
Queens	21	9	5	...	7	12	9	31	15	6	...	10	17	14
Bronx	128	19	38	2	69	70	58	131	35	23	4	72	76	58
Richmond	15	6	2	...	7	8	7	12	4	3	...	5	7	5
Total Upstate	125	29	28	2	66	58	67	219	57	42	2	118	116	103
Albany	1	1	...	...	...	1	...	1	1	...	...	...	1	...
Allegany	2	...	...	...	2	...	2	3	...	...	...	3	...	3
Broome	2	...	...	...	2	2	...	2	...	...	...	2	2	...
Cattaraugus	...	...	...	...	...	...	...	3	1	...	...	2	2	1
Cayuga	2	...	...	1	1	2	...	1	...	...	1	...	1	...
Chautauqua	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Chemung	5	1	...	...	4	1	4	9	5	1	...	3	6	3
Chenango	...	...	...	...	...	...	...	1	1	...	...	...	1	...
Clinton	...	...	...	...	...	...	...	4	1	...	...	3	2	2
Columbia	...	...	...	...	...	...	...	3	2	...	...	1	2	1

Cortland														
Delaware	1	1				1		3		2		3	2	3
Dutchess	2		2				2	18	4	6		8	10	8
Erie	26	2	15		9	11	15	33	5	17		13	19	14
Essex								1				1	1	
Franklin														
Fulton	2	1			1	1	1							
Genesee	1				1		1	1	1					1
Greene														
Hamilton														
Herkimer														
Jefferson	1	1				1		6	2			4	2	1
Lewis														
Livingston								6	5			1	5	1
Madison														
Monroe	1				1	1		7		2		5	6	1
Montgomery														
Nassau														
Niagara	3	2	1			5		8	5	3			7	1
Oneida	13	4	3		6	8	5	11	6	1		1	7	4
Onondaga	25	10			15	9	16	19	6	1		12	7	12
Ontario	1				1	1		3	1	1		1	2	1
Orange	7	1			6	1	6	12	2	1		9	4	8
Orleans														
Oswego	4		4			3	1	4	3			1	3	1
Otsego	1		1				1							
Putnam														
Rensselaer	3	1			2	1	2	12	3			9	1	8
Rockland	2	1			1	1	1	1				1		1
St. Lawrence	3			1	2	3		2		1	1		2	
Saratoga								3	1			2	1	2
Schenectady	3				3		3	5		1		4	1	1
Schoharie														
Schuyler														
Seneca	1				1	1		1		1			1	
Steuben								1				1		1
Suffolk	5		2		3	3	1	14	1			13	6	8
Sullivan	2				2		2	5	1	1		3	1	4
Tioga	2	1			1	1	1	2	1	1				2
Tompkins														
Ulster	1				1		1	1		1			1	
Warren								1				1		1
Washington	2	2					2	3	1			2		3
Wayne														
Westchester								1		1			1	
Wyoming	1				1	1		5				5	5	
Yates								1				1	1	

Table 62
FAMILY COURT
Court Findings in Child Protective Proceedings Involving Child Abuse, by Sex
Reason for Petition Both Abuse and Neglect
January 1, 1975 through December 31, 1975

Region / County	Boys							Girls						
		Court Findings at Dispositional Hearing				Court Findings Based on			Court Findings at Dispositional Hearing				Court Findings Based on	
	Total	Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties	Total	Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties
Total New York State	153	29	46	10	68	87	66	180	38	64	13	65	96	84
Total New York City	120	24	45	9	42	78	42	139	33	48	12	46	85	54
New York	21	.	3	9	9	14	7	31	1	9	9	12	16	15
Kings	31	10	14	.	7	17	14	42	22	14	.	6	27	15
Queens	13	2	5	.	6	6	7	15	2	6	.	7	7	8
Bronx	54	12	23	.	19	40	14	51	8	19	3	21	35	16
Richmond	1	.	.	.	1	1	.	.	.	.	.	.	.	.
Total Upstate	33	5	1	1	26	9	24	41	5	16	1	19	11	30
Albany	2	2	.	.	.	2	.	.	.	.	.	.	.	.
Allegany	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Broome	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Cattaraugus	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Cayuga	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Chautauqua	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Chemung	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Chenango	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Clinton	1	.	.	.	1	1	.	1	.	.	.	1	1	.
Columbia	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Cortland	.	.	.	.	.	.	.	.	.	.	.	.	.	.

Delaware														
Dutchess	6				6	1	5	5				5		5
Erie								3	1	2				3
Essex														
Franklin														
Fulton								2		1		1		2
Genesee	5				5		5							
Greene								2		2			2	
Hamilton														
Herkimer														
Jefferson	1				1		1							
Lewis														
Livingston														
Madison														
Monroe														
Montgomery														
Nassau								7		6	1		1	6
Niagara														
Oneida	4				4		4							
Onondaga	1	1				1		1	1				1	
Ontario								1	1				1	
Orange	1				1		1	4				4		4
Orleans														
Oswego														
Otsego														
Putnam														
Rensselaer														
Rockland														
St. Lawrence	2			1	1	1	1							
Saratoga								2				2		2
Schenectady								2		2			1	1
Schoharie														
Schuyler														
Seneca								1				1		1
Steuben	1				1		1	3		1		2	2	1
Suffolk	7		1		6	2	5	3				3		3
Sullivan														
Tioga														
Tompkins														
Ulster														
Warren														
Washington														
Wayne								2	2				1	1
Westchester	2	2				1	1	2		2			1	1
Wyoming														
Yates														

Table 63
FAMILY COURT
Court Findings in Child Protective Proceedings Involving Child Abuse, by Sex
Reason for Petition Neglect Only
January 1, 1975 through December 31, 1975

Region County	Boys							Girls						
		Court Findings at Dispositional Hearing				Court Findings Based on			Court Findings at Dispositional Hearing				Court Findings Based on	
	Total	Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties	Total	Child Is Abused	Child Is Neglected	Both	Neither	Establishment of Facts Sufficient to Sustain Petition	Consent of All Parties
Total New York State	2,689	10	1,396	3	1,279	1,176	1,513	2,594	16	1,363	4	1,211	1,092	1,502
Total New York City	1,401	8	810	1	582	682	718	1,287	15	739	2	531	612	675
New York	392	1	251		140	217	175	379	2	217	1	159	181	198
Kings	296	4	195		97	135	161	277	8	174	1	94	124	153
Queens	303	2	166	1	134	152	174	252		156		96	108	144
Bronx	346	1	172		173	173	173	333		169		164	185	150
Richmond	63		26		37	26	37	46		23		23	12	30
Total Upstate	1,288	2	586	3	697	494	795	1,307	1	624	2	680	480	827
Albany	77		23			23		54		23			23	
Allegany														
Broome	83		30		53	28	55	85		30		55	31	54
Cattaraugus	17		8		9	9	8	19		6		13	10	9
Cayuga	4				4	3	3	5				5	1	4
Chautauqua	37		21		16	12	25	48		21		28	19	29
Chemung	26		8		18	9	17	29		11		18	12	17
Chenango	12		8		4	4	8	6		4		2	3	3
Clinton	14		8		6	12	2	18		14		4	17	1
Columbia	5		4		1		5	1		1				1

Cortland	7		5		5		1	2		2					2
Delaware	7		4		4	1	3	16		9		7	8		8
Dutchess	23		7		20	5	20	26		10		26	6		30
Erie	125		91		32	32	71	122		94		28	61		61
Essex	2		2				2	5		3		2	1		4
Franklin	30		17		13	13	16	19		11		8	8		11
Fulton	21		11		10	4	17	24		11		13	5		19
Genesee	8		1		7		8	17				17	1		16
Greene	1				1		1	5		1		4	1		4
Hamilton	3				3	2	1								
Herkimer	6		4		5	1	5	5		1		2	1		4
Jefferson	17		1		16	1	16	15		6		9	1		13
Lewis	3		3		1	1	1	3		3					
Livingston	4		2		2	2	2	4		1		1	1		1
Madison	2				1	1		4		3		1	1		
Monroe	39		18		21	22	17	67		31		36	39		28
Montgomery	12				12		12	9				9			9
Nassau	112	1	96	1	15	24	88	141		112	1	28	23		118
Niagara	24		16		8	6	18	14		7		7	1		11
Oneida	9		6		3	3	1	10		3		7	4		6
Onondaga	97		31		66	17	21	71		18		53	11		60
Ontario	7		5		2	2	2	7		4		3	3		4
Orange	11		8		6	7	7	19		9		10	10		9
Orleans															
Oswego	48		27		21	27	21	22		11		11	10		12
Otsego	9		7		2	1	2	6		4		2	1		3
Putnam	4				4		4	3					1		2
Rensselaer	9		6		3	6	3	8		5		3	1		3
Rockland	6		2		4	2	4	15		5		10	6		9
St. Lawrence	19		24	1	27	23	26	59		19	1	39	23		36
Saratoga	17		6		11	6	11	11		4		7	4		7
Schenectady	20		15		16	6	23	18		13		5			18
Schoharie	12		5		7	1	11	12		7		5	1		8
Schuyler															
Seneca	7		1		6	4	3	4		1		3	2		2
Steuben	49		5		44	19	30	49		4		45	16		33
Suffolk	146		20		126	53	93	129		12		117	37		92
Sullivan	11		3		8	3	8	4		2		2	2		2
Tioga	10		8		2	6	4	17		13		4	5		12
Tompkins	7		6		1	6	1	6		5		1	6		
Ulster	11		1	1	9		11	16		3		13			16
Warren	4				4	2	2	5		1		4	2		3
Washington	11		7		4	2	9	20		15		5			20
Wayne	9		2		7		9	13		12		2	10		4
Westchester	94	1	32		61	28	66	96	1	48		47	25		71
Wyoming	5				5	5		2		1		1	1		1
Yates	2		1		1	2		3		2		1	3		

Table 64
FAMILY COURT
Dispositions of Child Protective Proceedings Involving Child Abuse (Boys Only)*
January 1, 1975 through December 31, 1975

Region County	Total	Withdrawn	Dismissed	Adjudged not Neglected	Released to Parent or Other Person	Released to Parent or Other Person Under Protective Supervision	Released to Parent or Other Person Under Protective Supervision of Child Protective Agency	Placed with Relative	Placed with Commissioner of Social Services	Placed with Authorized Agency	Placed with Commissioner of Social Services and Authorized Agency	Placed with Commissioner of Mental Hygiene	Placed with Commissioner of Mental Hygiene and Authorized Agency	Placed with Commissioner of Social Services and Commissioner of Mental Hygiene	Placed with Commissioner of Social Services, Commissioner of Mental Hygiene and Authorized Agency	Placed with Commissioner of Social Services and Commissioner of Public Welfare	Placed with Commissioner of Social Services, Commissioner of Public Welfare and Authorized Agency	Placed with Commissioner of Social Services and Commissioner of Correction	Placed with Commissioner of Social Services, Commissioner of Correction and Authorized Agency	Other
Total New York State	511	78	132	7	32	99	4	2	25	.	1	.	.	.	5	.	123	2	.	1
Total New York City	348	57	99	3	26	66	2	2	10	.	1	.	.	.	5	.	75	2	.	.
New York	37	8	11	.	1	3	.	.	4	.	1	.	.	.	1	.	8	.	.	.
Kings	75	4	13	.	4	27	1	.	2	.	.	.	.	.	1	.	23	.	.	.
Queens	37	6	4	.	1	7	1	2	3	.	.	.	.	.	.	.	12	1	.	.
Bronx	183	34	68	.	20	28	.	.	1	.	.	.	.	.	3	.	28	1	.	.
Richmond	16	5	3	3	.	1	.	.	.	.	.	.	.	.	.	.	4	.	.	.
Total Upstate	163	21	33	4	6	33	2	.	15	.	.	.	.	.	.	.	18	.	.	1
Albany	3	.	.	.	.	3	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Allegany	2	.	1	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Broome	2	.	.	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Cattaraugus	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Cayuga	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	2	.	.	.
Chautauqua	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Chemung	5	1	2	1	.	.	.	.	.	.	.	.	.	.	.	.	1	.	.	.
Chenango	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Clinton	1	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Columbia	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Cortland	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Delaware	1	.	.	.	.	1	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Dutchess	8	3	2	.	1	2	.	.	.	.	.	.	.	.	.	.	.	.	.	.

Erie	26		7			3			7										9					
Essex																								
Franklin																								
Fulton	2	1				1																		
Genesee	6	6																						
Greene																								
Hamilton																								
Herkimer																								
Jefferson	2					1													1					
Lewis																								
Livingston																								
Madison																								
Monroe	1																							1
Montgomery																								
Nassau	2																		2					
Niagara	3																		3					
Oneida	17	3	6						2										6					
Onondaga	26	1	3			11			1										10					
Ontario	1		1																					
Orange	8					3			1										4					
Orleans																								
Oswego	4					3													1					
Otsego	1					1																		
Putnam																								
Rensselaer	3								3															
Rockland	2	1			1																			
St. Lawrence	6		2																4					
Saratoga																								
Schenectady	3	3																						
Schoharie																								
Schuyler																								
Seneca	1				1																			
Steuben	1		1																					
Suffolk	12	1	8	1		1													1					
Sullivan	2				2																			
Tioga	2								1										1					
Tompkins																								
Ulster	2	1																	1					
Warren																								
Washington	2						2																	
Wayne																								
Westchester	3					1													2					
Wyoming	1					1																		
Yates																								

*For the purpose of compiling this table, only one disposition per petition was considered. If more than one disposition was reported, the one deemed to be the most significant was used.

Table 65
FAMILY COURT
Dispositions of Child Protective Proceedings Involving Child Abuse (Girls Only)*
January 1, 1975 through December 31, 1975

Region County	Total	Withdrawn	Dismissed	Judgment Suspended	Released to Parent or Other Person	Released to Parent or Other Person Subject to Supervision of Social Services Department	Released to Parent or Other Person Subject to Supervision of Private Agency	Placed	Order of Protection	Transferred to Criminal Jurisdiction	Transferred to Another Family Court									
Total New York State	677	96	151	7	39	116	3	2	67	6	5	1		1	5	1	172			5
Total New York City	414	72	95	3	35	83	3	1	13	3	3	1			3	1	95			3
New York	65	8	23		4	5			5		2						18			
Kings	101	6	7		4	39	3		1						1	1	37			2
Queens	46	10	6		4	9		1	1			1			1		13			
Bronx	190	45	57	1	23	28			6	3	1				1		21			1
Richmond	12	3	2	2		2											3			
Total Upstate	263	24	56	4	4	33		1	54	3	2			1	2		77			2
Albany	1								1											
Allegany	3		2														1			
Broome	2			1													1			
Cattaraugus	3	1							1								1			
Cayuga	1																1			
Chautauqua																				
Chemung	9		3						2								4			
Chenango	1																1			
Clinton	5	1	2		1				1											
Columbia	3	1				2														
Cortland																				
Delaware	5			1		4														
Dutchess	23	6	8														9			

Erie	36	1	9							13									13						
Essex	1		1																						
Franklin																									
Fulton	2					2																			
Genessee	1					1																			
Greene	2																		2						
Hamilton																									
Herkimer																									
Jefferson	6					1				3									2						
Lewis																									
Livingston	6					3				1									2						
Madison																									
Monroe	7	2	1									1													
Montgomery																									
Nassau	8							1		3									4						
Niagara	8																		8						
Oneida	11	2	1			2				4									2						
Onondaga	20	1	2			3				3		1							10						
Ontario	4		3			1																			
Orange	16		1			4				4									6						1
Orleans																									
Oswego	4		1	1						2															
Otsego																									
Putnam																									
Rensselaer	12		1							10									1						
Rockland	1		1																						
St. Lawrence	3					1													2						
Saratoga	5		1							1															
Schenectady	7	4								3									1						
Schoharie																									
Schuyler																									
Seneca	2		1																1						
Steuben	4	2			1														1						
Suffolk	17	1	10			1				2	2								1						
Sullivan	5		1	1		1													1						1
Tioga	2					1										1									
Tompkins																									
Ulster	1																1								
Warren	1		1																						
Washington	3	2			1																				
Wayne	2									1							1								
Westchester	4				1	1													2						
Wyoming	5					4					1														
Yates	1					1																			

*For the purpose of compiling this table, only one disposition per petition was considered. If more than one disposition was reported, the one deemed to be the most significant was used.

Table 66
FAMILY COURT
Child Protective Petitions Involving Child Abuse, by Sex
Disposed of Between
January 1, 1975 and December 31, 1975

Region County	BOYS			GIRLS		
	Total	Petition Filed Prior to Jan. 1, 1975	Petition Filed on or After Jan. 1, 1975	Total	Petition Filed Prior to Jan. 1, 1975	Petition Filed on or After Jan. 1, 1975
Total New York State	511	235	276	677	330	347
Total New York City	348	176	172	414	220	194
New York	37	26	11	65	45	20
Kings	75	22	53	101	44	57
Queens	37	28	9	46	35	11
Bronx	183	99	84	190	95	95
Richmond	16	1	15	12	1	11
Total Upstate	163	59	104	263	110	153
Albany	3	1	2	1	1	.....
Allegany	2	1	1	3	2	1
Broome	2	.....	2	2	.....	2
Cattaraugus	.....	.....	.....	3	1	2
Cayuga	2	.....	2	1	.....	1
Chautauqua	.....	.....	.....	.....	.....	.....
Chemung	5	1	4	9	4	5
Chenango	.....	.....	.....	1	.....	1
Clinton	1	.....	1	5	2	3
Columbia	.....	.....	.....	3	.....	3
Cortland	.....	.....	.....	.....	.....	.....
Delaware	1	1	.....	5	2	3
Dutchess	8	4	4	23	13	10
Erie	26	10	16	36	12	24
Essex	.....	.....	.....	1	.....	1

Franklin						
Fulton	2		2	2		2
Genesee	6	5	1	1		1
Greene				2		2
Hamilton						
Herkimer						
Jefferson	2	1	1	6	4	2
Lewis						
Livingston				6	4	2
Madison						
Monroe	1		1	7	2	5
Montgomery						
Nassau	2		2	8	7	1
Niagara	3		3	8	3	5
Oneida	17	5	12	11	7	4
Onondaga	26	13	13	20	13	7
Ontario	1	1		4	3	1
Orange	8		8	16		16
Orleans						
Oswego	4		4	4	1	3
Otsego	1		1			
Putnam						
Rensselaer	3	2	1	12	8	4
Rockland	2	1	1	1	1	
St. Lawrence	6	2	4	3	1	2
Saratoga				5		5
Schenectady	3		3	7	1	6
Schoharie						
Schuyler						
Seneca	1		1	2	2	
Steuben	1		1	4	3	1
Suffolk	12	8	4	17	9	8
Sullivan	2		2	5	1	4
Tioga	2		2	2		2
Tompkins						
Ulster	2		2	1		1
Warren				1		1
Washington	2		2	3		3
Wayne				2	1	1
Westchester	3	3		4	2	2
Wyoming	1		1	5		5
Yates				1		1

Table 67
FAMILY COURT
Child Abuse Part Statistics, by Sex*
January 1, 1975 through December 31, 1975

Region County	BOYS						GIRLS					
	Total	Dispositions Not Indicating whether Court Has a Child Abuse Part	Courts Having Child Abuse Part			Courts Not Having Child Abuse Part	Total	Dispositions Not Indicating whether Court Has a Child Abuse part	Courts Having Child Abuse Part			Courts Not Having Child Abuse Part
			Dispositions in Child Abuse Part	Dispositions in Other than Child Abuse Part	Dispositions Not Indicating where Disposed	Dispositions			Dispositions in Child Abuse Part	Dispositions in other Than Child Abuse Part	Dispositions Not Indicating where Disposed	Dispositions
Total New York State	497	9	298	24		166	657	16	345	27		269
Total New York City	339	5	244	23		67	397	7	290	27		73
New York	36		33	2		1	62	1	54	3		4
Kings	71	1	53	6		11	92	2	73	9		8
Queens	31	1	21	1		8	46	2	32	1		11
Bronx	182	3	134	14		31	185	2	131	14		38
Richmond	16					16	12					12
Total Upstate	158	4	54	1		99	260	9	55			196
Albany	3					3	1					1
Allegany	2					2	3					3
Broome	2			1		1	2					2
Cattaraugus							3					3
Cayuga	2					2	1					1
Chautauqua												
Chemung	5					5	9					9
Chenango							1					1
Clinton	1					1	5					5
Columbia							3					3
Cortland												
Delaware	1					1	5					5

Dutchess	8					8	23					13
Erie	26		22			4	36		28			8
Essex							1					1
Franklin												
Fulton	2					2	2					2
Genesee	6					6	1					1
Greene							2					2
Hamilton												
Herkimer												
Jefferson	2					2	6					6
Lewis												
Livingston							6					6
Madison												
Monroe	1	1					7	3				4
Montgomery												
Nassau							7					7
Niagara	3					3	8					8
Oneida	17					17	11					11
Onondaga	26	3	22			1	20	3	17			
Ontario	1					1	4		1			3
Orange	8					8	16					16
Orleans												
Oswego	4					4	4					4
Otsego	1					1						
Putnam												
Rensselaer	3					3	12					12
Rockland	2					2	1					1
St. Lawrence	5					5	2					2
Saratoga							5					5
Schenectady	3					3	7					7
Schoharie												
Schuyler												
Seneca	1					1	2					2
Steuben	1					1	4					4
Suffolk	12		10			2	17	2	9			6
Sullivan	2					2	5					5
Tioga	2					2	2					2
Tompkins												
Ulster	1					1	1					1
Warren							1	1				
Washington	2					2	3					3
Wayne							2					2
Westchester	2					2	3					3
Wyoming	1					1	5					5
Yates							1					1

*This table includes only cases in which the reason for petition was abuse or both abuse and neglect regardless of court finding.

Table 68
FAMILY COURT
Original Petitions Initially Disposed
Persons in Need of Supervision Proceedings (Boys Only)*
Detention by Region and County
January 1, 1975 through December 31, 1975

Region County	Total**	Not Detained	Detained		Length of Detention Between Petition and Disposition							
			Before Petition	Between Petition and Disposition	1-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366 Days or More
Total New York State	4,623	3,696	57	897	199	127	82	98	257	95	36	3
Total New York City	1,578	1,127	15	141	73	38	24	35	154	80	34	3
New York	249	253	6	99	23	9	7	9	29	15	7	. . .
Kings	510	363	7	140	18	11	5	11	17	33	12	. . .
Queens	358	242	1	115	13	9	7	9	50	21	6	. . .
Bronx	306	227	. . .	79	16	6	1	5	26	10	9	3
Richmond	51	42	1	8	3	. . .	1	1	2	1	. . .	. . .
Total Upstate	3,045	2,569	42	756	126	89	58	63	103	15	2	. . .
Albany	240	209	. . .	31	1	4	11	7	5	. . .	. . .	. . .
Allegany	10	9	1	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Broome	19	19	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Cattaraugus	19	18	1	1	1	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Cayuga	9	9	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Chautauqua	29	29	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Chemung	22	22	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Chenango	13	13	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Clinton	11	11	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Columbia	8	7	. . .	1	1	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Cortland	22	18	. . .	4	2	. . .	. . .	. . .	2	. . .	. . .	. . .
Delaware	9	7	. . .	2	. . .	. . .	1	. . .	1	. . .	. . .	. . .
Dutchess	68	67	. . .	1	1	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Erie	322	275	1	47	21	2	5	4	9	5	1	. . .
Essex	8	7	1	1	1	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Franklin	7	7	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Fulton	10	10	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .

Genesee	11	10		1				1				
Greene	10	10										
Hamilton	1	1										
Herkimer	15	15										
Jefferson	25	25										
Lewis	3	3										
Livingston	14	14										
Madison	6	6										
Monroe	182	139	14	37	9	12	3	5	8			
Montgomery	7	7										
Nassau	328	238	4	87	21	31	9	7	13			
Niagara	19	13		6	1	1		1				
Oneida	31	31										
Onondaga	175	127	2	18	18	9	8	5	8			
Ontario	17	13		1	2				2			
Orange	82	78		1	1				3			
Orleans	1	1										
Oswego	25	22	2	1	1							
Otsego	9	9										
Putnam	12	11		1		1						
Rensselaer	41	29		12		5	1	1	2			
Rockland	51	41		7	1			3	1	2		
St. Lawrence	34	27		7			2	2	3			
Saratoga	18	15		3	1	2						
Schenectady	31	28		3				1	2			
Schoharie	6	6										
Schuyler	3	2		1		1						
Seneca	13	9		1	1	2				1		
Steuben	44	32	1	11	3	5		1	2			
Suffolk	515	435	1	80	15	6	9	13	33	4		
Sullivan	18	17		1				1				
Tioga	8	8										
Tompkins	9	9										
Ulster	31	26		5			1	1	3			
Warren	12	12										
Washington	61	60	1	1				1				
Wayne	38	28		4	1		1	1	1			
Westchester	243	196	13	40	14	5	7	5	5	3	1	
Wyoming	1	1										
Yates	3	3										

* This table is based on the following reported original petitions disposed of (boys only): 4,389 PINS petitions, plus 234 PINS petitions substituted for Juvenile Delinquency petitions (72 in New York City and 162 outside New York City); *regardless of Court finding.*

** The sum of columns 2, 3 and 4 exceeds the total whenever there was detention both before and after petition. There were 27 such instances statewide (boys).

Table 69
FAMILY COURT
Original Petitions Initially Disposed
Persons in Need of Supervision Proceedings (Girls Only)*
Detention by Region and County
January 1, 1975 through December 31, 1975

Region County	Total**	Not Detained	Detained		Length of Detention Between Petition and Disposition							
			Before Petition	Between Petition and Disposition	1-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366 Days or More
Total New York State	3,950	2,937	71	974	249	108	92	105	265	100	47	8
Total New York City	1,366	897	10	464	81	21	39	53	139	81	39	8
New York	296	191	5	105	29	5	6	13	25	18	7	2
Kings	397	279		118	19	6	7	14	41	15	13	3
Queens	315	194	2	119	13	7	15	14	40	20	10	
Bronx	308	197	3	108	17	6	11	10	26	27	8	3
Richmond	50	36		14	3			2	7	1	1	
Total Upstate	2,584	2,040	61	510	168	84	53	52	126	19	8	
Albany	208	176	1	32	6	5	7	3	10	1		
Allegany	12	9		3	1	1			1			
Broome	57	57										
Cattaraugus	19	18		1	1							
Cayuga	7	6		1				1				
Chautauqua	24	24										
Chemung	22	20		2	1	1						
Chenango	6	5		1		1						
Clinton	15	15										
Columbia	9	9										
Cortland	13	12		1			1					
Delaware	8	8										
Dutchess	68	67		1	1							
Erie	311	212	1	96	56	7	2	1	14	7	6	
Essex	3	3										
Franklin	8	6		2		1			1			
Fulton	20	19		1					1			

Genesee	14	13		1				1				
Greene	7	5		2					1	1		
Hamilton												
Herkimer	12	12										
Jefferson	15	15										
Lewis	2	1	1	1				1				
Livingston	13	11		2	2							
Madison	9	9										
Monroe	201	115	31	39	1	12	3	7	13			
Montgomery	5	5										
Nassau	255	162	1	89	20	22	20	12	15			
Niagara	45	41		1	3			1				
Oneida	35	33		2	1		1					
Onondaga	201	116	8	85	23	18	10	6	26	2		
Ontario	24	17	2	7	5				2			
Orange	79	72	1	6	1				2	3		
Orleans	3	3										
Oswego	29	27	1	2	2							
Otsego	2	2										
Putnam	3	3										
Rensselaer	30	23		7		1	1	4	1			
Rockland	41	36		5	1						1	
St. Lawrence	30	21		9		1			8			
Saratoga	10	9		1					1			
Schenectady	24	23		1					1			
Schoharie	3	3										
Schuyler												
Seneca	8	7		1		1						
Steuben	33	21	1	11	7	2		1	1			
Suffolk	329	285	1	43	15	3	5	6	13	1		
Sullivan	16	15		1		1						
Tioga	6	6										
Tompkins	17	15		2	1				1			
Ulster	23	22		1	1							
Warren	10	9		1	1							
Washington	12	11	1	1				1				
Wayne	18	13		5	4	1						
Westchester	203	159	5	40	8	6	3	4	14	4	1	
Wyoming	3	3										
Yates	1	1										

* This table is based on the following reported original petitions disposed of (girls only): 3,913 PINS petitions, plus 37 PINS petitions substituted for Juvenile Delinquency petitions (15 in New York City and 22 outside New York City), *regardless of Court finding*.

** The sum of columns 2, 3 and 4 exceeds the total whenever there was detention both before and after petition. There were 32 such instances statewide (girls).

Table 70
FAMILY COURT
Original Petitions Initially Disposed
Persons in Need of Supervision Proceedings (Boys Only)*
Nature of Dispositions by Region and County
January 1, 1975 through December 31, 1975

		No Adjudication							Adjudication														
														Placement							Continuance		
Total New York State	1,623	736	451	668	54	4	37	305	16	5	13	203	1,361	231	49	310	128	26	9	51	6		
Total New York City	1,578	458	142	318	16	2	13	13	20	3	14	16	320	65	28	127	16	5		1	1		
New York	353	102	33	71	5		8	1	5	1	2	2	71	10	1	21	6	2					
Kings	510	98	57	48	7			2	6		7	1	170	24	8	73	5	1					
Queens	358	190	25	118	2	1	3	2	5	2	2	5	35	29	11	15	3						
Bronx	306	139	25	68	2	1	2	5	1		3	1	31	2		12	2	2		1	1		
Richmond	51	19	2	13								1	10			3							
Total Upstate	5,045	278	209	350	38	2	24	292	26	2	29	187	1,041	166	21	183	112	21	9	50	5		
Albany	210	1	86	16			2	11	10		3		38	31		1	1	1		6			
Allegany	10		2	2			1					2	2			1							
Broome	14	3	1	1	1		1					27	10			3		1		1			
Cattaraugus	19		1	2	1			1					8			1		1			1		
Cayuga	9	1										3	4						1				
Chautauqua	29		1	1				1			1	2	11			5	3		1				
Chemung	22			1	5				2				6			1	1	1		1	1		
Chenango	13			1									6	1	1	1	2	1					
Clinton	11			1								1	5			1	3						
Columbia	8	1		1									2				3						
Cortland	22			2				8				1	3			1	1						
Delaware	9	1		3	1			1					1				2						

Dutchess	68	1	7	10				1			1		29	11		7	1								
Erie	322	24	17	26		1		58		1	1	27	114	6	1	33	8	3	2						
Essex	8	1						1					2	3			1								
Franklin	7	2	1										3				1								
Fulton	10			5				1					1			2		1							
Genesee	11	2		1				3					2			2	7								
Greene	10			1							1		1				1								
Hamilton	1																				1				
Herkimer	15			7								2	3				1	1			1				
Jefferson	23			3				5				1	16			1	1								
Lewis	3	1									2														
Livingston	11			1	1			4					5			2	1								
Madison	6							1			1		2			1	1								
Monroe	182	11		4	1		1	30			1	7	53	3		14	9		2	13					
Montgomery	7			1					1				3												
Nassau	328	11	7	14	3		1	31				26	171	19	10	1	2			2					
Niagara	49	6		8								2	24			7	2								
Oneida	51	1	3	2	1			2					11	1		3	1			3					
Onondaga	175	3	51	3				20				17	19	18	1	1	5	1							
Ontario	17							1	1		1		1	2		4	3	1							
Orange	82	11	6	9	2		1	10	1		1	1	23	3		4	2			5					
Orleans	4												2	1		1									
Oswego	25	1		2	1		1					2	13			3	1	1							
Otsego	9											3	4			2									
Putnam	12	1		1			1				1	1	1	2			1		1						
Rensselaer	41	2		7	2		2	8	1			2	6	3		1	4	3							
Rockland	51	10		6			3	3				7	16	2	2	1				1					
St. Lawrence	34	12	1	2				3				1	8			6			1						
Saratoga	18	1		3				1					7			1	2								
Schenectady	31	4	2	5	1			1					7	1		7	2	1							
Schoharie	6	2						1				2				1									
Schuyler	3															2	1								
Seneca	13	1				1					3		2				3	2	1						
Steuben	14	13	3	13			1	1		1			5		2	4		1							
Suffolk	515	94	4	101			5	38			1	8	182	49		19	1			12	1				
Sullivan	18		3	2					2				9			1		1							
Tioga	8							1					3			1	3								
Tompkins	9				2			2				1	3	1											
Ulster	31	1	2	6				5					5	1		5	6								
Warren	12							1				1	6			2	2								
Washington	61	1		2								11	40			1				6					
Wayne	38	2	1	1				1			8	6	19			2	2								
Westchester	243	15	7	34	13		1	5	8		1	20	89	8	1	14	24								
Wyoming	4	1											2			1									
Yates	3												1			2									

* This table is based on the following reported original petitions disposed of (boys only): 4,389 PINS petitions, plus 231 PINS petitions substituted for Juvenile Delinquency petitions (72 in New York City and 162 outside New York City), *regardless of Court finding.*

For the purpose of compiling this table, only one disposition per petition was considered. If more than one disposition was reported, the one deemed to be the most significant was used.

Table 71
FAMILY COURT
Original Petitions Initially Disposed
Persons in Need of Supervision Proceedings (Girls Only)*
Nature of Dispositions by Region and County
January 1, 1975 through December 31, 1975

Region County	Total	No Adjudication							Adjudication														
														Placement							Continuation		
Total New York State	3,950	708	329	713	20	3	21	269	14	1	30	138	1,038	151	30	305	93	22	20	40	5		
Total New York City	1,366	412	127	373	4	1	6	8	7		15	19	249	21	18	95	5	5		1			
New York	296	103	34	79	..	..	2	4	1	..	..	4	35	3	4	24	1	2	..	..	..	..	..
Kings	397	82	45	58	1	..	1	1	3	..	6	7	127	8	6	46	3	2	..	1	..	..	..
Queens	315	86	23	120	1	1	2	2	3	..	5	2	39	9	6	15	..	1	..	..	..	..	..
Bronx	308	130	22	99	2	..	..	1	..	..	3	3	36	1	2	8	1	..	..	..	..	..	..
Richmond	50	11	3	17	..	..	1	..	..	..	1	3	12	..	..	2	..	..	..	..	..	..	..
Total Upstate	2,584	296	202	340	16	2	15	261	7	1	15	119	789	130	12	210	88	17	20	39	5		
Albany	208	3	75	21	1	..	1	27	1	..	1	..	28	33	..	5	3	2	..	7	..	..	..
Allegany	12	1	..	..	..	..	..	..	..	..	..	5	..	..	..	3	..	2	..	..	1	..	..
Broome	57	9	1	1	..	..	..	..	1	..	..	22	7	1	..	13	..	1	..	1	..	..	..
Cattaraugus	19	..	..	..	1	..	..	2	..	..	..	..	4	..	..	8	1	..	3	..	..	..	..
Cayuga	7	..	..	..	..	..	..	..	..	..	..	..	3	..	..	1	3	..	..	..	..	..	..
Chautauqua	24	3	..	6	1	..	..	..	..	..	..	1	10	..	..	3	..	..	..	..	..	..	..
Chemung	22	..	..	4	..	..	1	..	..	..	..	2	7	1	..	3	2	..	..	1	1	..	..
Chenango	6	1	..	..	..	..	..	..	..	..	..	1	1	..	..	3	..	..	..	..	..	..	..
Clinton	15	..	..	3	..	..	..	..	..	..	..	1	8	1	..	1	..	1	..	..	..	..	..
Columbia	9	2	..	..	..	1	..	..	..	..	..	..	..	..	..	1	3	1	..	..	1	..	..
Cortland	13	..	..	3	..	..	..	2	..	..	..	1	2	..	..	5	..	..	..	..	..	..	..
Delaware	8	2	..	2	1	..	..	..	..	..	..	2	..	..	..	..	1	..	..	..	..	..	..
Dutchess	68	..	7	13	..	1	..	7	..	1	2	2	23	4	..	5	2	..	..	..	1	..	..

Erie	311	28	20	39				68			2	14	95	9	1	23	10	2								
Essex	3	1						1									1									
Franklin	8	3						1					1			3										
Fulton	20			7				4					3			5	1									
Genesee	14	2		3				1					3			5										
Greene	7	1						1					2			2				1						
Hamilton																										
Herkimer	12	1		6								1	1			1	1				1					
Jefferson	15	1											10			2	1	1								
Lewis	2												1				1									
Livingston	13			3				2				2	4			2										
Madison	9	1	2	2				1			1		1							1						
Monroe	204	50	1	8	2		1	35			1	6	61	2	1	14	6	1	5	10						
Montgomery	5	1						2					1			1										
Nassau	255	8	2	32	1		2	26				17	112	15	2	3	4			1						
Niagara	45	3	3	3				1			3		18			11	1		2							
Oneida	35	4	1	2				5				1	11	1		5	4			1						
Onondaga	201	4	75	7				14				15	43	21	6	7	9									
Ontario	24							2					6	2		8	5		1							
Orange	79	10	2	8				4	1			1	38	3		7	1			1						
Orleans	3												1			1	1									
Oswego	29	1		3				1			1	7	11			4	1									
Otsego	2															2										
Putnam	3	1																1	1							
Rensselaer	30	1		5	2			1			1		4	7		3	2	1								
Rockland	41	12		4								6	14	3	1				1							
St. Lawrence	30	10			1			2					15						2							
Saratoga	10	2		1									1			3										
Schenectady	24	1	1	3	1		1	4			1		5			6	1									
Schoharie	3	1										1				1										
Schuyler																										
Seneca	8	1		1				1									2	2	1							
Steuben	33	11	4	7									8			2		1								
Suffolk	329	86		82				26			1	2	98	14		9	3	1		7						
Sullivan	16	1	3	2	1				1				4			3	1									
Tioga	6	2		1									2			1										
Tompkins	17			2	1		1	4				1	4		1	1	1		1							
Ulster	23	3	1	5				2				1	6	1		4										
Warren	10	1		2									2	1		4										
Washington	12			4									7			1										
Wayne	18	1	1	1				5				1	4			1	1			3						
Westchester	203	22	3	44	3		8	6	3		1	6	65	11		11	15		1	3	1					
Wyoming	3												1			2										
Yates	1															1										

* This table is based on the following reported original petitions disposed of (girls only): 3,913 PINS petitions, plus 37 PINS petitions substituted for Juvenile Delinquency petitions (15 in New York City and 22 outside New York City), regardless of Court Finding. For the purpose of compiling this table, only one disposition per petition was considered. If more than one disposition was reported, the one deemed to be the most significant was used.

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Table 72
FAMILY COURT
Original Petitions Initially Disposed
Reasons for Juvenile Delinquency Proceedings by Sex and by Region*
January 1, 1975 through December 31, 1975

Reasons**	*New York City*			*Outside New York City*			*Statewide*		
	Boys Percent	Girls Percent	Both Percent	Boys Percent	Girls Percent	Both Percent	Boys Percent	Girls Percent	Both Percent
Homicide	1	1	1	0 (15)	0 (1)	0 (16)	0 (102)	0 (8)	0 (110)
Arson	1	1	1	1	2	1	1	2	1
Rape	1	0 (0)	1	0 (26)	0 (0)	0 (26)	1	0 (0)	1
Other Sex Crimes	2	1	2	1	0 (3)	1	1	1	1
Narcotics Violation	2	1	2	2	1	2	2	2	2
Robbery	15	15	15	5	2	5	10	8	10
Burglary	14	7	13	29	11	28	23	9	20
Assault	11	25	12	6	18	7	8	23	10
Auto Theft	2	1	2	1	0 (1)	0 (59)	1	0 (10)	1
Unauthorized Use of Auto	3	2	3	7	3	6	5	2	5
Larceny, Not Auto	9	12	10	19	31	20	14	24	15
Dangerous Weapons	8	7	8	2	1	2	5	3	5
Malicious Mischief	3	2	3	5	2	5	4	2	4
Unlawful Entry	1	1	1	2	2	2	2	1	1
Burglar's Tools	3	1	3	1	0 (0)	1	2	0 (9)	2
Gambling	0 (1)	0 (0)	0 (1)	0 (0)	0 (0)	0 (0)	0 (1)	0 (0)	0 (1)
Receiving Stolen Property	6	4	6	2	1	2	4	2	4
Unlawful Assembly	0 (41)	0 (0)	0 (41)	0 (11)	0 (4)	0 (15)	0 (52)	0 (4)	0 (56)
Disorderly Conduct	0 (25)	0 (2)	0 (27)	0 (37)	1	0 (51)	0 (62)	1	0 (78)
Running Away from Home	0 (9)	0 (2)	0 (11)	0 (15)	0 (3)	0 (18)	0 (24)	0 (5)	0 (29)
Habitual Truancy	0 (15)	0 (1)	0 (16)	0 (21)	1	0 (30)	0 (36)	0 (10)	0 (46)
Refusal to Obey	0 (20)	0 (4)	0 (24)	0 (18)	0 (6)	0 (24)	0 (38)	0 (10)	0 (48)
Sexual Misconduct	1	0 (2)	0 (60)	1	1	1	1	0 (11)	1
Staying out Late	0 (6)	0 (0)	0 (6)	0 (2)	0 (1)	0 (3)	0 (8)	0 (1)	0 (9)
Associating with Bad Companions	0 (41)	0 (4)	0 (45)	0 (1)	0 (0)	0 (1)	0 (42)	0 (4)	0 (46)
Using Vile Language	0 (7)	0 (0)	0 (7)	0 (10)	0 (1)	0 (11)	0 (17)	0 (1)	0 (18)
Intoxication	0 (2)	0 (0)	0 (2)	0 (7)	0 (5)	0 (12)	0 (9)	0 (5)	0 (14)
Glue Sniffing	0 (4)	0 (1)	0 (5)	0 (3)	0 (0)	0 (3)	0 (7)	0 (1)	0 (8)
Other Offense	17	19	17	16	20	17	16	20	17
Totals:	100 (11,456)	100 (1,137)	100 (12,593)	100 (10,861)	100 (1,292)	100 (12,153)	100 (22,317)	100 (2,429)	100 (24,746)

* This table is based on the following reported original petitions disposed of:

	Boys Only	Girls Only	Both
Juvenile Delinquency petitions	16,025	1,891	17,916
minus Juvenile Delinquency petitions for which PINS petitions were substituted			
in New York City	234	37	271
outside New York City	72	15	87
	162	22	184
Net (regardless of Court finding)	15,791	1,854	17,645

** Due to the reporting of multiple reasons for some petitions, the number of reasons exceeds the number of petitions.

Note. Figures in parentheses represent the *number* of reasons. They are given for totals, and where the sum is less than 0.5%

Table 73
FAMILY COURT
Original Petitions Initially Disposed
Juvenile Delinquency Proceedings (Boys Only)*
Detention by Region and County
January 1, 1975 through December 31, 1975

Region County	Total**	Not Detained	Detained		Length of Detention Between Petition and Disposition							
			Before Petition	Between Petition and Disposition	1-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366 Days or More
Total New York State	15,791	12,834	573	2,671	1,138	503	252	225	415	107	24	7
Total New York City	6,661	4,921	144	1,662	785	241	143	121	262	77	23	7
New York	1,711	1,242	43	144	226	57	36	23	65	27	9	1
Kings	1,842	1,385	53	427	152	60	49	50	90	20	6	
Queens	1,389	1,008	5	377	195	49	21	30	56	16	4	3
Bronx	1,369	997	39	354	182	63	30	17	43	14	3	2
Richmond	350	289	4	60	30	12	4	4	8		1	1
Total Upstate	9,130	7,913	429	1,009	353	262	109	101	153	30	1	
Albany	399	377	1	21	5	2	4	3	7			
Allegany	19	18		1					1			
Broome	242	240	2									
Cattaraugus	70	68	1	2	2							
Cayuga	73	72	1	1	1							
Chautauqua	115	110		5	5							
Chemung	83	79	4									
Chenango	53	58	1	1		1						
Clinton	14	14										
Columbia	34	32		2	2							
Cortland	36	36										
Delaware	59	56		3			3					
Dutchess	323	303	4	18	2	5	6	1	4			
Erie	1,610	1,454	27	146	54	7	7	19	43	15	1	
Essex	23	23										
Franklin	50	50										
Fulton	35	35										

Genesee	37	37										
Greene	12	12										
Hamilton	18	18										
Herkimer	64	63		1				1				
Jefferson	31	31										
Lewis	6	6										
Livingston	22	22										
Madison	28	28										
Monroe	705	131	225	154	60	19	16	8	17	1		
Montgomery	7	7										
Nassau	721	526	21	179	62	63	20	20	13	1		
Niagara	57	50	1	6	5			1				
Oneida	106	96	3	9	2	5	2					
Onondaga	386	266	31	115	37	11	13	10	10	1		
Ontario	57	42	11	6	2	3	1					
Orange	485	128	18	56	17	20	11		5			
Orleans	24	22	1	2	1	1						
Oswego	83	68	1	11	12	2						
Otsego	30	29		1		1						
Putnam	55	55										
Rensselaer	138	120	5	16	5	2		3	6			
Rockland	134	127		7	1	3			2	1		
St. Lawrence	122	108		14			2		11	1		
Saratoga	75	64		11	1	1	1	1	1			
Schenectady	70	62		8	1	2		1	1			
Schoharie	15	15										
Schuyler	5	3		2				2				
Seneca	42	36		6	1	1			1			
Steuben	111	94		17	8	2	2	2	3			
Suffolk	1,097	1,035	1	61	13	20	2	11	11	1		
Sullivan	50	48		2	2							
Tioga	25	19	5	5		3		1	1			
Tompkins	34	26	2	6	2	2		2				
Ulster	99	94	1	5	1	2		1	1			
Warren	35	28	2	6	2			1	1	2		
Washington	56	54	1	2	2							
Wayne	95	86	3	9	4		1	3	1			
Westchester	670	553	55	89	38	18	12	10	7	1		
Wyoming	53	52	1									
Yates	23	23										

* This table is based on the following reported original petitions disposed of (boys only): 16,025 Juvenile Delinquency petitions, minus 234 Juvenile Delinquency petitions for which there were substituted PINS petitions (72 in New York City and 162 outside New York City), regardless of Court finding.

** The sum of columns 2, 3, and 4 exceeds the total whenever there was detention both before and after petition. There were 287 such instances statewide (boys).

Table 74
FAMILY COURT
Original Petitions Initially Disposed
Juvenile Delinquency Proceedings (Girls Only)*
Detention by Region and County
January 1, 1975 through December 31, 1975

Region County	Total**	Not Detained	Detained		Length of Detension Between Petition and Disposition							
			Before Petition	[illegible]	1-7 Days	8-14 Days	15-21 Days	22-30 Days	31-90 Days	91-180 Days	181-365 Days	366 Days or More
Total New York State	1,854	1,578	59	248	94	47	16	21	50	18	2	.....
Total New York City	675	533	16	136	54	22	7	10	29	12	2	.....
New York	139	102	6	34	14	5	1	2	10	1	1	.....
Kings	173	145	1	27	10	1	1	2	8	2	.....	.....
Queens	190	156	2	31	13	5	3	5	6	1	1	.....
Bronx	142	108	3	33	12	7	2	1	3	8	.....	.....
Richmond	31	22	1	8	5	1	.....	.....	2	.....	.....	.....
Total Upstate	1,179	1,045	43	112	40	25	9	11	21	6	.....	.....
Albany	103	96	1	6	.....	2	1	1	1	1	.....	.....
Allegany	3	.....	.....	3	.....	3	.....	.....	.....	.....	.....	.....
Broome	31	31	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Cattaraugus	13	12	.....	1	.....	.....	.....	1	.....	.....	.....	.....
Cayuga	1	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Chautauqua	10	10	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Chemung	13	13	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Chenango	2	2	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Clinton	1	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Columbia	4	4	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Cortland	1	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Delaware	12	12	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Dutchess	54	52	.....	2	2	.....	.....	.....	.....	.....	.....	.....
Erie	146	126	5	20	12	1	2	.....	1	1	.....	.....
Essex	3	3	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Franklin	3	3	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Fulton	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Genesee	5	3		2		1		1				
Greene	1	1										
Hamilton	1	1										
Herkimer	10	10										
Jefferson												
Lewis												
Livingston	4	4										
Madison	2	2										
Monroe	91	56	23	22	7	5	1	1	5			
Montgomery												
Nassau	135	111	7	18	6	1	2	3	3			
Niagara	9	9										
Oneida	9	8	1									
Onondaga	36	29	2	6	2	1	2			1		
Ontario	6	6										
Orange	84	78	3	6	1					2		
Orleans	8	7		1	1							
Oswego	10	10										
Otsego												
Putnam	10	10										
Rensselaer	20	17		3		1		1	1			
Rockland	17	15		2		2						
St. Lawrence	17	16		1					1			
Saratoga	11	9		5		2			3			
Schenectady	12	12										
Schoharie												
Schuyler												
Seneca	1	1										
Steuben	11	10		1	1							
Suffolk	127	122		5	2	1			1	1		
Sullivan	11	13		1	1							
Tioga	3	3										
Tompkins	2	2										
Ulster	8	8										
Warren	1	1										
Washington												
Wayne	11	10		1	1							
Westchester	80	75		5		2	1		2			
Wyoming	6	5	1	1	1							
Yates	2	2										

* This table is based on the following reported original petitions disposed of (girls only): 1,891 Juvenile Delinquency petitions, minus 37 Juvenile Delinquency petitions for which there were substituted PINS petitions (15 in New York City and 22 outside New York City), *regardless of Court finding*

** The sum of columns 2, 3 and 4 exceeds the total whenever there was detention both before and after petitions. There were 31 such instances statewide (girls).

Table 75
FAMILY COURT
Original Petitions Initially Disposed
Juvenile Delinquency Proceedings (Boys Only)*
Nature of Dispositions by Region and County
January 1, 1975 through December 31, 1975

Region County	Total	No Adjudication							Adjudication													
														Placement							Continued		
Total New York State	15,791	1,591	869	1,133	465	7	414	2,926	289	4	97	758	2,971	227	45	259	503	27	12	143	34	11	6
Total New York City	6,661	3,047	334	674	155	3	191	636	181	3	36	166	896	58	17	46	167	8	1	21	8	5	5
New York	1,711	705	97	112	33	1	114	314	20			21	171	8	1	16	16	1		10		4	1
Kings	1,842	750	129	132	54		12	36	78	1	32	15	431	25	8	18	69	7		4	7	1	3
Queens	1,389	588	62	213	13	1	54	159	16	1	3	33	129	23	3	6	22			3			
Bronx	1,369	909	46	110	27	1	9	11	13	1	1	30	112	1	1	1	28			3	1		1
Richmond	350	95		17	28		3	86	21			37	50	1	1	2	2		1	1			
Total Upstate	9,130	1,544	535	459	310	4	220	2,290	108	1	61	592	2,075	169	28	213	336	19	11	122	26	6	1
Albany	399	3	88	17	1		3	137	7	1	1		98	21			10			10			
Allegany	19	3	9	1									3			1	1	1					
Broome	242	51	20	2	1		12				1	110	50			10	1			1			
Cattaraugus	70	2	1	10	1		9	27			1		11	1		1	2		1				
Cayuga	73	23	1					2			5	9	21			1	7						
Chautauqua	115	8	1	8	1		3	16				18	47			7	2			1			
Chemung	83	6	1	3	18				8			1	21			1	9	1		6	2		
Chenango	59	12						7				5	16			5	14						
Clinton	14	1			3								9							1			
Columbia	34	1	4	17			1	2	1				4				3	1					
Cortland	36			1			1	19				2	8	1		1							
Delaware	59	1						7			3	21	21			1	2						
Dutchess	323	26	13	32	2		5	14	1		10	39	87	17		1	16						

Erie	1,610	86	112	14	3		2	811	2			120	218	26	3	63	76	2		2	1	2		
Essex	23	2	4		1		8	7					1				1							
Franklin	50	9	8	6						1		1	25			1	3							
Fulton	35	3		2	1		1						9			1	15							
Genesee	37	8		1	1			8	1				12	1		1	1							
Greene	12	2			1			2		1			1			2	1							
Hamilton	18	2										3	13											
Herkimer	64		3	11	1		2	12	2			1	20			3	4		1	1	1			
Jefferson	51	1		1	3			2					17			3	3			1				
Lewis	6	1								1			5											
Livingston	32	1					1	12					4			1								
Madison	28		1	4			1	2				12	5				1	1						
Monroe	705	352		12	3		1	159				10	92			17	18		1	9		1		
Montgomery	7	3			2			1					1											
Nassau	721	62	24	37	57		69	111	1			89	216	32	11	5	11			3	5			
Niagara	57	6	2	13				3			2	2	13			1	6			1	1	1		
Oneida	106	23	1	5	2		1	10				1	36	1			8			9				
Onondaga	486	17	77				3	129				50	83	11	1		13	1				1		
Ontario	37	2	1	1	1		2	1		1			32			6	6			1				
Orange	185	8	15	7	65	1	11	116	10	13		7	100	6			16	1		21	8			
Orleans	24	7										1	15			2				1				
Oswego	83		2				1	18				3	43			1	1			6	2			
Otsego	30	1										6	17			3	2	1						
Putnam	55	1	2	13		3	1	3		1			19	1	2					6	2		1		
Rensselaer	138	28		7	8			13	1	1		12	22	3			20		1		1			
Rockland	134	33	2	11	1		3	15				9	18	3	2	2	4			1				
St. Lawrence	122	74	2		5		1	8	1				14			17			2		1			
Saratoga	75	8		23	5		1	11	2				17			3	5							
Schenectady	70	12	1	9	9		2	6					17	2	1	5	1	1	1					
Schoharie	15		2	1	1			7					1											
Schuyler	5	1										1	1				1		2					
Seneca	42	2						19	1			5	8				6			1				
Steuben	111	45	15	18			1	1				2	23		1	3	2							
Suffolk	1,097	120	3	51			21	264				11	219	29	1	17	6			21	1			
Sullivan	50	6	1	5			2	2	12				17	1			1							
Tioga	25	10		2			1				1	2	6			1	2							
Tompkins	34	1		3	1		1	12				1	7	2				3		3				
Ulster	99	18	10	13			1	28					14	2	3	3	6					1		
Warren	35	2	1	2			2	7					11	1	1	7	1							
Washington	56	10		13			1	5				5	18				1		1	2				
Wayne	95	12	5	4	5			13	1		5	7	21			5	5	1	1	6	1			
Westchester	670	91	6	73	123		39	100	34		3	15	112	12		12	23	5		2				
Wyoming	53	7		1	1			17					25			2								
Yates	23		1								1		12			2	1							

* This table is based on the following reported original petitions disposed of (boys only): 16,025 Juvenile Delinquency petitions, minus 234 Juvenile Delinquency petitions for which there were substituted PINS petitions (72 in New York City and 162 outside New York City), regardless of Court finding.
For the purpose of compiling this table, only one disposition per petition was considered. If more than one disposition was reported, the one deemed to be the most significant was used.

Table 76
FAMILY COURT
Original Petitions Initially Disposed
Juvenile Delinquency Proceedings (Girls Only)*
Nature of Dispositions by Region and County
January 1, 1975 through December 31, 1975

Region County	Total																				
Total New York State	1,854	579	123	176	40	...	51	408	29	1	18	75	261	16	..	29	29	6	1	9	3	..	..
Total New York City	675	355	33	77	4	...	16	92	13	..	7	10	58	2	..	2	5	..	..	1	..	..	..
New York	139	66	9	16	.		8	31					8	1									
Kings	173	83	14	19	2		1	6	7		6	5	25	1			3			1			
Queens	190	89	1	28	1		6	40	3			2	17										
Bronx	142	109	6	12	1		.	6			1	.	5			1	1						
Richmond	31	8		2			1	9	3			3	3			1	1						
Total Upstate	1,179	224	90	99	36	...	35	316	16	1	11	65	203	14		27	24	6	1	8	3		
Albany	103	.	33	4	2		2	35	1			.	19	6		1							
Allegany	3																3						
Broome	31	11	3		1							8	7			1							
Cattaraugus	13						2	5								4		2					
Cayuga	4										3					1							
Chautauqua	10		2	1			3	1				1	2										
Chemung	13			1			3		1			1	4			1	2						
Chenango	2	1											1										
Clinton	4	1			1				2														
Columbia	4	1		3																			
Cortland	1							1															
Delaware	12	2						1				4	5										

Dutchess	54	2	1	9				13		1			11	14			1	2							
Erie	116	10	12	3				76			1		9	26	1		5	2		1					
Essex	3				1									2											
Franklin	3													1				2							
Fulton																									
Genesee	5			1				2						1			1								
Greene	1							1																	
Hamilton	1						1																		
Herkimer	10	2		3	1			2					1	1											
Jefferson																									
Lewis																									
Livingston	1							4																	
Madison	2		1				1																		
Monroe	91	53	1	3				20					1	7			1	2							
Montgomery																									
Nassau	135	10	5	20	6		15	30					9	32	2			3			2	1			
Niagara	9			4				1			1			2								1			
Oneida	9							4						2				5							
Onondaga	36		16					13					5	1				1							
Ontario	6			1										3				1			1				
Orange	84	17	9	3	10			25	1					16							2	1			
Orleans	8	2												6											
Oswego	10						1	1					5	3											
Otsego																									
Putnam	10	4		2				2					1					1							
Rensselaer	20	5		1	1		1	7					1	2	1		1								
Rockland	17	4	1	5									2	4	1										
St. Lawrence	17	10	1					2						1			2		1						
Saratoga	14	2		1	4		2	2						1			1	1							
Schenectady	12	2		7	1												1		1						
Schoharie																									
Schuyler																									
Seneca	4		1					3																	
Steuben	11	5	1	4										1											
Suffolk	127	50		4				14					5	19	2		1				2				
Sullivan	14	1	1	1			1		7					3											
Tioga	3			1													2								
Tompkins	2													1				1							
Ulster	8	3		1				2						2											
Warren	4	1						1						2											
Washington																									
Wayne	11	1			1			2			5		1								1				
Westchester	80	22	2	16	7		3	15	4					9	1				1						
Wyoming	6	2						1						2					1						
Yates	2										1			1											

* This table is based on the following reported original petitions disposed of (girls only): 1,891 Juvenile Delinquency petitions, minus 37 Juvenile Delinquency petitions for which there were substituted PINS petitions (15 in New York City and 22 outside New York City); regardless of Court finding.
For the purpose of compiling this table, only one disposition per petition was considered. If more than one disposition was reported, the one deemed to be the most significant was used.

Table 77

FAMILY COURT

Law Guardian Program

For Last Two Completed Fiscal Years

Region and County	No. of Law Guardians 1/1/73 - 12/31/73	No. of Law Guardians 1/1/74 - 3/31/74	No. of Proceedings 1/1/73 - 12/31/73	No. of Proceedings 1/1/74 - 3/31/74	Cost of Law Guardians 1/1/73 - 12/31/73	Cost of Law Guardians 1/1/74 - 3/31/74
GRAND TOTAL					$7,071,242.86	$3,116,581.89
	Individual Law Guardians					
Total New York State	1,909	1,363	18,799	11,751	$1,028,865.11	$1,014,045.52
Total New York City	318	380	5,124	2,939	$432,015.81	$491,905.94
New York	159	114	1,854	989	$140,773.29	$149,824.28
Kings	107	121	1,504	738	124,565.74	108,617.71
Queens	81	88	1,077	698	83,775.59	79,630.45
Bronx	57	41	670	355	71,274.19	98,337.90
Richmond	18	9	289	159	10,427.89	5,477.50
Total Upstate	1,091	947	13,675	11,790	$575,915.72	$621,039.58
Albany	18	17	305	318	$25,225.77	$26,853.25
Allegany	2	1	17	15	1,165.00	735.26
Broome	93	68	774	561	53,636.64	23,774.48
Cattaraugus	18	16	168	15	3,206.58	3,604.10
Cayuga	9	7	81	101	3,238.78	1,812.78
Chautauqua	12	12	17	20	663.94	1,244.22
Chemung	15	13	137	282	23,145.97	17,909.38
Chenango	7	8	78	15	1,851.72	2,145.43
Clinton	12	8	108	138	3,666.57	3,825.80
Columbia	4	5	75	110	3,852.50	3,317.50
Cortland	10	11	16	31	1,686.13	1,510.00
Delaware	6	6	18	31	616.66	1,690.97
Dutchess	34	12	284	198	16,137.09	13,322.83
Essex	13	13	112	69	5,909.51	3,169.27
Franklin	18	13	191	113	6,132.86	5,955.08
Fulton	13	13	96	98	2,908.00	3,302.22
Genesee	9	9	137	160	5,967.43	6,452.82
Greene	15	18	55	31	1,192.11	2,306.32
Hamilton	1	2	2	1	93.20	253.10
Herkimer	13	18	55	62	1,691.63	4,407.57
Jefferson	13	15	109	181	5,017.14	6,445.62
Lewis	3	2	61	27	2,717.82	1,234.25
Livingston	13	12	58	52	2,516.24	1,739.50
Madison	8	6	68	61	2,860.88	2,133.16
Montgomery	11	12	224	56	2,381.96	1,862.59
Nassau	46	42	2,911	1,702	80,508.43	93,122.95
Niagara	26	27	353	272	12,679.30	12,488.67
Oneida	33	32	158	175	16,115.10	18,775.93
Onondaga	65	61	1,116	819	56,087.45	62,343.24
Ontario	8	9	99	81	4,724.18	3,397.93
Orange	8	2	22	8	1,115.00	556.00
Orleans	7	7	42	33	1,447.91	1,507.42
Oswego	17	19	76	103	3,873.95	4,567.71
Otsego	6	4	9	4	472.50	237.18
Putnam						
Rensselaer	13	13	688	619	18,869.42	26,756.08
Rockland	31	25	302	307	18,473.24	21,154.35
St. Lawrence	25	28	146	510	27,658.19	23,896.71
Saratoga	13	9	209	186	8,012.07	7,574.12
Schenectady	36	30	304	323	13,216.62	16,592.00
Schoharie	10	10	96	51	2,813.57	941.02
Schuyler	2	2	15	9	237.50	531.66
Seneca	3	2	62	18	1,319.91	936.53
Steuben	27	28	137	137	7,139.12	6,219.00
Suffolk	16	7	57	14	3,048.50	1,252.50
Sullivan	14	21	69	141	4,415.20	10,018.62
Tioga	4	6	48	68	1,750.00	2,941.25
Tompkins	33	21	93	38	4,951.99	2,257.96
Ulster	26	25	238	226	9,417.55	13,071.28
Warren	21	18	238	180	7,152.17	7,396.29
Washington	8	6	161	161	7,302.91	8,718.35
Wayne	12	15	115	148	6,006.76	9,217.25
Westchester	117	100	2,161	1,889	93,509.18	116,882.35
Wyoming	1	5	137	90	3,867.50	2,484.60
Yates	7	5	39	43	1,269.00	1,178.95
	Legal Aid Services					
TOTAL					$2,052,391.23	$2,103,549.17
New York City					$1,852,254.82	$2,160,724.55
Erie					63,487.13	67,194.85
Monroe					73,113.00	71,533.00
Orange					13,061.55	14,099.25
Suffolk					50,470.73	90,787.82

Note: Erie, Monroe, Orange (since 7/1/73) and Suffolk Counties and New York City contract for law guardian services with the legal aid societies in their respective geographical areas. In addition (since 1/1/74) if there is a conflict of interest in a case, an individual law guardian may be appointed to represent a child in these counties.

Chapter 4

SPECIAL PROGRAMS

4.1 MENTAL HEALTH INFORMATION SERVICE

Section 29.09 of the Mental Hygiene Law establishes in each of the State's four judicial departments a Mental Health Information Service. The director in each department, his assistants and staff are appointed by the Presiding Justice of the appropriate Appellate Division. The statutory functions of the service include reviewing the admission and retention of mentally ill patients in mental health facilities; informing patients of their legal rights; providing courts with all relevant information concerning the patient's case in judicial proceedings; and providing similar services for the mentally disabled and their families.

Table 78 is a summary of the principal activities of the Mental Health Information Service during 1975 as tabulated from reports furnished to the Office of Court Administration.

4.2 CENTRAL INDEX FOR POST-CONVICTION APPLICATIONS

A Central Index for Post-Conviction Applications was established in the office of the Administrative Board of the Judicial Conference on July 1, 1970. This system was devised after extensive discussion with a committee of both State and Federal judges which was chaired jointly by then Chief Judge Stanley H. Fuld and then Chief Judge Edward J. Lumbard. The main purpose of this Central Index was to permit a judge, whether State or Federal, who received a post-conviction application to look to one place to determine if the petitioner had made a similar application to another court or had another application presently pending.

The system is relatively simple in its operation. When a judge receives a post-conviction application, he completes a card form and mails it to the Office of Court Administration. This form indicates the petitioner's name, his New York State Identification Information Number (NYSID), the date the application was received, the type of application, the judge's name, the court, and the docket number. The OCA then processes the information on its computer, and the computer generates a two-part form which is sent to the judge. The first part of this form indicates any previously reported application made by the petitioner since July 1, 1970. The second part of the form is completed by the judge when the application is disposed of, and it is forwarded to the Office of Court Administration for inclusion in the Central Index.

For the calendar year 1975 there were 1,297 applications received into the Central Index, 959 from State courts and 338

from Federal courts. Of the 854 dispositions received, 650 were from State courts and 204 from Federal courts.

An analysis by computer of the applications received indicates that 371 post-conviction applications during the year had been filed previously in another court. This would indicate that those who bring post-conviction applications do not limit themselves to one application or one court. Thus, the main purpose in establishing the Index — to make available to the courts the information that other similar applications have been made or are pending in other courts — is being served.

Table 79 sets forth the type of applications received by both the State and Federal courts which were reported to the Administrative Board of the Judicial Conference during 1975.

4.3 RETAINER AND CLOSING STATEMENTS

Under 22 NYCRR Parts 603, 551 and 1022, every participant in a contingent fee in the First, Second and Fourth Judicial Departments* must file a Statement of Retainer with the Office of Court Administration in cases involving personal injury, property damage, wrongful death, or change of grade. This statement must be filed within 30 days of the lawer's being retained (15 days in the case of "of counsel" lawyers). It sets forth the date of the agreement, the terms of compensation, the agreement as to work and fee division between the original lawyer and the "of counsel" lawyer, and data about the person referring the client to the lawyer. Additionally, every such lawyer must file a Closing Statement with the Office of Court Administration within 15 days of the date the monies become available to him. This statement sets forth such information as the monetary amount of the settlement or award (if any). If an action was commenced, it contains the date, court, and county of commencement and the method and date of termination (by settlement or judgment), the gross amount of the recovery, the person paying the recovery, the distribution of the recovery to the client, and the lawyers' fees and other disbursements. The purpose of these statements is to provide information for use by the three Appellate Divisions to prevent the charging of unconscionable fees in contingent-fee cases and to discourage the solicitation of cases.

Table 80 shows that 101,057 retainer statements were filed with the Office of Court Administration in the calendar year 1975. This was a decline of 13,089 retainers from the previous calendar year and was probably due to the impact of no-fault insurance, especially during the first six months of the year.

Table 81 gives the court in which actions were terminated and the monetary breakdown by settlement or judgment. For cases on the Supreme Court calendar, the largest single group of cases terminated involved recoveries between $1,000 and $2,000. The largest single group of cases terminated in the lower courts also involved recoveries for $1,000 to $2,000. The

*At present, there is no filing rule for the Third Judicial Department.

great majority of claims settled resulted in at least some monetary recovery. Although there were some very large recoveries, they were proportionately few; there were 1,130 recoveries in the $50,000 to $100,000 category and 675 recoveries over $100,000.

4.4 COMPULSORY ARBITRATION

The Compulsory Arbitration Statute was enacted by the Legislature in 1970, Judiciary Law Section 213(8). The statute was extended by the Legislature at the 1975 session to August 31, 1977. Section 213(8) authorizes the Administrative Board to promulgate rules for the compulsory arbitration of claims for the recovery of a sum of money not exceeding four thousand dollars, exclusive of interest, pending in any court or courts. The administrative Board has adopted, and from time to time amended, rules governing compulsory arbitration (22 NYCRR 28). The Arbitration Program has been established on a pilot basis in Monroe County (September 1, 1970), Bronx County (May 17, 1971), Broome County (March 1, 1972), and Schnectady County (June 18, 1973).

One major measure for evaluating the success of the arbitration program is the use made of it. In the 1975 calendar year 3,861 cases were referred to arbitration panels in Bronx, Broome, Monroe and Schnectady counties, as shown in Table 82. This is more than 21 percent of the civil cases disposed of in the Supreme and County Courts in those counties during the year.

A second major measure for assessing the arbitration program concerns the acceptance of dispositions by the litigants. Of the 3,861 arbitrated cases, 39.5 percent were disposed of by settlement, 57.3 percent by trial award and 3.2 percent by other means. Tables 82 and 83 show that demands for trial de novo in arbitrated matters were 3.4 percent of cases arbitrated in Bronx County, 4.2 percent of cases arbitrated in Broome County, 7.0 percent of cases arbitrated in Monroe County, and 4.9 percent of cases arbitrated in Schnectady County. Thus, in 95.1 percent of the cases arbitrated, the arbitrator's award finally determined the matter and relieved the court of the burden of dealing with these cases, a high percentage considering that only 30.7 percent of the awards were as demanded by the plaintiffs, as shown in Table 84 for all arbitration programs.

A favorable by-product of the arbitration system is the increase in the transfer down to city courts of cases pursuant to CPLR Section 325(d). During the judicial year immediately preceding the institution of arbitration in Monroe County, the Supreme Court transferred 78 cases to city courts. In the 1975 calendar year, 194 cases were transferred to the Rochester City Court and 64 to the Binghamton City Court. It would appear that when the superior courts realize that there is a readily available method of speedily disposing of cases in the city courts, they will transfer cases in which they believe the award will be $4,000 or less. Furthermore, the Bar appears satisfied to

have such transfers made. Moreover, of those cases which were calendared in the Rochester City Court (those not settled before filing in City Court), 97 percent appeared on an Arbitration Calendar rather than on a Trial Calendar. Thus, despite the increase in transfers down to the city court, the number of cases added to the City Court Trial Calendar each month is substantially less than the number added before the institution of arbitration.

Another favorable aspect of the arbitration program is its use in situations in which the damage claims exceed $4,000. Although arbitration is not compulsory in these cases, there were 69 such cases stipulated to arbitration in Monroe County in 1975. (Similar figures were not tabulated for the other counties.)

An additional desirable aspect of the arbitration program is that 90.5 percent of the cases disposed of by arbitration took less than two and one-half hours to try, while less than 1 percent took more than five hours before disposition. It is apparent that the savings in time for attorneys and litigants is substantial, especially when compared with the length of trials conducted by traditional methods, particularly jury trials, in which at least a full day would be required.

Finally, the large number of lawyers who have volunteered to serve as arbitrators is evidence of the enthusiasm with which lawyers have received the arbitration program. Ninety-five percent of the active practicing Bar in Rochester is involved in the program.

4.5 STATEMENTS OF APPOINTMENTS AND STATEMENTS OF FEES OR COMMISSIONS

Section 35-a of the Judiciary Law, as originally enacted by the Legislature in 1967, required the filing of a Statement of Appointment by each person appointed by the courts to perform services in actions and proceedings for a fee or an allowance. The statute called for these statements to be filed with the Judicial Conference within 30 days of an appointment. The required information included name and address of appointee; nature of appointment; title of litigation; and name of the court and the judge or justice making the appointment. In addition, within 30 days of receiving a fee, the appointee was required to execute a statement of services rendered with other pertinent data related to the fee received. Under the statute, all statements filed were to be kept as matters of public record. The law also required that an annual summary of the information in the statements be furnished to the four Appellate Divisions of the Supreme Court for use in supervising court appointments in their Judicial Departments.

A total of 120,964 statements of appointment have been filed since July 1, 1967, under this system—13,778 in 1975.

An extensive study of this system of two reports for each appointment revealed a number of inefficiencies. Not the least of these was the failure of many appointees to file a statement

of services rendered after payment of the fee. To deal with this problem, the Office of Court Administration sponsored legislation amending section 35-a which was enacted as Chapter 834, Laws of 1975 and which went into effect starting with appointments made after September 1, 1975.

Under the amended law, judges who approve fees are responsible for filing a single comprehensive statement, entitled Statement of Fees or Commissions, on appointments for which the fee is more than $100. The judges are required to send the statements to the Office of Court Administration each week for data processing and filing. Fees of $100 or less are not required to be reported unless they are believed to have little significance in the statistical study of appointments made in the court system.

During the last 4 months of 1975, 779 statements of fees or commissions were filed with the Office of Court Administration. The OCA, although confronted with the problems of operating two ongoing systems to produce statistical data, is now getting timely reports on court appointments. In time all the required statistical data will be produced by the new system as the older one is phased out.

STATISTICAL TABLES

Table 78
Mental Health Information Service Activity
by Judicial Department
January 1, 1975 through December 31, 1975

JUDICIAL DEPARTMENT	NON-JUDICIAL PROCEEDINGS		APPLICATIONS FOR RELEASE OR RETENTION			OTHER ACTIVITY		
	Applications Reviewed	Contacts w/patients & others	Patients Released	Patients Retained	Hearings Demanded	Judicial Cases	Reports to Courts	Hearings Attended
FIRST	15,480	41,220	1,428	350	578	1,074	953	386
SECOND	65,213	232,798	609	8,918	2,405	10,138	10,068	2,403
THIRD	5,591	14,843	583	779	271	921	810	122
FOURTH	14,294	17,620	27	3,178	377	3,407	3,252	216
STATEWIDE TOTAL	100,578	306,481	2,647	13,225	3,631	15,540	15,083	3,127

Table 79
Central Index of Post - Conviction Applications
January 1, 1975 through December 31, 1975

Type of Application	*N.Y. Courts*	*Federal Courts*	*Total*	*Percent*
Habeus Corpus	476	201	677	52.2
Coram Nobis	20	2	22	1.7
Article 78	447	25	472	36.4
Civil Rights	2	105	107	8.2
Motion for Resentence	4	0	4	0.3
Certificate of Relief	1	0	1	0.1
Reargurments - Habeus Corpus	2	1	3	0.2
Reargurments - Coram Nobis	1	0	1	0.1
Reargurments - Motion for Resentence	2	0	2	0.2
Reargurments - Civil Rights	0	3	3	0.2
Motion for Leave to Appeal	4	1	5	0.4
Total	959	338	1,297	100.00

Table 80
Retainer Statement Filings by Month
January 1, 1975 through December 31, 1975

Month	*Number of Statements of Retainer Filed*
January	9,008
February	7,288
March	8,226
April	8,426
May	8,861
June	8,928
July	8,926
August	8,160
September	8,349
October	9,243
November	8,091
December	7,551
TOTAL	101,057

Table 81
COURT AND MONETARY BREAKDOWN OF CLOSING STATEMENTS
January 1, 1975 through December 31, 1975

Amount of Recovery	Supreme Court		U.S. District Court		Court of Claims+		County Court		Civil Court		City Courts		District Court		Justice Court		All Courts		No Action*
	Settled	Judgment	Settled	Judgment	Settled	Judgment	Settled	Judgment	Settled	Judgment	Settled	Judgment	Settled	Judgment	Settled	Judgment	Settled	Judgment	Settled
$1-499	628	24	30	....	1	1	74	3	2,970	37	202	9	436	11	14	1	4,355	86	1,599
500-999	1,723	42	59	....	5	1	159	2	7,502	107	362	26	740	13	11	1	10,561	192	2,917
1,000-1,999	3,740	84	100	4	8	3	234	2	10,635	141	530	34	1,027	14	3	....	16,277	282	3,900
2,000-2,999	3,580	86	110	2	3	4	110	4	4,684	78	218	31	382	10	....	....	9,087	215	2,276
3,000-3,999	3,299	80	93	1	4	2	49	1	1,960	48	95	12	139	7	....	....	5,639	151	1,535
4,000-4,999	2,533	59	74	1	3	3	32	....	790	30	39	4	39	6	....	....	3,510	103	928
5,000-5,999	2,312	67	80	2	3	2	21	....	343	37	8	1	21	1	....	....	2,788	110	604
6,000-6,999	1,881	36	75	1	....	....	6	1	190	16	2	....	9	1	....	....	2,163	55	427
7,000-7,999	2,189	40	57	....	1	....	3	....	103	13	3	....	7	....	....	....	2,363	53	419
8,000-8,999	1,236	40	41	2	1	1	1	2	46	9	....	....	....	....	....	....	1,325	54	261
9,000-9,999	1,585	35	37	2	....	....	4	....	35	4	....	....	....	....	....	....	1,661	41	316
10,000-14,999	3,354	154	117	5	2	3	4	....	76	12	....	....	1	....	....	....	3,554	174	635
15,000-19,999	1,714	100	85	3	1	....	....	....	24	1	....	....	....	....	....	....	1,824	104	183
20,000-24,999	1,010	85	52	2	1	....	....	....	10	1	....	....	....	....	....	....	1,073	88	109
25,000-29,999	667	72	36	5	1	3	....	....	6	1	....	....	....	....	....	....	710	81	61
30,000-34,999	388	66	25	2	2	3	....	....	2	1	....	....	....	....	....	....	417	72	31
35,000-49,999	762	88	55	6	1	2	....	....	4	....	....	....	....	....	....	....	822	96	56
50,000-99,999	859	144	95	11	2	8	....	....	9	2	....	....	....	....	....	....	965	165	43
100,000-UP	460	105	66	13	11	15	....	....	4	1	....	....	....	....	....	....	541	134	17
TOTAL WITH RECOVERY	33,920	1,407	1,287	62	50	51	697	15	29,393	539	1,459	117	2,801	63	28	2	69,635	2,256	16,317
NO RECOVERY	1,197		54		11		30		1,132		112		166		1		2,703		5,383

Note: Whenever individual closing statements were filed by attorneys acting jointly in a case, each statement received was included in these tabulations. Thus, the number of statements somewhat exceeds the total number of cases closed.

+Includes condemnation as well as tort matters.

*Item 3 of the closing statement requires that the court and date be indicated if an action was commenced. This category includes those statements in which this item is left blank.

Table 82
Disposition of Compulsory Arbitration Cases
By County
January 1, 1975 through December 31, 1975

	Settlement	Trial Awards	Other	Total
Bronx	868	991	77	1936
Broome	61	106	0	167
Monroe	459	1047	47	1553
Schenectady	138	67	0	205
Total	1526	2211	124	3861

Table 83
Demands for Trial De Novo in Arbitrated Cases
By Month
January 1, 1975 through December 31, 1975

Month	Bronx County	Broome County	Monroe County	Schenectady County	Total
January	3	0	9	0	12
February	9	1	9	3	22
March	4	0	5	1	10
April	5	0	10	0	15
May	4	3	11	1	19
June	8	0	10	1	19
July	5	0	12	1	18
August	5	0	10	0	15
September	6	1	7	2	16
October	5	0	15	0	20
November	4	2	5	0	11
December	7	0	6	1	14
Total	65	7	109	10	191

Table 84
All Arbitration Services
Plaintiff Demand and Award
January 1, 1975 through December 31, 1975

Award	Demand												
	Up to $100	$101-$200	$201-$300	$301-$400	$401-$500	$501-$1,000	$1,001-$2,000	$2,001-$3,000	$3,001-$7,000	$7,001-$10,000	$10,000 + up	Not Reported	Total
None	7	38	38	38	46	182	137	121	66	8	16	0	697
Up to $100	15	14	8	3	6	13	4	3	1	1	0	0	68
$101 - $200	2	58	23	14	9	29	11	14	2	0	0	0	162
$201 - $300	0	1	47	14	13	44	17	16	2	0	2	0	156
$301 - $400	0	0	1	53	14	38	11	12	4	0	1	0	134
$401 - $500	0	0	0	1	54	48	28	15	8	0	2	0	156
$501 - $1,000	0	0	0	0	2	204	99	63	37	3	4	0	412
$1,001 - $2,000	0	0	0	0	0	1	159	77	49	8	8	0	302
$2,001 - $3,000	0	0	0	0	0	0	1	81	28	5	11	0	126
$3,001 - $7,000	0	0	0	0	0	0	0	2	16	7	4	0	29
$7,001 - $10,000	0	0	0	0	0	0	0	0	0	1	0	0	1
$10,000 + Up	0	0	0	0	0	0	0	0	0	0	0	0	0
Not Reported	0	0	0	0	0	0	0	0	0	0	0	0	0
Totals	24	111	117	123	144	559	467	404	213	33	48	0	2243

Chapter 5

SEMINARS, WORKSHOPS AND TRAINING PROGRAMS

Since 1962 the Office of Court Administration has conducted education and training programs for over 13,970 judges and justices of New York State. In 1975, 765 judges and 1,424 town and village justices attended OCA-sponsored programs. In addition, 25 judges attended national programs outside New York State. Seventy nonjudicial personnel attended programs; 11 out of state and 59 in New York State.

The Office of Education and Training also administers the tuition reimbursement program for state-paid court personnel and provides assistance or advice and counsel to both judicial and nonjudicial groups in the state.

This report includes four major sections: (1) judicial programs, the on-going OCA-sponsored and coordinated seminars and workshops for judges; (2) town and village justice training programs, mandated by the Legislature and the Rules of the Administrative Board; (3) nonjudicial programs, including newly developed cooperative relationships with various nonjudicial court personnel groups in the State; and (4) other programs, judicial and nonjudicial, outside New York State coordinated or assisted by OCA for various groups.

5.1 JUDICIAL PROGRAMS

Seven programs of three to five days' duration were sponsored with 764 judges attending. These programs are described below.

Seminar for City Court Judges
March 20-22, 1975

This seminar was the first of its type conducted in New York State for City Court judges outside New York City in cooperation with the National College of the State Judiciary. About 40 City Court judges attended. Dean Ernst John Watts of the National College of the State Judiciary led discussions on the "Role of the Judge" and "Judicial Ethics." Judge V. Robert Payant of the District Court in Iron Mountain, Mich., spoke on "Special Constitutional Problems of the City Court." Other talks and discussions included "Preliminary Hearings" and "Right to Counsel and Bail Proceedings" by Justice Ben

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Overton, Supreme Court, Tallahassee, Fla.; "The Negotiated Plea" and "Accepting Guilty Pleas" by Justice William A. Grimes, Supreme Court, Dover, N.H.; "Warrantless Arrests and Searches" and "Arrest and Search Warrants," by Magistrate Arthur L. Burnett, U.S. District Court, Washington, D.C.; and "Sentencing in Municipal Courts," by Judge Tim Murphy, Superior Court, Washington, D.C.

Family Court Judges' Seminars
April 5-12, 1975

Two Family Court seminars were conducted in cooperation with the National College of Juvenile Justice, which is based at the University of Nevada, in Reno. About 44 Family Court judges, clerks and lawyers attended the New York City program. The faculty for this comprehensive program consisted of outstanding local and national experts. The subjects and speakers were "Review and Implementation of Recent Supreme Court Decisions," Dean Charles Mentkowski, Marquette Law School, Milwaukee, Wisc.; "Dependency and Neglect, Child Abuse, and Adoptions," Dr. Vincent DeFrancis, Director, Children's Division of the American Humane Association, Denver, Colo.; "Family Court Issues, Custody, Visitation, Termination of Rights, Sibling Rights," the Honorable Edward P. Gallogly, Family Court Judge, Providence, R.I.; "Dispositions in the Family Court," the Honorable Bertram Polow, Judge of the Juvenile and Domestic Relations Court, Morristown, N.J.; "The Family Court and the Child with Learning Disabilities," Catherine Spears, M.D., neurological pediatrician, Morristown, N.J.; "The Psychology of the Violent Offender," Dr. Howard Vetter, Director, Graduate Studies, Criminal Justice Program, University of South Florida, Tampa, Fla.; "Recent Developments in the New York Statutes and Case Law," the Honorable I. Leo Glasser, Judge of the Family Court, New York City; "Institutions and Their Alternatives," Milton Luger, then Director, New York State Division for Youth, Albany, N.Y.; and "Behavioral Science Applications," Professor Vincent O'Leary, State University of New York at Albany, N.Y.

An upstate seminar was conducted in Syracuse on April 10 and 11 with about 32 judges representing 33 counties from the Third and Fourth Departments in attendance. This intensive, concentrated program included the following subjects and discussion leaders: "Disposition in Family Court," the Honorable Bertram Polow, Judge of the Juvenile and Domestic Relations Court, Morristown, N.J.; "Psychology of the Violent Offender," Dr. Harold Vetter, Director, Graduate Studies, Criminal Justice Program, University of Southern Florida, Tampa, Fla.; and "Recent Developments in New York Law," Professor M.E. Occhialino, Syracuse University School of Law, Syracuse, N.Y.

Seminar for Surrogates
May 13-15, 1975

The Ninth Annual Seminar was held in Cooperstown, N.Y.,

with about 40 Surrogates representing counties with over 90 percent of the population of the state in attendance. Among the attendees were four categories: Newly elected Surrogates, experienced Surrogates, judges who sit as County judge and Surrogate, and eight judges who occupy the positions of Surrogate, County Court judge and Family Court judge. The favorable letters received after the seminar indicated that the judges found the opportunity to meet with each other and exchange ideas extremely worthwhile. All Surrogates in attendance agreed that the format and the content were most beneficial.

Joseph T. Arenson, Esq., professor of law at New York Law School and attorney for the Public Administrator, New York County, led an active discussion of a number of questions based on recent decisions. Paul J. Powers, Esq., adjunct professor of law, St. John's University School of Law and former chief law assistant of the New York County Surrogate's Court, discussed additional recent decisions and their implications and various proposals for improvement in the statutes relating to estates. Ralph D. Semerad, Esq., professor of law at Albany Law School (now Dean), research counsel of the Bennett Commission, and editor of the Trust and Estate Section Newsletter, discussed the language implementing the elective share against a will with emphasis on the philosophy involved in this subject. Another valuable feature of this program was the provision of ample time for discussion of problems submitted by the Surrogates in attendance and a review of pending legislation that would affect the Surrogates' practice if passed.

Conference of New York State Trial Judges
June 23-26, 1975

About 140 judges attended this annual seminar held in Crotonville, N.Y. The program included four seminars on topics vital to the role of the trial judge. "CPLR-Recent Developments" was chaired by the Honorable Edward Thompson, Deputy Administrative Judge, New York City, with Professor David D. Siegel, Albany Law School, as reporter. Panelists for this seminar were Honorable Harold J. Hughes, Justice of the Supreme Court; Honorable Leonard H. Sandler, Acting Justice of the Supreme Court; Professor Adolf Homburger, State University of New York at Buffalo School of Law; and Gerald Aksen, Esq., counsel, American Arbitration Association.

Another seminar, entitled "Evidence," was chaired by Dean Joseph M. McLaughlin, Fordham University School of Law. The reporter for this seminar was Professor Robert A. Barker of the Albany Law School. Panelists were Honorable T. Paul Kane, Associate Justice of the Appellate Division, Third Department; Honorable Arnold G. Fraiman, Justice of the Supreme Court, and Honorable John J. Conway, Justice of the Supreme Court.

The seminar on "Criminal Law and Procedure" was chaired by Honorable Lyman H. Smith, Justice of the Supreme Court.

Professor Faust F. Rossi, Cornell University School of Law, was reporter for this seminar. Panelists were Honorable Peter J. McQuillan, Acting Justice of the Supreme Court; Albert M. Rosenblatt, Esq., District Attorney, Dutchess County; and Joseph W. Bellacosa, Esq., Clerk, Court of Appeals.

The "Role of the Trial Judge" seminar was chaired by Honorable Morrie Slifkin, Justice of the Supreme Court. Professor Milton Gershenson, Brooklyn Law School, was the reporter. Members of the panel for this seminar were Honorable William R. Geiler, Justice of the Supreme Court; Supreme Court Justice Robert H. Wagner, Administrative Judge, Family Court, Fourth Department; and Dean Emeritus Ray Forrester, Cornell University School of Law. The last day of the conference consisted of a "Consensus of Panel Discussions," with the four seminar reporters giving their summary reports, and "Criminal Jury Instructions — A Report and Discussion." Participating in this report and discussion were Honorable Lyman H. Smith and Honorable Thomas M. Stark, Justices of the Supreme Court; Honorable Peter J. McQuillan, Acting Justice of the Supreme Court; and Honorable Douglas F. Young, Judge of the County Court.

Observers at this conference were Dean Emeritus Jerome Prince, Brooklyn Law School; Dean John J. Murphy, St. John's University School of Law; and Professor Joseph H. Koffler, New York Law School. Program coordinators were Professor David R. Kochery, State University of New York at Buffalo School of Law; and Michael F. McEneney, Esq., Director of Education and Training of the Office of Court Administration.

The reporters' summaries are printed in full at the end of this chapter.

Family Court Workshop
September 22-24, 1975

The Seventh Annual Workshop for Family Court Judges was held in Niagara Falls with about 80 judges in attendance. The first meeting, the General Assembly, included introductory remarks by Honorable William L. Kellick, Jr., President of the Association of Judges of the Family Court, and welcoming remarks by Honorable Richard J. Bartlett, State Administrative Judge. These remarks were followed by a discussion of the newly revised probation rules as they affect Family Court. The discussion was led by the late Honorable Walter Dunbar, then State Director of Probation, assisted by Honorable Charles L. Hutchinson, Erie County Probation Director with Honorable Howard Levine, Family Court Judge of Schenectady County, as chairman. Three concurrent workshops were repeated to enable every judge present to participate in each one. Honorable Peter J. McQuillan was chairman of a workshop on "Principles of Criminal Law in the Family Court," assisted by Honorable Edward J. McLaughlin, Family Court Judge, Onondaga County. Honorable Edith L. Miller was chairman of a workshop on "Placement and Foster Care Review," assisted by Philip C.

Pinsky, Esq., chief counsel, Temporary State Commission on Child Welfare, and Professor Frank S. Polestino of St. John's Law School. A workshop on a "Review of Legislation and Significant Recent Decisions" was chaired by Honorable I. Leo Glasser, Family Court Judge of New York City.

Sentencing Institutes
October 3-5, 1975
October 24-26, 1975

Two sentencing institutes were held in Crotonville, N.Y. for 258 county judges and Supreme Court justices, criminal term. Attendance was about equally divided, with New York City and upstate judges combined in both institutes as last year. Speeches, panels and workshops focused on revised probation rules, disparity in sentencing, and emerging problems in the law of sentencing. Workshop groups discussed several presentence probation reports, providing the opportunity for an exchange of ideas.

At the first institute, Honorable Robert F. Sullivan, Acting Director, New York State Division of Probation, explained the revised statewide probation rules. A panel discussion on "Disparity in Sentencing," chaired by Honorable Lyman H. Smith, Justice of the Supreme Court, was the first part of the program. Panel members were Professor Donald J. Newman, Albany School of Criminal Justice at the State University of New York; Dr. Edward DeFranco, Chief, Probation Management Analysis and Information Systems, New York State Division of Probation; Commissioner Frank L. Caldwell, Member, Board of Parole; Honorable Peter Preiser, Deputy State Administrator for the New York City Courts, Office of Court Administration; David Diamond, Esq., Chief Counsel, New York State Office of Drug Abuse Services; Alexander Garfinkel, Deputy Director, New York City Department of Probation; Robert Bennett, Senior Deputy Director, Nassau County Probation Department; Theodore Kusnierz, Administrator, New York State Division of Probation; and Louis Kraus, Supervising Probation Officer, New York City Department of Probation.

Professor Newman opened this session with an overview of the developments in the area of sentencing around the nation. The next part of the discussion was led by Dr. DeFranco, who had compiled comparative statistics on sentencing for various crimes. A lively discussion followed.

The judges were then divided into four workshop groups to discuss several presentence probation reports. Discussion leaders for these workshops were Honorable Michael Duskas, County Judge, St. Lawrence County; Honorable William Kapelman, Assistant Administrative Judge, First Judicial District; Honorable Joseph S. Mattina, Supreme Court Justice, Eighth Judicial District; and Honorable Larry Vetrano, Acting Supreme Court Justice, Second Judicial District.

Later, Commissioner Caldwell delivered an address on the

parole function, and Mr. Garfinkel and Mr. Bennett spoke on what the probation department has to offer as an alternative to prisons. The judges then returned to the workshop groups.

The next day's session opened with a discussion by Mr. Kusnierz of what the future holds for upstate probation departments, followed by a discussion of sentencing procedures and recent changes by Mr. Preiser. The discussion concluded with reports from the four workshop groups which summarized what had taken place at their two sessions.

The format and the content of the second institute was essentially the same as for the first.

The institute began with a discussion entitled "Emerging Problems in Sentencing." Mr. Preiser discussed with the judges new problems that they would face in the area of sentencing as well as some recent changes in the law on sentencing. This was followed by a discussion, led by Mr. Sullivan, of the recently revised probation rules and their impact on the courts.

The judges were then divided into four workshop groups to discuss actual presentence reports. The discussion leaders were Honorable Frederick M. Marshall, Administrative Judge, Eighth Judicial District; Honorable Robert J. Sise, Administrative Judge, Family Court, Third Department; Honorable Norman B. Fitzer, Supervising Judge, Special Narcotic and Predicate Felony Parts; and Honorable Lawrence J. Tonetti, Acting Supreme Court Justice.

Later, there was a presentation by Mr. Bennett on probation as an alternate sentence, followed by Mr. Garfinkel's discussion of deferred sentencing and disclosure of the presentence report. Norman Dix, Deputy Director of the New York City Department of Probation, discussed the New York City Probation Department's practices and policies.

The judges then returned to the workshops to discuss additional presentence reports.

The next day, Dr. DeFranco discussed the statistical information he had assembled, which again evoked much discussion. This was followed by reports of the discussions in the four workshop groups.

Conference of Civil Court Judges
November 7-9, 1975

This third annual seminar was held at the Mohonk Mountain House, New Paltz, N.Y., with 66 judges attending. The purpose of this conference was to present current developments in the law and to provide for an exchange of ideas between recently elected and experienced judges and law school professors. There were two panel discussions: "CPLR — Recent Developments," chaired by Professor David Siegel, Albany Law School, and "Evidence," chaired by Dean Joseph M. McLaughlin, Fordham University School of Law.

Professor Siegel's panel consisted of Civil Court judges Benjamin F. Nolan, Seymour Schwartz and Charles H. Cohen. Dean McLaughlin was assisted by Civil Court judges Arthur E.

Blyn, Dominick Corso, and Israel Rubin. Three topics of special interest also were included in the conference: "Video-tape and the Courts — An Update," by Civil Court Judge William P. McCooe; "Strict Liability," by Civil Court Judge Richard W. Wallach; and "Section 50-e General Municipal Law — What the Law Is Today," by Professor Paul Graziano of St. John's Law School.

Newly Elected Judges Seminar
December 1-5, 1975

As soon as possible after election or appointment, new judges have the opportunity at this seminar to learn about a variety of important aspects of their new roles as judges. Experienced judges, law school professors and other experts discuss substantive law and helpful information about the duties and responsibilities of judges. At the 1975 session, a discussion on "The Trial Judge's Role, Conduct of Trials, Courtroom Decorum, Pitfalls," was led by Honorable James J. Leff. Justice of the Supreme Court, first Judicial District. This was followed by a "Roundtable Question and Answer Period on Judicial Conduct," with Associate Justice Arthur Markewich of the Appellate Division, First Department, and Michael R. Juviler, Esq., Counsel, Office of Court Administration, guiding the discussion and providing answers to the questions. The highlights of the programs of the Office of Drug Abuse Services as related to the courts was presented by David Diamond, Esq., Counsel for this agency.

Additional major topics and discussion leaders were "Intercourt Relations: Family Court-Supreme Court; Family Court-Criminal Courts," Supreme Court Justice Robert H. Wagner, Administrative Judge, Family Court, Fourth Judicial Department; "Criminal Procedure Law," Acting Justice of the Supreme Court Peter J. McQuillan and Albert M. Rosenblatt, Esq., District Attorney of Dutchess County; "Pattern Jury Instructions in Civil Cases," Honorable Bernard S. Meyer; "Evidence," Dean Jerome Prince, Brooklyn Law School; "The Judge and the Court Reporter," Eugene A. Sattler, court reporter of the Bronx Supreme Court; "Roundtable Discussion — The Judge's Problems," Michael F. McEneney, Esq., Director of Education and Training, Office of Court Administration; "Substantive Criminal Law," Honorable Joseph W. Bellacosa, Clerk of the Court of Appeals; and "Civil Practice Law and Rules," Professor David D. Siegel, Albany Law School. About 65 judges from Supreme, County, Family, Surrogate's, Civil, Criminal and the larger City courts attended the seminar.

5.2 TOWN AND VILLAGE JUSTICE TRAINING PROGRAMS

There are over 2500 town and village justices in New York State. Most of them are not lawyers or admitted to practice law in the state.

Newly elected or appointed justices are required by law and the rules of the Administrative Board to take a Basic Course in

the fundamentals of the law that they need to know and in their duties and responsibilities. The basic course is given three times a year in April, July and November and must be taken as soon as possible after election or appointment. A passing mark on the final written examination and attendance at a minimum of 80 percent of the classes qualify the justice for certification.

Newly elected or appointed justices are also required to take the advanced course, which is scheduled at least five times a year and must be taken as soon as possible after completing the basic course. The successful completion of this course qualifies the justice for certification, which is valid for the current term of office and one year thereafter.

All justices are also required to successfully complete the advanced course within one year of beginning a new term of office to be recertified.

A summary of the basic and advanced programs held in 1975 follows:

	Number of Attendees	
Month and Location	Basic	Advanced
February—New York City		92
April—Albany, Buffalo, Syracuse	84	
May—Binghamton		54
July—St. Lawrence University	35	142
September—Grand Island, N.Y.		40
November—Albany, Buffalo, Syracuse	211	296
	330	624

In addition to the above courses required by law, two additional programs for town and village justices were sponsored in 1975. They are described below.

Special Evidence Seminars
June 20, June 21, September 23, 1975

The National College of the State Judiciary provided the Office of Education and Training with copies of the book "Trial Judge's Guide — Objections to Evidence," by E. Gardner Brownlee. This book was written expressly to assist the lay judge in making evidentiary rulings, but it is also useful to the law-trained judge. The Education and Training Office agreed with the National College that the book would be made available to the judges at a seminar which introduced it. To make the book more useful to the New York judges, Professor Robert Barker of the Albany Law School was asked to review it and prepare a set of annotations to the New York Law of Evidence. The National College had these annotations printed on self-sticking labels and, at the beginning of each seminar, the judges were instructed to affix them at the proper pages.

The book has been so well received that this office has incorporated it into the basic course. The book may not be purchased and may be obtained only by attending a special

seminar or the basic program. The faculty at the special seminars have been the program directors of the three town and village schools: Honorable Eugene W. Salisbury of Buffalo, Honorable Eugene F. Sullivan, Jr., of Syracuse and Honorable Duncan S. MacAffer of Albany, assisted by Michael F. McEneney, Director of Education and Training, OCA.

In 1975, a total of 370 justices attended three special evidence seminars held in Utica, Rochester, and Grand Island, N.Y.

Lawyer Town and Village Justices' Seminar
October 18, 1975

About 100 justices attended this first seminar held in Tarrytown, N.Y., with County Judge Theodore H. Dachenhausen, President of the Westchester County Magistrates' Association, presiding. Lectures and discussions were held on the following topics: Office of Court Administration policies and rules; searches and seizures; new civil legislation and decisions; evidence; pre-trial motions; vehicle and traffic matters; and the judge in the jury selection process. Lectures at this seminar were Eugene W. Salisbury, Acting Village Justice, Village of Blasdell; Eugene F. Sullivan, Jr., District Attorney, Oswego County; and Michael F. McEneney, Director of Education and Training, OCA.

5.3 NONJUDICIAL PROGRAMS

Plans are being developed to increase the emphasis on nonjudicial training as staffing permits. In the latter half of 1975, relationships were developed with the various statewide groups of nonjudicial personnel.

Two major nonjudicial court personnel groups with which OCA was significantly involved were the Suffolk County Uniformed Court Officers and the New York State Shorthand Reporters Association.

Suffolk County Uniformed Court Officers

In summer 1975, the Suffolk County Courts requested training for uniformed court officers. A cooperative program was formalized with the Suffolk County Police Academy to meet this need.

Five court officers attended 80-hour pilot programs in October and November for evaluation purposes. A total of 54 court officers and aids from County, Supreme and Family Courts attended a revised 8-day or 64-hour program in December 1975.

Among the main court-related topics included in the program were "Standards and Goals for the Courts" as approved by the Administrative Board; "Constitutional Law," issues which most frequently arise in the courts; "Elements of Arrest," stressing the role of the peace officer; "First Aid," a comprehensive course to enable court officers to assist anyone suddenly

stricken by the more common illnesses in the courthouse; "Physical Education and Self-Defense," providing intensive practice in protecting the judge or other court personnel, who may be physically threatened by an unruly prisoner, by use of the body rather than by use of weapons; "Handling Mentally Disturbed Persons," preparing court officers with certain tested guidelines in recognizing and dealing effectively with violent or nonviolent mentally disturbed persons encountered in the various courts; "Criminal Law," informing court officers of the basics to better enable them to understand courtroom procedures.

New York State Shorthand Reporters' Association

Representatives of the Education and Training Office attended this group's annual seminar in Syracuse on October 18 and 19, 1975 as observers. The main topics were "Statutes and the Court Reporter" and "English for the Court Reporter." John Knisley, Supreme Court reporter in the Seventh Judicial District, covered the highlights of a detailed handout of the official compilation of codes, rules, and regulations of the State of New York as they pertain to court reporters. Nathaniel Weiss, official reporter in the Surrogate's Court of New York City, is the author of "Punctuation for the Shorthand Reporter" and "Medical Terminology." His expertise is recognized nationally and he has given seminars throughout the United States. He gave an excellent presentation on various aspects of the English language which create difficulties for both experienced and novice court reporters.

Another purpose of the seminar was to explore ways and means of helping these nonjudicial personnel in their continuing education program. Assistance was given in obtaining two speakers and providing reproduction services for this group's annual downstate seminar.

In addition, cooperative relationships have been established with the Association of Supreme and County Court Clerks and the Family Court Clerks Association. It is expected that training-program planning will be developed in cooperation with these groups.

5.4 OTHER PROGRAMS

The Education and Training Office sponsors and coordinates selective attendance of judicial and nonjudicial personnel at nationally recognized, out-of-state educational programs.

In 1975, 25 judges attended intensive programs of two weeks' duration or longer and 13 nonjudicial personnel attended two-, four-, or five-week programs.

5.4.1 Judicial Programs

National College of the State Judiciary

Nineteen judges attended, mostly during the summer months, one of four different programs, varying in length from two to

four weeks, at the National College facilities at the University of Nevada in Reno.

Three judges attended the two-week program entitled "New Trends in the Law, the Trial, and Public Understanding." This program focused on recent thinking on the judicial role of the future, with emphasis on new developments in torts and contracts, public understanding, court and jury relations, the courtroom of the future, the judge as administrator, changing duties of care and emerging legal remedies, the decision-making process, scientific evidence, legal writing, criminal law aspects of civil cases, state court administrative systems, pretrial and jury workshops, family law developments, declaratory judgments, obscenity, libel and slander, ecology and environment.

Four judges attended "Criminal Law and Sentencing" for two weeks. The first half of this program was primarily an overview of trends in the criminal justice system and an analysis of recent and current significant criminal law decisions of the United States Supreme Court with emphasis on cases based on Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Subjects specifically treated were warrants and warrantless searches, right to counsel, identification, double jeopardy, mistrial, confrontation, contempt and disruptive trials, and plea bargaining. The second half of the program examined sentencing philosophies, new trends and concepts pertaining to disposition of criminal offenders, current correctional concepts and prisoners' rights.

Five judges attended what the College calls regular two-week sessions. This program stresses an analytical and practical consideration of significant everyday problems most likely to confront the special court judge, especially the adult misdemeanant judge. While emphasis is given to evidence, criminal law, sentencing, and search and seizure, there are also short presentations on court administration, courts and the community, judge-jury relations, alcohol problems, traffic, civil law, and constitutional law developments—First Amendment, due process and equal protection.

Seven judges attended the regular four-week sessions. The objectives of this program are (1) to increase the confidence of the relatively new judge by giving him a deeper understanding of his role as a judge and of the entire judicial process, and to provide an opportunity to learn methods of judges from other jurisdictions; (2) to allow the experienced judge to re-examine his judicial philosophy and approaches to decision making, court administration and other court problems in an academic atmosphere with the assistance of fellow judges; and (3) to encourage the use of the latest techniques to increase the efficiency of trial courts and to decrease the number of reversals and new trials; to seek means of bringing about speedy trials; and to explore ways of explaining the judicial function to the general public.

Specific topics discussed in depth were court administration, civil proceedings before trial, judicial discretion, family law, evidence, judicial problems, jury, courts and the community,

sentencing, corrections, criminal law, new developments in civil law, communications and inherent powers of the courts.

National College of Juvenile Justice

Five Family Court judges attended the two-week fall College course. Topics included were review and implementation of recent supreme court decisions; dependency and neglect, adoptions, and child abuse; waiver and transfer; dispositions; drug use and abuse; the juvenile court and the child with hearing disabilities; kids, crime, and corrections: some trends in psychological treatment and its relation to the juvenile court; behavioral science applications; institutions and their alternatives; back home applications.

5.4.2 Nonjudicial Programs

The Institute for Court Management (ICM)

A total of 13 nonjudicial personnel attended one of three programs in 1975. Six nonjudicial personnel attended phase I of five weeks' duration, concentrating on the operational side of court management. Five attended phase II of the ICM program for four weeks, focusing on the justice environment and managerial perspective in the courts. In addition, two court staff members attended the final two-week residential seminar whose successful completion qualifies participants for certification as a Fellow of the Institute for Court Management.

Tuition Reimbursement

During the year the Education and Training Office administered the tuition reimbursement program for state-paid employees of the judicial system. A total of 92 applications for job-related courses and programs were processed. In terms of career objectives the breakdown was as follows:

A.A. or A.S. degree	12
B.A. or B.S. degree	17
M.A., M.S., M.P.A. or M.B.A. degree	17
L.L.M.	12
Doctoral level	8
Other	26
	92

5.4.3 Other Judicial Programs

Appellate Judges' Seminar

One Associate Justice of the Appellate Division, First Department, was sponsored to attend this three and one-half day seminar. Various appellate judges from 10 different states conducted sessions on the following topics: impact of recent decisions, the decision-making process at the appellate level, the

opinion: why, when and how, rule-making power, and expediting appeals.

County Judges' Association

The County Judges' Association spring meeting was held at Cooperstown on May 15-17. Typing and copying assistance was provided to the Association, and a representative of the Education and Training Office attended the sessions. Reading material also was provided to the judges on search warrants and selected recent cases, as well as a bibliography on fitness to stand trial, prepared by Judge Bernard Thomson.

The New York School for Psychiatry

This office assisted in obtaining nominees to attend a series of seminars conducted by the New York School for Psychiatry under a grant. A small group of judges and psychiatrists met one night a week for 13 weeks and discussed such topics as what is mental illness?; psychiatrists: what are they and how they function; treatments for mental illness; fitness to stand trial; the insanity defense; disposition of the insanity acquittal; involuntary civil commitment standards; commitment procedures; and the right to treatment and the right to resist treatment.

The judges who have attended these seminars have found them to be a most rewarding experience.

5.4.4 Other Activities

The Education and Training Office staff also coordinates the work of the Special Committee for the Office of Court Administration. The Pattern Jury Instructions-Civil Committee, chaired by Honorable Bernard S. Meyer, is charged with the responsibility of keeping this important work up to date. When necessary, contracts with law school professors to assist in drafting specific complex charges and comments are negotiated through this office.

The "Bench Book" Committee, chaired by Honorable Edwin Kassoff, prepares an annual supplement to this looseleaf work. The typing, reproduction and distribution of the book and supplements are coordinated by the staff of the Education and Training Office.

The Criminal Jury Instructions Committee, chaired by Judge Lyman Smith, is the newest of these committees. This committee, with the aid of a Federal grant, is drafting pattern charges for use in the criminal trials of our state. The Director of Education and Training serves as project director under this grant and attends all the meetings of the committee. Eventual publication will be coordinated by the Education and Training Office.

5.5 SUMMARIES OF DISCUSSIONS AT CROTONVILLE CONFERENCE

CIVIL PRACTICE LAW AND RULES

Reporter

Professor David D. Siegel

This year's panel was Justice Thompson, as chairman, his associates Justices Hughes and Sandler, Adjunct Professor Aksen, who is counsel to the American Arbitration Association, Professor Homburger, and myself. We had as always more material than utopia would produce.

In each of the four sessions Justice Thompson led off with the provisional remedies, made sensitive in recent years by the United States Supreme Court's series of decisions tightening up the constitutional requirements applicable to them. The opening entry in these sweepstakes was the *Sniadach* case,[1] followed by *Fuentes*,[2] *Mitchell*,[3] and *North Georgia*.[4] These pronouncements are not entirely consistent with one another, but the upshot of their aggregate is to require that the provisional remedies be as a rule granted only after due notice and opportunity to be heard has been given to the defendant. Only in special circumstances, such as where the provisional remedy is being used for a jurisdictional purpose (as where an attachment is sought to seize local property of a nonresident defendant against whom no personam jurisdiction exists),[5] may it be granted ex parte.

The requirements applicable to the replevin remedy are reasonably clear in New York today because of recent amendments made in Article 71 of the CPLR to conform with current constitutional requirements. These amendments just flow with the tide, leaving to the courts to shape procedure as Supreme Court edicts of the moment dictate. But another frequently used remedy, the order of attachment, has not been amended and still purports to authorize ex parte orders in all instances. A three-judge federal district court declared several of the attachment grounds unconstitutional because of this. The *Sugar* case[6] in the Southern District, whose decision has been stayed pending direct appeal to the United States Supreme Court, misread the New York attachment statutes; the court assumed that the only ground to vacate an attachment is that it is not needed as security by the plaintiff, whereas that is but one of many grounds on which attachments can be vacated. Because of this erroneous premise New York courts have been almost unanimous in rejecting the *Sugar* case[7] especially when the attachment is sought for its jurisdictional rather than mere security purpose.

The Civil Court has circulated a directive, as Justice Thompson showed the panels, which answers present constitutional demands by permitting the attachment to issue ex parte initially; the plaintiff, within three days after the levy,

is then required to repeat his motion, this time on notice, and sustain his attachment grounds, the burden of proof being placed by this directive on the plaintiff. Without such a directive the proof burden is said to rest with the defendant if he wants the attachment vacated, but since the order of attachment is discretionary with the court and constitutes as a provisional remedy a drastic device which must be construed against the seeker,[8] the proof burden is not so clearly on the defendant as some courts, including reported New York cases, have assumed.

The Southern District federal court has made use of the Civil Court directive. Its clerk has circulated it to the judges for possible inclusion in federal attachments, which follow state law.[9]

The second topic was arbitration, or rather the extent to which the courts should permit themselves to become involved with arbitrability questions. This topic was presented by Gerald Aksen, a national arbitration expert (as counsel to the AAA) and a first-time guest at Crotonville. He subdivided the arbitration topic into three categories: labor agreements, where arbitration as a remedy is designed to avoid industrial strife; commercial agreements, one of the oldest sources of arbitration, where arbitration's main asset is to avoid the time and expense of litigation; and international arbitration, where arbitration carries out the governmental purpose of avoiding the unpredictability that could result from international undertakings were foreign court adjudications to be resorted to.

Further subdividing of arbitration was made, looking at it from different vantage points. One such was voluntary (the most common kind) versus compulsory arbitration. The cases in these respective areas cannot be analyzed in the same way because different legislative policies are involved. With compulsory arbitration the Legislature is telling the parties that arbitration is the only way they can compel a settlement of their dispute.

There is then the remedial use made of arbitration in such areas today as Uninsured Motorist and No-Fault, both of which illustrate the arrival of arbitration as a remedy upon the tort scene. Mr. Aksen described some of the no-fault procedures and illustrated some of the forms promulgated for official use.

Next discussed were the CPLR applications which may be used to test questions or arbitrability. These come from CPLR 7503 and are well known to Supreme Court Justices, who see them frequently in the motion parts. Stressed here was the narrow judicial function, which is only to determine *whether* the parties agreed to arbitrate the particular dispute. The recent Court of Appeals *Nationwide* case[10] was used to set the tenor. If the parties agreed to arbitrate the dispute, the court so holds and stays its hand from all further involvement, remitting the aggrieved person to pursue his remedy in arbitration.

The purpose of the no-fault legislation to keep small cases out of court was discussed, a topic expanded on by Justice Hughes in the next topic.

The arbitration discussion ended with accent on the limited scope of review which exists after an award has been rendered. Few grounds are available to overturn the award. A sometimes used ground to reject an award is that it offends public policy. In that connection a recent Court of Appeals decision was introduced. In the *Savin Brothers* case[11] a divided Court upheld an arbitration award which allowed a penalty under a liquidated damages clause contained in the contract. The arbitrators said that this was not really a "penalty" and a majority of the court felt constrained to accept the arbitrators' view of it, lest any weakening of the arbitral process occur by allowing disgruntled losers to undo their commitments by trying to get the courts to apply arbitration-rejecting characterizations.

An interesting statistic was introduced, by the way, in connection with arbitration, again concerning the recent no-fault legislation. No-fault took effect February 1, 1974. In all of 1974, Mr. Aksen showed, there were only 175 arbitrations of no-fault disputes. By the time of Crotonville in 1975 (late June), the law had caught on (with the New York multitudes the catchers): no-fault arbitrations were now coming into the American Arbitration Association (which handles them by arrangement with the Insurance Department) at the rate of 250 a month. Even that number is not, in context, very high, suggesting that most cases are being settled without dispute, i.e., not going to litigation *or* arbitration.

Topic three took us into the no-fault area again, a not surprising event since personal injury proliferates in litigation and all of the no-fault inroads are made there. Justice Hughes presented the topic, leading off with reference to the *Montgomery* case,[12] which declares the law unconstitutional. We are advised that the case is on direct appeal to the Court of Appeals, bypassing the Appellate Division pursuant to a provision[13] which permits that procedure when only a constitutional question is involved.

Briefly mentioned were the requirements that both pleading and bill of particulars in these tort cases plead and particularize the facts necessary to take the case out of no-fault coverage so as to make litigation permissible.[14] Attention was then turned to a matter which has serious implications for one of the major aims of no-fault: to keep as many cases as possible out of the courts so as to assure cheap and quick procedure to resolve small cases. The problem concerns, for example, the case in which the plaintiff fancies that his injury is a "significant disfigurement" and hence a "serious injury", which, if it is, would take the case out of no-fault and allow ordinary tort suit.[15]

Were such suit allowed, pain and suffering would be a permitted compensatory item. It is an item absent in no-fault cases but one on which the most money is usually awarded in ordinary personal injury litigation. Defendant, to be sure, contends that the plaintiff's injury is not "serious", i.e., the disfigurement not "significant", and with those simple battle lines the fight is on. Is the injury such? Is it a fault suit (with a

court action to be allowed)? Is that a question of fact? law? If fact, does the court try it, or must it go to a jury?

These problems usually arise when the plaintiff makes his own assumptions and just sues in court. The defendant then makes his own assumptions and moves to dismiss under CPLR 3211 (a) (7) or for summary judgment under CPLR 3212. That those would be the procedural modes for raising these issues, and that many of these issues were bound to arise, were contemplated in the 1974 Commentaries,[16] and Justice Hughes presented to the panel a case squarely in point, perfectly illustrative of the problem and, by happy coincidence, his own of only a few months earlier:

P had a shoulder scar which he believed to be a significant disfigurement, and sued. D believed otherwise and moved for summary judgment. The court held the issue to be one of fact triable by jury, and ordered it immediately tried (on the authority of CPLR 3212 [c]) so as to get the case right out of court (and into no-fault) if the jury should decide in defendant's favor on the issue.[17] In a similar case, with the threshold (determining whether this is a fault suit for the courts or a no-fault one for treatment accordingly) this time concerned with whether the "reasonable and customary" medical expenses for plaintiff's injury passed the required $500, the court also held the issue to be one of fact, and triable by jury; but here the court deferred resolution of the issue to the main trial so as to avoid duplication, otherwise a possibility, of expensive medical proof.[18]

There was a broad range of disagreement among the judges about which of those two dispositions was correct, or whether either was. Every position had its advocates. Some judges contended that the matter is one of law for the court to decide or, in any event, if one of fact, one on which only "jurisdiction" depends so that it can be tried by the court and needs no jury. One group of judges bought this position; others contested it vigorously. The latter group felt that it would be inappropriate to treat this as only a "jurisdictional" matter; that cases which involve only service of process or the like and hence get fact issues decided by judges without juries offer bad analogy for the present situation. Cases like that, even if resolved against plaintiff, mean only that the plaintiff must sue again, something he can do without impediment. He sustains no substantive loss. But finding against the plaintiff in these no-fault situations, whether called by a "jurisdictional" or any other name, is in effect an absolute determination that the plaintiff will never collect for pain and suffering; that plaintiff's case is a small one meant for no-fault treatment and is to be ejected from the court system and sent to the no-fault arena, where little cases end up. It is, in short, a permanent and binding judgment, unless overturned by immediate and direct appeal, that plaintiff's recovery will be far more modest than it might be in a jury's hands in a fault suit. It is therefore difficult to dismiss that question as a mere "jurisdictional" one. Much more turns on it than the mere question of the court's power to

go ahead with it. It is in every substantial sense a determination of a good part (possibly the major part) of the merits.

Yet, if so regarded and if jury is to be allowed (as it was in both cases discussed above), what is to be the effect of this doing on the purpose of avoiding litigation implicit in the no-fault laws? Much remains to be resolved on these matters, by the Court of Appeals if not, indeed, by the Legislature itself. The courts can in many cases find themselves involved with long trials, not to resolve the merits, but only to determine who is going to hear those merits.

Judge Hughes pointed out how even settlements are impeded in these instances. If the case is found to be for litigation, the settlement can be substantial because the insurer knows pain and suffering is in it and a jury will get the question. If it is determined to be a no-fault case (the action being dismissed because it does not belong in court), the insurer can be tight in a settlement offer because it knows the recovery is severely restricted.

Topic four was forum non conveniens, in which Judge Sandler reviewed the statute in point, CPLR 327 (enacted a few years ago), and several recent cases. This was probably the only topic that could be presented tersely and yet fairly, or at least so it came off in Judge Sandler's hands.

A point of controversy here concerned whether or not a judge could dismiss a case for inconvenient forum on his own motion. CPLR 327 authorizes an inconvenient forum dismissal "on the motion of any party". Does that preclude the court's dismissing sua sponte? The question was put by Professor Homburger. Judge Sandler answered that the statute would seem to have that restrictive effect but that he would, given the opportunity, construe it more broadly. Most of the judges agreed with that response. Were there no judicial power to dismiss for inconvenient forum, such a rule could enable parties on both sides, whenever they agree , to impose on the New York courts with parties and cases having no relevance whatever to New York and no reasonable call on the time and attention of New York judges and juries and on the New York taxpayer who supports the system.

Topic five was an updating of the Dole rule, the doctrine of *Dole v. Dow Chemical Company*[19] which now apportions culpability (and liability) among tortfeasors according to their actual fault, as found by the jury, and permits one tortfeasor if sued alone to implead the others whether plaintiff wants them in the action or not. Previous years had given *Dole* heavy treatment, and this year was able to get by with only a few recent developments. This was my topic, and I contented myself with bringing to the judges' attention two recent Court of Appeals decisions finally resolving two items which had been left dangling as of last year (one of which produced some subtantial disagreement among the judges earlier).

The first case was the *Holodook* decision,[20] in which the Court of Appeals resolved what was surely the chief dilemma of the *Dole* era. This was the question of whether a parent could

be impleaded, by a defendant tortfeasor, to contribute to the damages emanating from an accident in which the child was hurt if the basis of liability alleged against the parent is not affirmative negligence of a traditional kind but, rather, nonsupervision of the child (exposing the child to the accident). The Court of Appeals closed the door to this kind of liability abruptly. It held that New York, as a substantive matter, does not recognize a cause of action by infant against parent for nonsupervision; that a third party sued by the infant derives its right against the parent through the infant in this kind of case; and that since the infant has no claim against the parent directly, neither does the third person derivatively.

The other open question closed during the past year was this. Wife (passenger in husband's car, husband driving), sues X, the driver of the other car. X impleads the husband. Does the husband's insurance policy cover the third-party claim? Resolving dispute among the lower courts, the Court of Appeals held that the insurance policy does not apply even in third-party context; that the terms of the applicable statute[21] are too clear to admit of a contrary construction even though the underlying purpose of the statute (which makes liability insurance inapplicable between spouses unless expressly stated so to apply) is to deter collusion by spouses against their insurer and such possibility is almost nil here (where both spouses share an interest in pinning liability on X's insurer rather than on their own).[22] The upshot of this holding, as long as the marriage is strong, is that (practically speaking) whatever the wife recovers from X will be diminished by whatever X recovers over from the husband, since the wife will presumably fork over, from whatever she gets, whatever her husband needs to pay X's contribution judgment. If the marriage is on the rocks, the husband will have to fend for himself, which is no novelty when a marriage is on the rocks.

Professor Homburger handled another subject which is really a phase of the *Dole* rule today because it is a statutory development accelerated by it. It is the comparative negligence rule, enacted by the 1975 Legislature in a new CPLR Article 14A to apply to all occurrences happening on or after September 1, 1975. It rejects the contributory negligence rule, applicable in New York for generations, which precludes a plaintiff in a personal injury action from recovering anything at all if the plaintiff is in any measure negligent. It substitutes not just a comparative negligence rule, which permits a plaintiff who is negligent to recover but with damages diminished by the plaintiff's ratio of fault, but a "pure" one, which means that the recovery does not dissolve entirely if plaintiff's fault passes a certain threshold, such as 49% or 50%. Whatever the proportion of plaintiff's fault, 2% or 92% or any other, plaintiff still recovers, the diminution in damages proportional to plaintiff's culpability left to work the justice needed. Professor Homburger then reviewed several items he felt should be stressed in conjunction with the new comparative negligence rule.

The recovery against the defendants stands as joint and several after the figure is diminished for plaintiff's fault. Thus, if P sues A, B and C, and each of the four is found 25% at fault with P's damages $100,000, P's judgment gets reduced by the $25,000 representing P's fault, but the balance of $75,000 is a judgment P takes jointly and severally against A, B and C (who are then left to seek Dole contribution under CPLR Article 14 if one pays more than his own pro rata $25,000 share).

Counterclaims may not be so used as to benefit an insurer. P sues D for $50,000 damages, D counterclaiming for $70,000 damages. P and D are both found to have suffered the damages they seek but they are each found at fault, 50%-50%. P has a $50,000 policy (per person), D a $100,000 policy (per person). P's $50,000 damages get reduced to $25,000 because of P's 50% fault and P collects the whole $25,000 from D, payable by D's insurer; D's damages are reduced by his own 50% fault to $35,000, and he collects all of that from P, payable by P's insurer. P's insurer will not be allowed to use P's $25,000 as an offset to reduce D's $35,000 and pay D only $10,000. The reminder is helpful, but no judge was likely to give an insurer this windfall even had no such reminder been included. And although an insurance company's lawyer might have made such suggestion, it would not have been with a straight face.

Topic six was the class action, discussed several times in previous years but never with the currency or impact of this moment. The New York class action statute, CPLR 1005, which has been so restrictively interpreted over the years that it was, at least vis-a-vis Federal Rule 23 and the broadly construed California provision, virtually impotent, has been repealed, and a new statute, in fact several statutes (the new Article 9 in the CPLR), adopted to replace it. The force behind the new class action, which will reverberate through the courts immediately (it takes effect on September 1, 1975), if one person has to be singled out from among the many who had a hand in its adoption, is Professor Homburger; so it naturally fell to him to present the subject. As chairman of the Judicial Conference's CPLR Committee he gave the class action project succor at every stage of its development and stayed with it over the years until, in 1975 at last, it reached the statute books and will shortly reach the courts.

He described the class action as a "pooling device", i.e., one in which a number of people with a small stake in the outcome can get together and sue a wrongdoing defendant through a self-chosen representative. That they may pool their efforts (and their resources) means a saving, and often means the difference between suing and not suing when neither individual prosecution nor actual joinder of the class members would be possible as a practical matter. The resulting judgment binds the class members if the action is properly conducted.

Under New York's old statute mass relief by way of a declaratory judgment or injunction was available at times because there the court could with one wave of the hand come up with but a single judgment to satisfy the whole class and be

done with the case. Even there the results were erratic and often nonfunctional. However, the main troublemaker, and the phenomenon which generated the rigid construction, was the case in which what was actually sought was monetary relief to be distributed to thousands or hundreds of thousands among the class. When money was the object the courts were not just circumspect, they were hostile. Limited "fund" cases, in which the amount to be recovered was limited by such as an insurance policy, and cases "in the closely associated relationships growing out of trust, partnership or joint venture, and ownership of corporate stock"[23] made inroads; but the open allowance of money relief was, with only an occasional case slipping through and quickly finding itself ostracized in subsequent decisions, frowned upon. Not until a year or so ago did the Court of Appeals indicate growing dissatisfaction with the current state of the law. The main accomplishment of the new legislation is that, at long last, it makes the class action unashamedly available even in money cases.

The class action can be a law school course by itself, but it could be allowed no more than an hour of our proceedings (so great were the demands of competing topics). It will thus be helpful to cite sources for reference should the reader want to turn elsewhere for discourse. The CPLR Committee's comments, set forth in the Judicial Conference's 18th Annual Report, is a prime source of insight,[24] as is Professor Homburger's law review article,[25] which in turn cites numerous authorities and sources on the subject. The reader can also turn to the federal counterpart, Rule 23 of the Federal Rules of Civil Procedure. There is an exhaustive note of the Federal Advisory Committee (the rule's sponsor) following Rule 23 in the Title 28 volumes of the U.S.C.A. and that along with the prolific federal case law on Rule 23 can offer guidance by analogy, but with a big proviso: The reader should carefully compare the relevant provision in the new New York class action law with the analogue (if any) in Federal Rule 23 to make sure there is sufficient identity to make the federal cases and notes valid for New York use. Many will be the occasions for such adoption of federal sources, but there are also significant differences to make cautious comparison an indispensable preliminary.

The Governor's message notes that with the new statute the class action, now available also for monetary relief in a proper case, can take the profit out of "poor workmanship, deceptive or unconscionable trade practices and illegal conduct". Hitherto an individual could not press a just suit in such an area because it was financially impossible, and actual joinder was not feasible.

Briefly reviewing the new law, its prerequisites (contained in CPLR 901) were treated, and the requirement of Section 902 was stressed: that the plaintiff shortly after the action is begun move for an order permitting the action in class form. The court then has occasion to consider whether the factors of CPLR 901 (plus yet others listed in CPLR 902) have been met, and whether the class form should be used. One important

limitation, however, must be noted: class actions are not available in New York to collect statutory penalties.

If the action seeks money, notice of its commencement must be given class members, but the method of notice is left to the court to decide. So provides CPLR 904(b). The content of the notice is also for the court to determine.[26] The expense of notification is the plaintiff's but, and this is quite important, the court has power to fix it elsewhere. It does have power to make the defendant pay or share the notice costs.[27] There is also power to divide the class into subclasses, each one to be treated as a class for further proceedings, and to direct class treatment of only one or some rather than all issues.[28] The court's reins on the proceedings of a class action are tight throughout, and just about all significant phases are court supervised, including attempts to settle or discontinue the action.[29]

An "opting out" practice akin to what is met under the federal rule is provided for, thus enabling the court to set up a procedure whereby class members in a given situation (the court to decide which ones) can ask to be excluded from the class.[30] That, if permitted, eliminates them from the case and means that they are not affected (pro or con) by the judgment.

Attorney's fees may be allowed in the court's discretion if the class recovers, to be based on the "reasonable value" of the services rendered. The class's opponent can be made to pay those fees.[31]

Topic seven was the package of medical malpractice legislation, hurriedly pressed and passed to avoid a doctors' strike. Justice Hughes presented this subject, part of which is the requirement that in uninformed-consent cases the plaintiff must prove (among other things) that the lack of consent is the proximate cause of the injury. Defendant is also given a number of defenses.[32] Also affected are statutes of limitation (cut from 3 to 2 1/2 years for medical malpractice cases), including the discovery provision in surgery instances (reduced from 2 years to 1).[33] The case gets a special preference,[34] and the plaintiff in uninformed-consent cases must produce a medical expert to attest to the "qualitative insufficiency" of the consent. Absent such expert proof the plaintiff's claim will be dismissed.[35] There is also a new rule allowing evidence of "collateral source" payments to be brought to the jury's attention, although without directing what (if anything) the jury may do with the data.[36]

The above, believe it or not, is the merest summary of our proceedings, which offers some indication of what kind of a year it has been in civil practice.

Footnotes

[1] Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820 (1969).
[2] Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972).
[3] Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895 (1974).
[4] North Georgia Finishing, Inc. v. Di-Chem, Inc., U.S. 95 S. Ct. 719 (1975).

[5] See footnote 23 at page 91 of 407 U.S., page 1999 of 92 S.Ct.
[6] Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974).
[7] See, e.g., AMF Inc. v. Algo Distributors, Ltd., NYLJ June 23, 1975, p. 1, cols. 7-8 (2d Dep't); Regnell v. Page, 82 Misc. 2D 506, 369 N.Y.S. 2d 936 (1975).
[8] See Sartwell v. Field, 68 N.Y. 341 (1877).
[9] Rule 4(e), (f), Federal Rules of Civil Procedure.
[10] Nationwide General Ins. Co. v. Investors Ins. Co. of America, decided June 9, 1975 (not yet reported).
[11] Associated General Contractors v. Savin Brothers, Inc., decided June 16, 1975 (not yet reported).
[12] Montgomery v. Daniels, 81 Misc. 2d 373, 367 N.Y.S. 2d 419 (1975).
[13] CPLR 5601(b) (2).
[14] CPLR 3016(g), 3043(a) (6).
[15] See Ins. L. § § 671 (4) (a), 673(1).
[16] See 1974 Commentary C3211:29 on McKinney's CPLR 3211.
[17] Sullivan v. Darling, Misc. 2d , 367 N.Y.S. 2d 199 (1975).
[18] Snyder v. Laffer, Misc. 2d 367 N.Y.S. 2d 454 (1975).
[19] 30 N.Y. 2d 143, 331 N.Y.S. 2d 382 (1972).
[20] Holodook v. Spencer, 36 N.Y. 2d 35, 364 N.Y.S. 2d 859 (1974).
[21] Ins. L. §167(3).
[22] State Farm Mutual Auto Ins. Co. v. Westlake, 35 N.Y. 2d 587, 364 N.Y.S. 2d 482 (1974).
[23] Hall v. Coburn Corp. of America, 26 N.Y. 2d 396, 402, 311 N.Y.S. 2d 281, 284 (1970).
[24] See 18th Annual Jud. Conf. Rpt. (1973), p. A-35 et seq.
[25] State Class Actions and the Federal Rules, 71 Col. L. Rev 609 (1971).
[26] CPLR 904(c).
[27] CPLR 904(d).
[28] CPLR 906.
[29] CPLR 907, 908.
[30] CPLR 903.
[31] CPLR 909.
[32] Public Health Law §2805-d.
[33] CPLR 203(f), 214-a.
[34] CPLR 3403(a) (5).
[35] CPLR 4401-a.
[36] CPLR 4010.

EVIDENCE

Reporter

Professor Robert A. Barker

The Evidence Panel this year was under the direction of Dean Joseph McLaughlin and included Justice T. Paul Kane, Justice Arnold Fraiman and Justice John J. Conway. The panelists discussed opinion evidence, impeachment, hearsay and presumptions.

Opinion Evidence

Dean McLaughlin led the groups through the cases dealing with the necessary foundation for expert testimony. In *People v. Keogh* (276 N.Y. 141) the court clearly enunciated the traditional rule that the facts upon which an expert rests his opinion must have been presented in evidence. In 1963 CPLR 4515 was enacted. This statute permits an expert to testify without the use of a hypothetical question. The ostensible purpose of this rule was to curtail the abuse of the hypothetical, but in *People v. DiPiazza* (24 NY 2d 342) the Court intimated that 4515 also did away with the necessity for having the underlying facts in evidence. The statute, in fact, does say that the opinion may be rendered without the data upon which it is based and leaves it to the cross-examiner to ferret this out if he be so inclined. All these provisions in 4515, however, seem to go to the procedure and form to be used in extracting information from the experts. It would not seem to be its intent that it do away with the *Keogh* rule requiring facts upon which the opinion is based to be in evidence.

In *People v. Stone* (35 NY 2d 69) the Court approved an expert opinion, confirmed, said the psychiatrist, by interviews with 12 people. Four of those did not testify and the *Keogh* rule was argued by defendant. The Court said that the *Keogh* rule imposed an undue limitation on an expert's investigation which ought to be thorough and unhampered by the fact all his sources might not get into evidence. Again 4515 was alluded to as watering down *Keogh*. So long as the expert's opinion is substantially, although not exclusively, bottomed on facts in evidence, it will be admissible.

In *People v. Sugden* (35 NY 2d 453) the Court seems to have retreated to *Keogh* in adopting a general rule that the opinion must be based on facts in evidence; but then two exceptions are carved out. First, if people interviewed by the expert testify at trial, then the expert may rely on their information. This restriction was imposed in order to meet the argument of lack of confrontation in criminal cases where an expert relies on hearsay and is really an application of the *Keogh* rule and not an exception to it. Secondly, it was stated that the expert may rely on material of a kind accepted in his profession as reliable and commonly relied on. Just what this might be from profession to profession is open to question and may well be whatever the expert says it is. A careful reading of *Sugden*

indicates that although the Court claims to be fashioning new rules in this area, aided by 4515, it really has not strayed awfully far from *Keogh*. And, of course, as Dean McLaughlin put it, the *Sugden* "materials commonly relied on" exception if carried far enough could swallow the rule altogether.

Dean McLaughlin posed a possible ramification of this second *Sugden* exception. What would the "commonly relied on" exception do to the old rule that only a treating physician can testify as to expressions of pain? Could the defendant's examining physician testify that he relied on plaintiff's exclamations or lack thereof in reaching his opinion since this is information commonly relied on?

Justice Conway discussed further aspects of expert testimony. Can a party call the expert hired by the other side? In *Gugliano v. Levi* (24 AD 2d 591) the Appellate Division held that this could not be done where plaintiff called an expert hired by defendant to examine plaintiff and who came in with an opinion favoring plaintiff. Previously, in *McDermott v. Eye and Ear Hospital* (15 NY 2d 20) the Court of Appeals had held that plaintiff in a malpractice case could call the defendant doctor as her witness because of his expertise. Dictum in *McDermott* was also to the effect that plaintiff could properly have called defendant's hired expert who had examined her, a point seemingly overlooked by the *Gugliano* court.

There was general agreement that either party could call a neutral expert such as a city medical examiner for an opinion, and this is borne out in *Bernikow* v. *Allstate* (355 N.Y.S. 2d 964).

Changing the inquiry slightly, we next investigated whether defendant could examine plaintiff's attending physician as to plaintiff's history in order to show that plaintiff's malady predated the accident or, as in *Villano v. Conde Nast Publications* (361 NYS 2d 351) the publication of unauthorized photographs which plaintiff claimed caused his psoriasis. It was agreed that this was proper although defendant could not ask for the doctor's opinion as to causal relationship.

What is the difference between "opinion" and "fact"? Dean McLaughlin suggested that perhaps as expert was testifying only to fact so long as he stayed away from key issues such as causal relationship; that, often, diagnosis of a condition, although arguably necessitating an opinion, was nevertheless permissible as the elicitation of fact in this context.

Impeachment

Justice Fraiman presented the impeachment topic. What has happened to *People v. Sandoval* (34 NY 2d 371), a case decided in June 1974, in which, in addition to authorizing a pretrail motion to exclude the use of prior convictions and bad acts for impeachment purposes, the Court attempted to set guidelines as to what sort of previous indiscretions could be used? The Court instructed that the trial judge must be careful to balance the probative effect of such impeachment on the issue of credibility

against undue prejudice to the defendant. Thus, antiquated convictions, or prior acts of spontaneous violence might have very little bearing on the issue of the defendant's present credibility; and allowing in prior crimes similar to the one in issue is to be avoided since it indicates defendant's predisposition to commit the crime in issue. The "putting one's own interests ahead of society's" test was suggested as a test by which the prior act could be measured against the question of present credibility regardless of whether or not the prior act directly involved dishonest expression.

Sandoval seemed to have put limits to the old *Sorge* rule. But then came *People v. Duffy* (36 NY 2d 258), which the groups regarded as restoring full use of the judge's discretion in these situations. After all, any prior crime shows defendant's willingness to put his own interests ahead of society's, so that test is not awfully helpful. Moreover, the other *Sandoval* limitations were not cast in the form of ironclad injunctions, but merely staked out danger zones.

Sandoval - Duffy go only to impeachment of criminal defendants, and the rule here also is that, in the case of convictions, the prosecutor may not go into the acts underlying the convictions. In civil cases, and with nondefendant witnesses, however, the cross-examiner is permitted to get into the underlying facts as illustrated in *DelCerro v. City of New York* (36 NY 2d 707).

In another area of impeachment we found the First Department apparently ignoring the provisions of CPL 60.35, which provides that you may impeach your own witness with a prior signed or sworn statement, but only if he has given testimony damaging to your case. The advisory committee's notes show that they intended that the witness must have affirmatively hurt the case, and that an "I don't remember" response to a question would not be sufficient. This is exactly the response elicited in *People v. Fitzpatrick* (47 AD 2d 70), however, where the Court held the ensuing impeachment by a previous grand jury statement was proper.

What about the witness who testifies to detail not mentioned at an earlier time, such as in his memo book? Can he be impeached on account of these omissions? The groups agreed that he cannot really be impeached and that *People v. Bornholdt* (33 NY 2d 75) says that unless it is shown that at the prior time his attention was specifically directed to the matter in question it is of no materiality. It is not expected that a cop, for instance, is going to put all detail in his memo book which it may occur to him later to testify about.

What about the admission by silence where the defendant would otherwise be expected to speak, such as in *People v. Rothschild* (35 NY 2d 355) where the officer being tried for extortion claimed he was setting up a bribe? It was permissible, said the Court, to show that at and around the time of the incident he made no mention of bribery to anyone. Either before or at the time he was caught, his normal response would

have been the protestation that he was engaged in proper police work. This bit of circumstantial evidence law must be carefully applied, however, since in another case there may be a defendant who had a perfect right to say nothing in the face of accusations especially if he is Joe Mugger in custody and not, as in *Rothschild*, a police officer.

Finally, as to impeachment we were instructed as to the rule in *Spaminato v. A.B.C. Consolidated Corp.* (35 NY 2d 283), where plaintiff in a personal injury action read in defendant's deposition. The trial court ruled that by so doing plaintiff had made defendant his witness and was bound by the statements in the deposition. Applying the provisions of CPLR 3117, the Court of Appeals pointed out that plaintiff had every right to use the deposition and that where, as here, the deposition is that of a party, the statute specifically provides that use of the deposition does not make the deponent the plaintiff's own witness. Moreover, even when plaintiff called defendant to the stand, although he made defendant his own witness, plaintiff was not to be considered bound by defendant's testimony. The Court stated: "No party is ever limited by the witnesses he produces, or examines, from establishing facts in issue. A party may not generally impeach . . . the credibility of his own witness, but impeachment is not to be confused with 'binding' testimony." (35 NY 2d at 287).

Hearsay

The hearsay discussion this year was led by Justice Kane and was devoted to the business entry rule, CPLR 4518. The discussions centered on the question whether or not employee accident reports should be admitted under 4518. The Supreme Court many years ago in *Palmer v. Hoffman* (318 U.S. 109) held that a railroad engineer's accident report was not admissible, since it was not the routine business of the railroad to be having accidents.

The consensus among the groups was that such reports should not be admissible, because the maker had every reason to report favorably on behalf of himself and his employer. The guarantee of truthfulness common to all hearsay exceptions is missing. The aspect of routineness which is the foundation of that guarantee is missing because accidents are not routine. They are catastrophic, extraordinary events creating conditions conducive to untruthfulness.

Yet, in New York, under *Toll v. State* (32 AD 2d 47) and several other cases, such reports are allowed in. The soundness of these decisions was brought into question in all the panels.

Another aspect of the business entry rule involved the question whether, where the report contains something resembling an opinion commonly uttered by an expert, the party against whom it was being offered would have an objection based on inability to cross-examine the entrant, especially as to his qualifications. This issue was not handily resolved by any group, especially when the illustration of hospital records was offered—those being rather routinely

admitted. Yet, in *Rodriguez v. Zampella* (42 AD 2d 805) it was held error to have allowed in a physician's report, since it invaded an area of expertise and the declarent was not available for cross-examination.

Presumptions

Federal Rule of Evidence 301 ascribes to presumptions generally only the procedural function of shifting the burden of producing evidence; the burden of persuasion is in no way to be affected by a presumption. The groups were agreed that presumptions never affect the burden of persuasion; but the point was discussed whether presumptions nevertheless have more than the procedural function of shifting the burden of producing evidence.

In *People v. Silver* (33 NY 2d 475) it was acknowledged that if there is a reason underlying the presumption based on probability then it can stay in, even after the shifted burden of producing evidence is satisfied, as at least an inference which can be weighed by the jury against the opposition's proof.

Various burdens have various purposes. The presumption that damaged bailed good were damaged by the negligence of the bailee is really only for the procedural purpose of placing on the party who has the knowledge the burden of producing evidence. The burden of persuasion on the question of negligence starts and ends with the plaintiff. Opposed to that is a presumption based on public policy such as the presumption of legitimacy which has almost the effect of substantive law. Between these extremes lie presumptions such as sanity and suicide where procedural functions are served and where there are underlying reasons properly to be considered by the jury as circumstantial evidence. It is the common experience of mankind that most men are sane and that it is against human nature to commit suicide. Thus, as expressed in *Silver*, once the procedural aspect of a "probability based" presumption falls away, a lingering inference remains for the jury's consideration.

CRIMINAL LAW AND PROCEDURE

Reporter

Professor Faust F. Rossi

The Criminal Law and Procedure Panel was composed again this year of judges and lawyers with experience and expertise in the substantive and procedural criminal law field. The panel was chaired by Honorable Lyman H. Smith and he was ably assisted by Honorable Peter J. McQuillan, Albert M. Rosenblatt, Joseph W. Bellacosa and Arthur Weinstein.

Almost all of the year's major developments were treated with emphasis upon five major topics. These significant items of discussion were (1) the definition of an "accomplice", (2) lesser included verdicts, (3) jury selection in criminal cases, (4) sentence negotiation and (5) search and seizure.

Definition of an Accomplice

Justice Smith opened deliberation with a series of related questions. Who is an accomplice? When is the decision one of fact for the jury? When is it one for the trial judge to decide as a matter of law?

The "accomplice" doctrine precludes conviction solely upon the testimony of one who is criminally implicated in the factual conduct for which the accused is on trial. Thus, in the case of a genuine accomplice, his testimony against the defendant requires corroboration to justify conviction. In 1970 the Legislature broadened the definition of accomplice by adding CPL 60.22 (2) (b). The effect of the modification was to require corroboration not only when the witness participated in the offense charged but also when the evidence indicates he participated in "an offense based upon the same or some of the same facts or conduct which constitute the offense charged." In spite of this legislative broadening, three recent cases point toward a narrow construction, one which limits the definition of accomplice with a consequent elimination of the corroboration requirement.

In *People v. Basch*, 36 N.Y. 2d 154 (1975), a snowmobile outing culiminated in the burglary of an isolated building and the theft of food and several other articles. The trial evidence indicated that the witness had been present in the area of the crime; had been asked to serve as a lookout; had purchased some of the stolen property; had eaten some of the stolen food and then had fled upon hearing the arrival of others. The trial court refused to charge that the witness was an accomplice as a matter of law. Instead the matter was left for jury decision as a question of fact. The Court of Appeals supported the trial court's approach, noting that it was not clear that the witness had actually agreed to be a lookout or that the witness had committed a criminal trespass on the victim's property. The Court relied in part upon *People v. Brooks*, 34 N.Y. 2d 475 (1974), an earlier decision which was also discussed by the panel.

In *Brooks* the Court of Appeals held that a receiver of stolen property is not the accomplice of the thief when there is no proof of a prior agreement between them. Under these circumstances, even though the witness "fence" and the thief had visited together 10 or 20 times before the larceny, a refusal to even submit the issue to the jury as a question of fact was upheld. A demonstration of the appellate tendency to read the statutory definition narrowly is contained in these words from the *Brooks* opinion at 34 N.Y. 2d 477-78:

> "We observe that perhaps in a mechanical, literal sense Lo Monaco [Witness] might be said to be an accomplice within the language of paragraph (b) [CPL 60.22 (2) (b)]. That is, he might be considered to have participated in an offense, criminal possession of stolen property, one material element of which would have been the theft of the jewelry by appellant."

However, after conceding the "literal" applicability of statutory accomplice definition, the Court finds apt the quote of Learned Hand that "there is no surer way to misread any document than to read it literally." The opinion cites Frankfurter's condemnation of "the notion that because the words of a statute are plain, its meaning is also plain."

The Court of Appeals concluded by saying at 34 N.Y. 2d 478-79:

> "We are aware of no responsible authority in New York holding that a receiver is an accomplice of the thief when, as here, there is no proof of a prior agreement between them. Usually the two crimes of theft and receiving the proceeds of the theft are separate both in time and in operative components. The theft has been completed independently before the receiver has come on the scene, and the act of receiving occurs at a quite different place and at a subsequent time."

The most recent of the trilogy of accomplice decisions is *People v. McAuliffe*, 36 N.Y. 2d 820 (1975). It continues the pattern of narrow construction of CPL 60.22 (2) (b). The defendant had been involved with others in large-scale bribery and police corruption. His involvement in these crimes led to his conviction for perjury based upon testimony before the grand jury. Defendant's partners in the underlying incidents of corruption and bribery were held not to be accomplices in the perjury prosecution. The Court reasoned at 36 N.Y. 2d 822:

> "No one suggests that the co-participants in the briberies fall within the scope of paragraph (a) of subdivision (2)—i.e., that they may reasonably be considered to have participated in defendant's perjury, the offense charged. Nor, we conclude, do they come within the sweep of paragraph (b). While each may have been a participant in bribery, such activity constituted no part of the crime of perjury—false swearing. Had defendant been on trial for bribery, § 60.22 would have been applicable; he was here charged, however, with the separate and distinct offense of perjury. The issue is obscured by the circumstance that defendant was involved in two criminal activities, bribery and perjury. Analysis may be advanced by suggesting that had the perjury charge comprised allegations that defendant had given false testimony as to an entirely innocent conversation, his partner-conversationalist would not be thought of as an accomplice. Conceptually the situation here is no different. To hold, as defendant would have us, that it should suffice to show only that the particular witness was "in some way implicated" in defendant's criminal activity would be to stretch the statute far beyond the ambit intended by the Legislature. It is critical that defendant was charged with perjury and not bribery."

Several panel participants suggested that these recent decisions might reflect part of a judicial trend disfavoring the corroboration requirement. Triers of fact routinely are called upon to assess the credibility of ordinary interested witnesses. Arguably, the corroboration requirement is an unnecessary additional requirement in the accomplice situation. Obviously, one way to limit the need for corroboration is to narrow the definition of "accomplice."

Lesser Included Verdicts

The second topic for the panel's deliberations concerned lesser included offenses and verdicts. Justice McQuillan pursued this complicated subject in considerable depth. The statutory descriptions of "lesser included offenses" or "inclusory concurrent counts" present three general questions to the trial judge. The first problem is what offenses should the trial judge submit for jury consideration. A second subject of inquiry involves the form of the submission. How should these included offenses or counts be charged? Separately or alternatively? A third consideration is put by asking what may properly be received from the jury after the submission of multiple included offenses or counts.

The statutory rules governing these questions are set forth in CPL 300.40 and 300.50. These provisions and interpretive decisions provide some answers. First, if there is a reasonable view of the evidence which would support a finding that the defendant committed a lesser included offense upon request of either party. Second, with respect to such "lesser included offenses" or "inclusory concurrent counts" charged in a multiple count indictment, the Court will submit them as alternatives to be considered by the jury only if the accused is found not guilty of the greatest or inclusive count. Third, a verdict of guilty on the greatest count is deemed a dismissal of every lesser included count submitted and thus no verdict is appropriate on such lesser counts.

By way of example, let us assume that defendant is charged with robbery in the first degree involving forcible stealing while armed with a gun. Assume further that grand larceny in the third degree and possession of the weapon are either charged as counts in the indictment or are not charged but are lesser included offenses under a reasonable view of the evidence and their submission is requested. What procedural course should the trial judge follow. A group of three First Department Appellate Division cases give a clear answer. The lesson of *People v. Pyles*, 44 App. Div. 2d 784 (1st Dept. 1974), *People v. Daniels*, 47 App. Div. 2d 821 (1st Dept. 1975), and *People v. Jenkins*, 47 App. Div. 2d 832 (1st Dept. 1975), is as follows. The trial judge should submit the robbery, larceny and possession crimes but he would instruct that if the jury finds defendant guilty of robbery, then they are not to consider the larceny or possession charges, since these two would be conclusory concurrent counts or included offenses.

What if the jury in fact returns a verdict of guilty on all

counts? Then the larceny and possession counts must be dismissed! Why bother—what difference does it make to the defendant since his sentence will be concurrent and will not be increased by the additional guilty verdicts on larceny and possession? The statute requires dismissal of the inclusory concurrent counts or offenses at least in part out of fear that the additional guilty verdicts will adversely affect defendant's parole consideration.

If guilt on the greater count of robbery mandates dismissal of the inclusory counts of larceny and possession, why should the court concern itself with submitting the counts to the jury as alternatives? Why not let the jury report on all three? If they find defendant guilty of all three, the court still can dismiss the larceny and possession charges. The danger is that the jury may return repugnant verdicts. It might for example, find defendant guilty of robbery but acquit of the lesser included offenses of larceny and possession. *People v. Belvin* 47 App. Div. 2d 929 (2d Dept. 1975), indicates that such a result would require dismissal of the indictment. In *Belvin*, the trial court submitted multiple counts to the jury including robbery in the first, second and third degrees. The Court failed to charge that robbery in the third degree, a lesser included offense, should be considered only in the alternative, and that the jury should not consider that lesser offense if it were to find defendant guilty of one of the greater counts. The jury returned repugnant verdicts of conviction on the counts for the first and second degrees but acquitted defendant of the lesser offense. The court concluded at 47 App. Div. 2d 929 that:

> "Since a retrial of the counts charging robbery in the first and second degree would necessarily include robbery in the third degree, as to which crime there has been an acquittal, a conviction of either of the higher crimes would constitute double jeopardy as to robbery in the third degree and, therefore, the counts for first and second degrees cannot be resubmitted."

The participants also discussed the meaning of the term "lesser included offense." CPL 1.20 (37) defines it in terms of the legal impossibility test. When it is impossible to commit a particular crime without concomitantly commiting by the same conduct another offense of lesser grade, the latter is, with respect to the former, a "lesser included offense." Is this "legal impossibility test" a conceptual one determined by looking at and comparing the statutory elements of the offenses? The answer is no. The message of the Court of Appeals in *People v. Stanfield*, 36 N.Y. 2d 467 (1975), *People v. Hayes*, 35 N.Y. 2d 907 (1974), and *People v. Cioneh*, 35 N.Y. 2d 924 (1974), is that "impossible" means "impossible under a reasonable view of the facts of the case to be decided." *Stanfield* is the most recent and best example. Defendant was indicted and tried for manslaughter second degree which involves recklessness, a mental state in which the actor perceives the risk but consciously disregards it. Criminally negligent homicide is

negligence, a mental state in which the actor fails to perceive the risk. Is the latter a lesser included offense of the former? Conceptually, it is not. One cannot perceive and disregard a risk under manslaughter second degree and, at the same time, negligently not perceive the risk under the charge of criminally negligent homicide. Nevertheless, the Court of Appeals held that negligent homicide can be a lesser included offense to manslaughter. The Court rejected an abstract "conceptually nice and mechanically accurate" analysis. Instead it speaks of a reasonable view of the evidence. The focus should be upon the particular facts of the case. As the Court put it at 36 N.Y. 2d 471-72:

> "It is necessary to say whether in this record there was a reasonable view of the evidence that would have supported a finding that the defendant committed the lesser but not the greater offense, thus entitling him to the instruction as requested . . . . we think there was . . . Therefore, on the particular facts of this case on which we focus rather than merely superimposing the 'impossibility' formula of lesser included offense upon the abstract statutory language. . .,we conclude that criminally negligent homicide is a lesser included offense of manslaughter, second degree."

Jury Selection in Criminal Cases

Arthur Weinstein led the panel in a discussion of jury selection in New York criminal cases. Mr. Weinstein described the amended rule adopted by the Administrative Board of the Judicial Conference which is effective on September 1, 1975.

The major objectives of new Section 20.10 of the Rules of the Administrative Board are to save court time and eliminate improper questioning by attorneys during the *voir dire* examination. The rule spells out the trial court's functions during the examination of jurors.

The judge must put to the prospective jurors questions relating to their qualifications. The current rule, which requires the judge to ask "any questions which he thinks necessary," allows him to ask no questions and defer to the attorneys on the assumption that they will ask all the necessary questions. The Court must permit the attorneys to examine the prospective jurors. The existing language—namely, that the judge "shall, in his discretion" permit examination by counsel—fails to express clearly their right to examine, which is guaranteed in section 270.15 of the Criminal Procedure Law. The revised rule clarifies that right. The judge must not permit repetitious or irrelevant questions and, if necessary to prevent improper questioning on any matter, he must himself examine prospective jurors on the matter. This requirement is not in the current rule. At the same time, the attorneys must be given a fair opportunity to question the prospective jurors on any unexplored relevant matters relating to their qualifications.

The amended rule also expressly codifies the holding of *People v. Boulware*, 29 N.Y. 2d 135 (1971). The Court of Appeals in *Boulware* held that questions by counsel about the prospective jurors' knowledge of or attitude toward rules of law—such as the presumption of innocence, the burden of proof, reasonable doubt, and the meaning and purpose of an indictment—are improper. The rule permits attorneys to ask, however, whether the jurors will follow the court's instructions.

Sentence Negotiation

Plea bargaining or, as it is now increasingly called, "sentence negotiation" was the panel's next topic for discussion. Joseph Bellacosa reviewed the recent Court of Appeals cases in this area and saw in them a restoration of judicial supremacy and flexibility in the sentencing process.

In *People v. Selikoff*, 35 N.Y. 2d 227 (1974), the defendant pleaded guilty to two counts in full satisfaction of 42 counts in four indictments arising out of a complicated real estate swindle. On accepting the plea the judge indicated his opinion that no sentence of imprisonment would be imposed. The statement was not expressly conditioned upon a later assessment of facts or the presentence report. Subsequent to the pleas, the judge presided at the trials of the co-defendants. He then learned that the pleading defendant's role in the fraud had not been peripheral, as the judge had been advised at plea, but that defendant had been a principal participant. This information and the presentence report led the sentencing judge to conclude that he could not and would not keep his promise to avoid a sentence of imprisonment. He offered defendant an opportunity to withdraw his pleas. Defendant refused and insisted upon compliance with the original sentencing agreement. The judge sentenced defendant to an indeterminate 5-year sentence. In *Selikoff* the Court of Appeals affirmed and the opinion makes this significant statement at 35 N.Y. 2d 238:

> "A Judge may not ignore those provisions of law designed to assure that an appropriate sentence is imposed . . .Thus, any sentence "promise" at the time of plea is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in light of the subsequent presentence report or information obtained from other reliable sources. That the court in the *Selikoff* case did not explicitly condition its "promise" . . . upon its later evaluation after reading the presentence report, or the facts it learned from the trial of the codefendants, is therefore of no consequence."

Thus, the judge's plea promise is deemed conditioned by operation of law and the demands of public policy.

People v. Campbell, 35 N.Y. 2d 227 (1974), was decided as a companion to the *Selikoff* decision. In Campbell, it was the district attorney who induced defendant's plea by an on-the-record promise that he would recommend a sentence of

no imprisonment and by an off-the-record promise that, if imprisonment were imposed, the People would not oppose a motion by defendant to withdraw his plea. At sentence, in spite of the district attorney's recommendation of no jail time, the judge imposed three months. The court was then informed by the prosecutor of the undisclosed arrangment that the People would not, in the event of a prison sentence, oppose a motion by defendant to withdraw this plea and that defendant "would be permitted to withdraw his plea." The court pointed out that it had not been privy to such a promise; that no mention had been made of it earlier and the sentence of three months remained. Again the Court of Appeals affirmed, noting at 36 N.Y. 2d 241:

> "Withdrawal of a plea, . . . is not within the power of the prosecutor; that power rests solely in the discretion of the court . . . The prosecutor, without authority, promised that which he could not legally perform and the defendant, therefore, could not, as a matter of law, rely on that promise."

A third case of interest is *People v. Williams*, 36 N.Y. 2d 829 (1975). As a condition to acceptance of his plea, defendant was asked to waive his right to appeal from the earlier denial of his suppression motion. The defendant's plea and the associated waiver were upheld. The defendant made the waiver knowingly, voluntarily and after consultation with counsel. References to situational coercion were not persuasive. The Court stated at 36 N.Y. 2d 830:

> "On this record there can be no doubt that defendant's plea and the associated waiver were each made knowingly and voluntarily. His position on this appeal is based rather on the argument that as a matter of law under CPL 710.70(2) there can be no waiver of a defendant's right to appeal from a pre-conviction denial of a motion for suppression, although reference is also made in conclusory fashion to what might be termed situational coercion.
>
> "In these circumstances, where the plea on condition was voluntarily entered, with full comprehension on defendant's part of both the plea and the associated condition, we conclude that this defendant may properly be held to the waiver of his right to appeal from the denial of his suppression motion."

Thus, both the plea and the appeal waiver were allowed to stand.

Beyond these cases, participants were reminded of the statutorily mandated requirement that the prosecutor and the judge state on the record the reasons for consenting to and accepting a plea of guilty. CPL 220.50 (4), as amended in 1973, provides:

> "Where the permission of the court and the consent of the people are a prerequisite to the entry of a plea of guilty, the court and the prosecutor must either

> orally on the record or in a writing filed with the indictment state their reason for granting permission or consenting, as the case may be, to entry of the plea of guilty."

Search and Seizure

Albert Rosenblatt presented a review of significant search and seizure developments. Discussion centered primarily upon the Court of Appeals decision in *People v. Nieves*, 36 N.Y. 2d 396 (1975), and *People v. Ingle*, 36 N.Y. 2d 413 (1975).

Nieves raises the problem encountered in multiple target warrants. It is possible for a single warrant to authorize a search of the named individual's described premises, automobile or his person wherever found. It is also possible under CPL 690.15 for the warrant to permit a search of designated premises and "any person present thereat or therein." The lesson of *Nieves* is that for such a warrant search and seizure to be upheld, the probable cause set forth in the authorizing papers must justify a search of all the targets. Thus, a search of a named person wherever found will be upheld only if there is probable cause to believe that the individual will be in possession of contraband or engaged in criminal activity away from the described premises. A search of premises and anyone thereat or therein would be justified only if there was probable cause to believe that each and every occupant of the designated premises may be engaged in ongoing criminal activity.

In *Nieves*, the warrant which authorized search of a restaurant and any person therein was invalidated when used to search a patron seated alone at a table. The Court stated at 36 N.Y. 2d 296 that such a multiple target warrant could only be upheld under conditions expressed as follows:

> "If on the particular facts articulated to the issuing Judge, the locus of the search is carefully confined by description and reasonably appears limited to criminal activity, then the challenged statute authorizing searches of any person present thereat or therein may be constitutionally applied. The facts made known to the Magistrate and the reasonable inferences to which they give rise, must create a substantial probability . . . that the authorized invasions of privacy will be justified by discovery of the items sought from all persons present when the warrant is executed. If this probability is not present, then each person subject to search must be identified in the warrant and supporting papers by name or sufficient personal description."

The Court concluded that the warrant used against Nieves fell far short of meeting these requirements, since it authorized a search of the entire premises at an apparently public place without any showing of probable cause that the premises were confined to illegal activity and that there was a substantial probability that all persons present at the time of execution would possess the items sought. It is clear that *pro forma* use of

the authorization to search "any person present thereat or therein" will be tolerated only when the *Nieves* criteria are met.

People v. Ingel, 36 N.Y. 2d 413 (1975), imposes a limitation on plain view seizures arising out of automobile traffic checks. The opinion reaffirms the right of police to engage in routine traffic stops and to seize contraband in plain view. However, the plain view seizure must in fact arise out of a genuine routine traffic check and not from a target search disguised as a traffic check. The police may choose to stop a vehicle to determine compliance with the Vehicle and Traffic Law. But the selection of vehicles to stop must be by some reasonable, nonarbitrary, random or systematic procedure and not on the basis of irrelevant reasons such as the driver's age, appearance or length of hair. Stops based upon discriminatory selection of automobiles will invalidate even a plain view seizure.

In *Ingle* the trooper selected one automobile out of the stream of traffic on a public highway and stopped it to conduct a "routine traffic check." The officer candidly testified that he had no reason to select defendant and had no information concerning defendant's vehicle. The Court held that the stop was an illegal seizure of defendant's automobile and that the evidence obtained by that seizure may not be used against him.

Mr. Rosenblatt concluded the discussion of search and seizures by making several suggestions in treating information obtained from informants. He recommended that judges consider going beyond the mere acceptance of affidavits in support of warrants. Instead, judges should consider the use of mini-hearings where police witnesses and informants may provide sworn testimony in elaboration of probable cause. He also urged the participants to remember that when probable cause is furnished by confidential informants the two-pronged tests of *Aguilar* and *Spinelli* must be met. Not only must the reliability of informant be detailed in the supporting affidavits, but facts concerning the reliability of the information itself must be supplied. It is not enough that the papers show that the informant knows and is reliable. The supporting documents must also specify *how* the informant knows where the contraband is to be found.

Summary Review of Legislation and Cases

The last portion of the panel's deliberations consisted of a summary review of recent legislation and several miscellaneous decisions of significance.

Enactment was noted of legislation to limit the admissibility of a victim's prior sexual conduct in sex offense cases. Section 60.42 of the Criminal Procedure Law provides that evidence of a victim's sexual conduct shall not be admissible in a prosecution for certain sex offenses except in five specific trial situations. One of the exceptions to the rule of exclusion gives the trial judge broad discretion to admit the victim's sex history upon express findings of fact that such evidence is "relevant and admissible in the interests of justice."

The most recent Court of Appeals "harmless error" decision was also discussed. In *People v. Crimmins*, 36 N.Y. 2d 230 (1975), the Court of Appeals found that the constitutional error committed in the trial court was harmless under the test of United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). It was determined that the prosecutor's comment in summation with respect to defendant's failure to testify was violative of State and Federal Constitutions. However, the Court decided that there was no reasonable possibility that the error contributed to the conviction and that it was harmless beyond a reasonable doubt. The Court further stated that three other possible errors in trial court rulings were not of constitutional dimension. This latter determination led the Court to define and elaborate upon the doctrine of harmless error as applied to nonconstitutional error.

The Court began by conceding its inconsistency in prior formulations. It refused to accept the view that there is no difference in the application of the doctrine between constitutional and nonconstitutional error. Two discrete considerations are relevant and have combined in varying proportions to produce specific results in particular cases. The first of such factors is the quantum and nature of proof of the defendant's guilt if the error in question were to be wholly excised. The second is the casual effect which it is judged that the particular error may nonetheless have had on the actual verdict. Under either the federal or state test, there is no occasion for consideration of any doctrine of harmless error unless the proof of defendant's guilt is overwhelming. Under the federal test, however overwhelming the quantum and nature of other proof, the error is not harmless if there is a "reasonable possibility" that the error might have contributed to conviction. The state test with respect to nonconstitutional error is not so exacting. In this context the error is prejudicial if, after finding overwhelming proof of guilt, the appellate court concludes that there is a "significant probability" that the jury would have convicted. Thus, the casual test to determine the need for reversal is not one of "rational possibility" that the error contributed to conviction. The reversing court must find that there was a "significant probability" that the nonconstitutional error contributed. Applying this test in *Crimmins*, the Court found all errors to be harmless.

Just a week before this conference the Court of Appeals decided *People v. Broadie*, 37 N.Y. 2d 100 (1975). This decision rejected a constitutional challenge to the life sentences mandated for defendants convicted of felony violations of New York's anti-drug laws. The Court of Appeals, in a unanimous decision, upheld lower court rulings on separate appeals by eight individuals convicted of class A felony drug offenses.

The issue raised in all of the appeals was that the law prescribed sentences so disproportionate with the penalties for other crimes that the statute violated the constitutional protection against cruel and unusual punishment.

The Court answered at 37 N.Y. 2d 110 that:

> "The sentences are not grossly disproportionate in constitutional analysis. The Legislature may distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each. Thus, while the courts possess the power to strike down punishments as violative of constitutional limitations, the power must be exercised with especial restraint. However disproportionality is measured, the instant sentences do not rise to the gross disproportionality violative of constitutional limitations."

It was pointed out, however, that one of the concluding sentences of the opinion leaves open the door to subsequent challenge "in some rare case" where facts are such that the statutes may be found to have been unconstitutionally applied (37 N.Y. 2d 119).

The panel concluded its deliberations with brief mention of the very recent United States Supreme Court opinion *Mullaney v. Wilbur*, 421 U.S. 684, 43 L.W. 4695 (1975). The State of Maine requires a defendant charged with murder, which upon conviction carries a mandatory sentence of life imprisonment, to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter. The punishment for manslaughter is a fine or imprisonment not exceeding 20 years. The Supreme Court held that this requirement that the defendant prove the defense by a preponderance of the evidence violates the Fourteenth Amendment. The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. Therefore, the prosecution in a homicide case must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented.

This decision calls into question New York's own affirmative defense statutes. Maine's "heat of passion" defense is reminiscent of New York's affirmative defense of "extreme emotional disturbance", which operates to reduce the degree of the homicide (Penal Law 125.27 (2); 125.25; 125.20). Penal Law 25.00 states that defendant has the burden of establishing an "affirmative defense" by a preponderance of the evidence. The similarity between our formulation and the condemned Maine rule presages *Mullaney* type constitutional challenges in New York.

ROLE OF THE TRIAL JUDGE

Reporter

Professor Milton G. Gershenson

The panel materials dealt with current problems in matrimonial actions, and were arranged to bring out three different themes relevant to the role of the trial judge: Discretion, interpretation, and constitutional implications.

Justice Robert H. Wagner drew on his experiences both in the Supreme Court and in the Family Court and as Administrative Judge of the Family Court in the Fourth Department to discuss and develop the interrelations between the Family Court and the Supreme Court in the area of discretionary referral to the Family Court of applications for (1) fixation of alimony (2) award of child custody and (3) enforcement or modification of support orders of New York or outside courts. Pointing out that any power granted to the Family Court by the Family Court Act is automatically conferred on the Supreme Court by virtue of the Judiciary Article of the New York State Constitution (*Kagan v. Kagan*, 21 N.Y. 2d 532), he cited the recent holding of *Levy v. Levy*, 46 A.D. 2d 876, in which a pure support proceeding was entertained by the Supreme Court, subject only to the strictures of the Family Court Act. A reason commonly offered for referrals from the Supreme Court to the Family Court is the availability of the "auxiliary arms and services" of the latter court. Justice Wagner pointed out, however, that under the *Kagan* theme, these auxiliary arms and services—such as the Probation Department—are equally available to the Supreme Court, subject, however, to practical problems of caseload, liaison and cooperation between the two courts. Most judges indicated that they were not kept informed in any official way of Family Court statistics. Justice Wagner concluded by emphasizing the great burdens on the Family Court caused by its heavy caseload, which strains every facility of that court.

Perhaps the most sensitive area of judicial discretion—child custody cases—was explored under the tutelage of Justice Morrie Slifkin, whose judicial experience also included service on both benches. With only the most general criterion for guidance, the best interest of the child, and the statutory mandate that there is to be no preference between parents, two aids to the judge were considered in depth: The holding in *Lincoln v. Lincoln*, 24 N.Y. 2d 270, approved the informal interview of the child or children without the consent or presence of either of the parties or their counsel. There was a consensus that while this is a very useful tool, judges must develop skillful questions designed to ferret out either "brain-washed" children or children who are cunningly seeking to manipulate their parents and the court; it was also agreed that younger children were considered more likely to speak the truth, and that interviews could profitably be held with children down to about the age of five, with few exceptions. Queried whether it was their practice to appoint a guardian ad litem for the child who is the object of a custody dispute, most judges responded in the negative, some giving as a reason the lack of authority to award a fee to such guardian. Nearly all indicated that they made a stenographic record of the confidential interview which could be sealed and annexed to the papers on appeal, if necessary.

The second aid to the judge in a custody case about which comment was made—the report of the Probation Department or

a psychiatric evaluation—was the subject of lively discussion on the issue whether such report, which is ordered as an aid to the court, should or must be made available to counsel for review and possible use on cross-examination of the author, assuming his availability. While it is true such report is for the use of the court alone, the consensus was that since such reports contain much hearsay, innuendo, and gossip, they must be made available to counsel to be tested by cross-examination, at least unless counsel have stipulated to waive this right.

Splitting *legal* custody between both parents found to be fit, espoused in such cases as *Perotti v. Perotti*, 78 Misc. 2d 131, was overwhelmingly regarded by the judges as impracticable, undesirable and unworkable.

The custody presentation was concluded with three other aspects, each of which produced lively discussion: (1) The relevancy of the open life style of the custodial parent, as was considered in *Feldman v. Feldman*, 45 A.D. 2d 320, (2) The modification of out-of-state court orders, with or without proof of change of circumstances affecting the best interests of the child; (3) The visitation rights of grandparents conferred since 1966 by statute; there was almost complete unanimity that the statute is useless, since if the relationship within the family after the death of a parent or parents has so deteriorated that the grandparents are compelled to seek a court order for forced visitation, such atmosphere is hardly such as will advance the best interests of the child.

Your reporter then reviewed current policies in the fields of alimony and counsel fees developed by judicial construction of the general standards of the statutes. One major problem involved construing a statute, sec. 236 of the Domestic Relations Law, which was drafted in 1962 in the era of the one-ground "fault" system and has been unamended since (but for the 1968 change which made the length of the marriage and the ability of the wife to be self-supporting additional factors to be considered by the court) despite the six grounds introduced by the Divorce Reform Act of 1966. The period of uncertainty was dissipated by two leading decisions: *Kover v. Kover*, 29 N.Y. 2d 408 (1972), approved of *de novo* review of awards of alimony made in "old" separation judgments upon later "conversion" into divorces; and *Math v. Math*, 39 A.D. 2d 583 aff'd no opinion in 31 N.Y. 2d 693 (1972), interpreted the word "misconduct"—which meant adultery and adultery alone when drafted in 1962—to include the first four "fault" grounds of the six grounds set up in the Divorce Reform Act, so that there can be no award made if a divorce is obtained against the wife on any of the four; very recently, the bar was applied in the first appellate affirmance of a double divorce where the wife won a divorce on a "fault" ground but lost the defense of the counterclaim with the result that the husband also won a divorce on the same "fault" ground (*John W.S. v. Jeanne F.S.*, 48 A.D. 2d 30).

It was also pointed out that two levels of "misconduct" were set up under the 1962 formulation; discretionary alimony is

authorized where there is some misconduct of the wife not rising to the level of such misconduct as would constitute grounds for separation or divorce. So, where both spouses are guilty of such lower-level misconduct, there is discretion to award alimony to the wife. *Madderom v. Madderom*, 44 A.D. 2d 828.

Two other situations were considered, one somewhat unusual, the second unfortunately too common. While the preseparation standard of living is the yardstick for an award of alimony, an artificially depressed, or excessively lavish, standard of living should not be controlling; proof of such departure from the norm must be permitted. (*Contrubis v. Contrubis*, 46 A.D. 2d 615; *Rockwell v. Rockwell*, 43 A.D. 2d 829). A more difficult policy problem is presented where the ex-husband has remarried and has incurred obligations of such amount that it is impossible for him to support two families. Does a showing of such facts entitle him to a reduction in the support of his first family? Recent cases moving in the direction of flexibility and discretion have seemingly been overruled by *Windwer v. Windwer*, 36 A.D. 2d 927 app. dism. 33 N.Y. 2d 599, mandating a preference for the first family unit, at least where the ex-husband's income has not been reduced in dollar amount. Most judges expressed dissatisfaction with a rule precluding a divorced man from marrying again solely because he will incur an intolerable economic burden if he cannot obtain some reasonable reduction in his obligations toward his first family—particularly toward an ex-wife who has some economic skills.

Attention was called to recent court rules mandating Official Form Affidavits to aid the court in determining the financial needs and resources of the parties and their pre-separation standard of living.

The subject of statutory counsel fees was briefly touched on, with emphasis on the divergence between the First and Second Departments—the former denying a counsel fee where the wife has the means to pay her lawyer, and the latter holding the contrary. The inconsistency is the result of the failure to amend sec. 237 to parallel the 1968 amendment of sec. 236, the alimony statute, which made the ability of the wife to be self-supporting, among other things, relevant.

Finally, the obvious point was made that the passage of the Equal Rights Amendment to the Constitution of the United States may require equal applicability to men and women of the right to alimony and counsel fees.

The panel then turned to leading recent cases, Justice Geiler making the presentation, under the Divorce Reform Act in which appellate courts construed the statutes involved. *Hessen v. Hessen*, 33 N.Y. 2d 406, which construed the "cruelty" ground to require proof of greater cruelty where the wife in a long-duration marriage is the defendant, has been followed by two obvious variants: *Armstrong v. Armstrong*, 47 A.D. 2d 800, where the marriage was of short duration, and *Johnson v. Johnson*, 36 N.Y. 2d 667, where the husband was the

defendant. A number of judges raised the intriguing question of how to charge a jury under *Hessen.* A practical solution was offered: Get the parties to waive a jury trial. *Becker v. Becker*, 36 N.Y. 2d *787* (Apr. 7, 1975), settled the question whether a separation judgment which denies separation but grants collateral relief, such as alimony, counsel fees and child custody, can be the basis for a "conversion" divorce. A unanimous court stated that conversion is not possible.

The practice of settling a separation action or a Family Court proceeding in open court by dictating an elaborate stipulation on the record has produced a spate of inconsistent lower court holdings on the question whether such stipulation qualifies either as a separation judgment or a separation agreement which can be converted into a divorce. The requirement that a separation *agreement* be subscribed and acknowledged would seem to clearly preclude conversion of a stipulation on the record.

Two Appellate Division cases permit conversion of separation agreements which could have been voided in *inter se* enforcement litigation in that they contained some void provisions. The holdings (in *Henderson v. Henderson*, 47 A.D. 2d 80, and *Christian v. Christian*, 367 N.Y.S. 2d 40) seem quite reasonable, since there are different policy considerations where the litigation is to end the status of marriage rather than to seek or enforce support; further, if the agreement is void, it is no bar to a *de novo* review of the question of support in the conversion divorce action.

Double divorce, an additional novelty under the Divorce Reform Act, was the subject of the Appellate Division opinion in *John W.S. v. Jeanne F.S.*, 48 A.D. 2d 30, where after a short-duration marriage each spouse established the cruelty of the other in a dual action. Justice Hopkins, writing for a unanimous court, rejected the wife's argument that a finding of fault on the part of the husband contradicts a finding of fault by the wife: "The innocence of one party is not a concomitant of the fault of the other." The case also held that both under *Hessen* and *Math* the wife was not entitled to alimony, since it was a marriage of short duration and was also an instance where although the wife "won" one action, she "lost" the other on a "fault" ground.

Justice Geiler concluded by commenting on a few leading cases on the power of the matrimonial court to pass on questions of title or possession of property. Two policies were noted: One, a preference in matters of support for an award in terms of money rather than in kind, and two, the nonpartitionable tenancy in common resulting under *Ripp v. Ripp*, 38 A.D. 2d 65, affd. 32 N.Y. 2d 755, if the divorce gives the wife an order of possession as to the marital home, title to which was originally in the form of a tenancy by the entirety. The new tenancy in common remains nonpartitionable until such time as the order of possession is terminated.

Turning to the interrelation of constitutional law and matrimonial law, Dean Emeritus Ray Forrester discussed two

Court of Appeals holdings, each of which is worthy of consideration by the Supreme Court of the United States. In *Matter of Smiley*, 36 N.Y. 2d 433, a divided court held that indigent wives have no right to publicly compensated counsel in divorce actions in which they are either the plaintiff or the defendant; the majority distinguished *Boddie v. Conn.*, 401 U.S. 371, where indigency would result in a denial of access to the courts if the state insisted on payment of litigation costs. In the present case, said the majority, "however desirable or necessary, representation by counsel is not a legal condition to access to the courts." Further, in the absence of statutes, courts have no power to require public compensation of counsel.

In *Matter of Orsini v. Blasi*, 36 N.Y. 2d 568, a divided court upheld the constitutionality of the section of the Domestic Relations Law which limits consent to the adoption of a child born out of wedlock to the natural mother. The adjudged putative father, although given notice, hearing, and an opportunity to demonstrate (albeit unsuccessfully) that the proposed adoption by the husband of the natural mother was not in the best interest of the 2 1/2-year-old female child, contended that the statute violated the due process and equal protection clauses of the Federal Constitution in that it unjustly discriminated between fathers of children born out of wedlock and all other parents. The majority found "several compelling reasons supporting a different legislative classification, tested even under different standards, for fathers of children born out of wedlock, so as to justify a denial to them of such a powerful veto over adoptions of illegitimate children—indeed over their welfare—which should be the primary public concern." Dean Forrester pointed out that the dissent of Judge Jones raised some interesting and innovative theories of the various balancing standards, applicable to an equal protection case, which have recently emerged in opinions of Justices of the Supreme Court of the United States.

Table 85
EDUCATION AND TRAINING OFFICE JUDICIAL PROGRAMS
January 1, 1975 through December 31, 1975

Dates—1975	*OCA Judicial Programs*	*Location*	*Duration*	*Number Attended*
February 10-12	Town and Village Justices Advanced Program	New York City	2 1/2 Days	92
March 20-22	New York State City Court Judges Seminar	New York City	3 Days	30
April 4 & 5, 11 & 12, 18 & 19	Town and Village Justices Basic Program	Albany, Buffalo, Syracuse	6 Days	84
April 7-12	Family Court Judges Seminar	New York City	7 Days	34
April 10 & 11	Family Court Judges Seminar	Syracuse	2 Days	32
May 2 & 3	Town and Village Justices Advanced Program	Binghamton	2 Days	64
May 14-17	Seminar for Surrogates	Cooperstown	4 Days	49
June 20 & 21	Town and Village Justices Special Evidence Seminar	Utica, Rochester	2 Days	262
June 22-26	Conference of New York State Trial Judges	Cortlandville	5 Days	140
June 23-25	Town and Village Justices Basic Program	St. Lawrence University	3 Days	85
July 22-25	Town and Village Justices Advanced Program	St. Lawrence University	4 Days	142
September 22-24	Family Court Judges Workshop	Niagara Falls	3 Days	80
September 22-24	Town and Village Justices Advanced Program	Grand Island	3 Days	40
September 23	Town and Village Justices Special Evidence Seminar	Grand Island	1 Day	108
October 5-7	Sentencing Institute	Cortlandville	3 Days	133
October 24-26	Sentencing Institute	Cortlandville	3 Days	142
October 18	Lawyer Town and Village Justices Seminar	Tarrytown	1 Day	109
November 7-9	Conference of Civil Court Judges	New Paltz	3 Days	66
November 14 & 15, 21 & 22, 28 & 29	Town and Village Justices Basic Program	Albany, Buffalo, Syracuse	6 Days	271
November 21 & 22	Town and Village Justices Advanced Program	Albany, Buffalo, Syracuse	2 Days	296
December 1-5	Newly Elected Judges Seminar	New York City	5 Day	65
			TOTAL	2789

	Other Judicial Programs			
Summer	National College of the State Judiciary	University of Nevada	2-4 Weeks	19
Fall	National College of Juvenile Justice	University of Nevada	2 Weeks	5
January 12-16	Appellate Judges Seminar	Miami Beach	3 1/2 Days	1
			TOTAL	25

Chapter 6

LEGISLATION

The 1974 reorganization of the Office of Court Administration, including the establishment of an Albany office to serve as liaison with the executive and legislative agencies in the capital, made possible a productive 1975 legislative program.

Counsel's office drafted a total of 66 bills for legislative action at the 1975 session, up from 45 introduced at the previous session. Of the 66 bills, 31 passed the Legislature and were approved by the Governor. In addition, three amendments to the rules of the Civil Practice Law and Rules promulgated by the Judicial Conference and submitted to the Legislature pursuant to section 229 of the Judiciary Law became law September 1, 1975.

The Office of Court Administration filed legislative memoranda on 520 bills introduced at the 1975 session that affected the administrative processes of the unified court system, compared with about 50 filed at the 1974 session. In response to requests from the Executive Chamber, counsel's office filed analyses and recommendations on 230 bills awaiting gubernatorial action, an increase of 98 over the 132 bills analyzed in 1974.

The following is a summary of concurrent resolutions and bills drafted by the Office of Court Adminstration and introduced at the 1975 session and of the CPLR amendments referred to above.

CONSTITUTIONAL AMENDMENTS RECOMMENDED BY THE ADMINISTRATIVE BOARD AND THE CHIEF JUDGE OF THE COURT OF APPEALS

1. Senate 1081 (Senator Goodman)
   Assembly 6397 (Rules Committee)

This proposed amendment to the Constitution would vest the authority and responsibility for the administrative supervision of the courts in the Chief Judge of the Court of Appeals, to be exercised through a Chief Administrator of the courts in consultation with the Administrative Board of the courts. The Chief Administrator of the courts would be appointed by the Chief Judge with the advice and consent of the Administrative Board. He would serve at the pleasure of the Chief Judge and exercise such duties as the Chief Judge might delegate and such other powers and duties as might be provided by law.

2. Senate 1011 (Senator Goodman)
   Assembly 6399 (Rules Committee)

This proposed amendment to the Constitution would require the State to finance the operation and maintenance costs of the

unified court system, while permitting the Legislature to require local reimbursement of a portion of such costs. The amendment would also provide that itemized estimates of the financial needs of the unified court system are to be prepared by the Chief Administrator of the courts and certified by the Chief Judge.

3. Senate 2832 (Rules Committee)
Assembly 6398 (Rules Committee)

This proposed amendment to the Constitution would provide for the appointment of the Chief Judge and the Associate Judges of the Court of Appeals by the Governor with the advice and consent of a Commission on Judicial Confirmation, consisting of 19 members selected by the Governor, the Chief Judge, the leaders of the Legislature, and the Presiding Jutices of the Appellate Divisions.

4. Senate 2829 (Rules Committee)
Assembly 6400 (Rules Committee)

This proposed amendment to the Constitution would abolish the Court on the Judiciary and establish a Commission on Judicial Conduct, which would be empowered to investigate complaints against judges and to recommend to the Court of Appeals, with respect to superior court judges, and to the Appellate Divisions, with respect to lower court judges, the censure, the removal, or the retirement for disability of any judge or justice in the unified court system.

CONSTITUTIONAL AMENDMENTS RECOMMENDED BY THE CHIEF JUDGE OF THE COURT OF APPEALS

1. Senate 2830 (Rules Committee)
Assembly 6395 (Rules Committee)

This proposed amendment to the Constitution would provide for the appointment of the Chief Judge and Associate Judges of the Court of Appeals, justices of the Supreme Court, and judges of the Court of Claims, the County Court, the Surrogate's Court and the Family Court by the Governor with the advice and consent of a Commission on Judicial Confirmation, consisting of 19 members selected by the Governor, the Chief Judge, the leaders of the Legislature, and the Presiding Justices of the Appellate Divisions.

2. Senate 2831 (Rules Committee)
Assembly 6396 (Rules Committee)

This proposed amendment to the Constitution would provide for a general reorganization of the unified court system to (1) abolish the County Court, the Surrogate's Court, the Family Court and the Court of Claims, merging their jurisdiction and judges into the Supreme Court, (2) provide for the appointment of judges of the Court of Appeals and justices of the Supreme

Court by the Governor with the advice and consent of a Commission on Judicial Confirmation, (3) replace the Court on the Judiciary with a Commission on Judicial Conduct, which could recommend that the Court of Appeals or the Appellate Divisions censure, remove or retire a judge, (4) vest administrative authority over the courts in the Chief Judge of the Court of Appeals, to be exercised through a Chief Administrator of the courts in consultation with an Administrative Board of the courts, and (5) require that the State finance the cost of operating the unified court system but permit the Legislature to require partial reimbursement by localities.

3. Senate 6594 (Rules Committee)
   Assembly 8548 (Rules Committee)

This proposed amendment to the Constitution would repeal present article 6 and add a new article 6 that would effect a major restructuring of the unified court system. The principal changes would be (1) the merger of the Court of Claims, the County Court, the Surrogate's Court, and the Family Court into one state-wide Supreme Court, (2) the end of selection of judges of the Court of Appeals and justices of the Supreme Court by general election and the institution of a system of gubernatorial appointments with the advice and consent of a Commission on Judicial Confirmation, (3) the abolishment of the Court on the Judiciary and the establishment of a California-style consolidation of all investigatory authority for the disciplining of judges in a single Commission on Judicial Conduct, which could recommend that the Court of Appeals or the Appellate Divisions censure, remove or retire a judge, (4) the consolidation of all administrative authority over the courts in the Chief Judge of the Court of Appeals, who would appoint a Chief Administrator of the courts, to have such powers as might be delegated to him by the Chief Judge, and (5) a requirement that the State finance the operation and maintenance of the unified court system, subject to whatever reimbursement by the localities the Legislature shall direct.

None of the foregoing concurrent resolutions was approved by the Legislature.

BILLS RECOMMENDED BY THE ADMINISTRATIVE BOARD

1. Senate 2556 (Senator Gordon)
   Assembly 5705 (Assemblyman Lehner)

This bill amended Chapter 1056 of the Laws of 1971 to extend until August 31, 1977, the statutory authority of the Administrative Board to continue programs for the compulsory arbitration of civil claims not exceeding $4,000.

This bill became Chapter 212 of the Laws of 1975.

2. Senate 3405-A (Senator Present)
Assembly 4671 (Assemblyman Thorp)

This bill amended the Judiciary Law (1) to increase the membership of the Judicial Conference to include a judge of a City Court outside the City of New York, a judge of a District Court, and a justice of a Town or Village Court and (2) to provide that appointment of these additional members shall be made by the Administrative Board.

This bill became Chapter 371 of the Laws of 1975.

3. Senate 4344-A (Senator Gordon)
Assembly 6363 (Assemblyman Thorp)

This bill amended the Uniform Justice Court Act and the Town Law to provide that no town or village justice, entering upon a term of office after July 1, 1975, shall engage in or accept any employment as a "peace officer" as that term is defined in section 1.20 of the Criminal Procedure Law.

This bill became Chapter 250 of the Laws of 1975.

4. Senate 4395 (Rules Committee)
Assembly 6286 (Assemblyman Siegel)

This bill would have amended section 35 of the Judiciary Law to eliminate statutory limits on the amount of compensation payable to court-appointed psychiatrists and physicians in proceedings involving the mentally ill, the mentally defective and narcotics addicts. It would have provided that a schedule of fees be established by the Office of Court Administration in lieu of those limits.

This bill died in both the Senate and the Assembly.

5. Senate 5960 (Senator Gordon)
Assembly 8269 (Rules Committee, request of Assemblyman Thorp)

This bill would have amended the Judiciary Law and the CPLR to permit law secretaries and law assistants to act as referees in uncontested matrimonial actions, without fee, upon appointment by an administrative judge.

This bill passed the Assembly, but died in the Senate.

6. Senate 6366 (Rules Committee)
Assembly 8421 (Rules Committee, request of Assemblyman Thorp)

This bill would have amended section 34-a of the Judiciary Law (1) to increase state aid for county-level, district and city court judicial salaries by $4,000 for each qualifying judge and (2) to increase the minimum annual salaries of these judges by $4,000.

This bill died in both the Senate and the Assembly.

7. Senate 3135 (Senator Hudson)
Assembly 4266-B (Assemblyman Sharoff)

This bill would have amended section 702 of the Real Property Tax Law to require that venue in tax certiorari proceedings shall be the county in which the assessed real property is located rather than any county within the judicial district in which the assessment was made.

This bill passed the Assembly, but died in the Senate.

BILLS RECOMMENDED BY THE JUDICIAL CONFERENCE

1. Senate 3277 (Senator Barclay et al)
Assembly 4178 (Assemblyman Fink et al)

This bill amended the General Obligations Law and the Estates, Powers and Trusts Law to establish a system of pure comparative negligence, thereby abolishing the contributory negligence doctrine in New York.

This bill became Chapter 69 of the Laws of 1975.

2. Senate 1309-B (Senator Barcley et al)
Assembly 1252-B (Assemblyman Fink et al)

This bill repealed CPLR section 1005 and added a new article, to be article 9, entitled "Class Actions". The bill, modeled after Federal Rule 23, modernized and liberalized the statutory law on class actions in New York, which had remained nearly unchanged since 1849.

This bill became Chapter 207 of the Laws of 1975.

3. 2752-A (Senator Volker et al)
Assembly 2378 (Assemblyman Brown et al)

This bill amended various sections of the Criminal Procedure Law to require that criminal record reports, particularly those of the Division of Criminal Justice Services, prepared after a defendant's arrest, be furnished to the court and to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.

This bill became Chapter 531 of the Laws of 1975.

4. Senate 2758 (Senator Barclay et al)
Assembly 2391 (Assemblyman Suchin et al)

This bill amended various sections of the Criminal Procedure Law to allow the issuance of appearance tickets to defendants arrested by persons other than police officers.

This bill became Chapter 78 of the Laws of 1975.

5. Senate 2615 (Senator Barclay et al)
Assembly 2390 (Assemblyman Siegel et al)

This bill amended section 5519(e) of the CPLR to provide that, subject to an order providing otherwise, any stay granted

on a motion for leave to appeal shall, in the event such motion is denied, continue for five days after service upon the movant of a copy of the order denying such motion together with notice of entry thereof.

This bill became Chapter 70 of the Laws of 1975.

6. Senate 2620-A (Senator Volker et al)
Assembly 2380 (Assemblyman Cooperman et al)

This bill amended section 270.35 of the Criminal Procedure Law to conform the statute to the holding in *People v. Ryan* (19 N.Y. 2d 100 (1966)) and to permit the discharge of a grossly disqualified juror.

This bill became Chapter 77 of the Laws of 1975.

7. Senate 2616 (Senator McFarland)
Assembly 2385 (Assemblymen Frey et al)

This bill amended section 5236 of the CPLR, governing notice of a sale of real property by the sheriff of the judgment debtor in connection with the enforcement of money judgments, to reword those segments of the section which were outmoded or stylistically improper and to update a cross reference to section 308 of the CPLR.

This bill became Chapter 570 of the Laws of 1975.

8. Senate 2617 (Senator Volker et al)
Assembly 2382 (Assemblyman Culhane et al)

This bill repealed subdivision 7 of section 213 of the CPLR, which limits the time within which to commence an action to establish a will.

This bill became Chapter 43 of the Laws of 1975.

9. Senate 2618 (Senator Pisani)
Assembly 2386 (Assemblyman Gottfried et al)

This bill would have repealed present article 240 of the Criminal Procedure Law, entitled "Discovery", and inserted a new article 240, also entitled "Discovery". Its purpose was to modernize New York's criminal discovery procedures and expedite criminal litigation.

This bill died in both the Senate and the Assembly.

10. Senate 3276 (Senator Dunne et al)
Assembly 2389 (Assemblyman Miller et al)

This bill would have amended the CPLR and the Insurance Law to create a right of direct action against an insurance carrier in wrongful death actions involving motor vehicles. The amendments would have abrogated the doctrine of *Seider v. Roth* (17 N.Y. 2d 111 (1966)).

This bill passed the Assembly, but died in the Senate.

11. Senate 5688 (Rules Committee)
Assembly 2381-B (Assemblyman Culhane et al)

This bill would have conformed the practice under the CPLR relating to examination of parties in *inter vivos* trust proceedings to that followed in Surrogate's court in testamentary trust proceedings.

This bill passed the Assembly, but died in the Senate.

12. Senate 5815 (Senator Volker)
Assembly 8203 (Rules Committee, request of Assemblyman M. Miller)

This bill would have amended the Criminal Procedure Law to require a court to order that one or more counts in an indictment be separately tried when they are improperly joined in a single indictment.

This bill died in both the Senate and the Assembly.

13. Senate 2834-B (Senator Dunne)
Assembly 2379-A (Assemblyman Brown)

This bill would have amended section 2512 of the CPLR (1) to make state and public officers, as well as domestic municipal corporations, liable for damages while being exempt from giving undertakings and (2) to clarify that where an appeal is taken by any such officer or municipal corporation, only the court to which the appeal is taken may fix the maximum liability.

This bill passed the Assembly, but died in the Senate.

14. Senate 2619 (Senator Bernstein et al)

This bill would have amended various sections of the Criminal Procedure Law to authorize a superior court to continue bail or issue a bail order in certain limited cases where the defendant has been convicted of a class A felony.

This bill died in the Senate.

15. Senate 2614 (Senator Pisani et al)
Assembly 2392 (Assemblyman Weprin et al)

This bill would have amended sections 710.20 and 710.30 of the Criminal Procedure Law to provide for a procedure to suppress potential testimony identifying the defendant, whether or not the witness actually saw the crime itself committed, where the identification results from a pretrial identification procedure which violated the defendant's constitutional right to counsel or was so unnecessarily suggestive as to violate due process.

This bill passed the Senate, but died in the Assembly.

16. Senate 2621-A (Senator Volker et al)
Assembly 2384 (Assemblyman Fink et al)

This bill would have amended articles 180, 200 and 215 of the Penal Law, covering bribery and related offenses, to identify

more clearly the requisite elements of those offenses.
This bill died in both the Senate and the Assembly.

PROPOSALS OF THE JUDICIAL CONFERENCE TO AMEND THE RULES OF THE CPLR

All three amendments in the form of Proposals to amend the Rules portion of the Civil Practice Law and Rules, promulgated by the Judicial Conference pursuant to section 229 of the Judiciary Law, became effective on September 1, 1975, none having been disapproved by the Legislature.
The three Proposals are:

Proposal Number 1

This Proposal amended Rule 5525(c) of the CPLR to facilitate the settlement of transcripts on appeal. It provided that if the appellant has proposed amendments to the transcript of the earlier proceedings and served them together with a copy of that transcript on the respondent, and no amendments or objections are proposed by the respondent within the time prescribed, the transcript, certified correct by the court reporter, together with the appellant's proposed amendments, shall be deemed correct without stipulation or settlement.

Proposal Number 2

This Proposal amended Rule 5529(a) of the CPLR in relation to the style and margins of briefs and appendices reproduced by offset printing, mimeographing or any method of reproduction other than printing. It provided that the bound margin shall be at least one inch, and typed matter shall not exceed seven by nine and one-half inches, with double spacing between each line of text.

Proposal Number 3

This Proposal amended Rule 9701 of the CPLR (1) to authorize the clerks of the Appellate Division to maintain a card index in lieu of large index books of cases, decisions and orders and (2) to eliminate the requirement that each department maintain an index of the names of all attorneys admitted and disciplined in other departments.

BILLS RECOMMENDED BY THE OFFICE OF COURT ADMINISTRATION

1. Senate 1641 (Senator Gordon et al)
   Assembly 1977 (Assemblyman Thorp et al)

This bill amended the Judiciary Law to eliminate provisions granting to women an absolute right to an exemption from jury duty in the civil and criminal courts of New York State. In addition, it provided that prospective jurors seeking excuse from or postponement of jury duty may make application

therefor to the commissioner of jurors by mail rather than by personal appearance.

This bill became Chapter 4 of the Laws of 1975.

2. Senate 3692 (Senator Barclay)
Assembly 5583 (Assemblyman Fink)

This bill amended the Criminal Procedure Law to provide that depositions may be used in preliminary hearings and before grand juries unless the court determines, upon application of the defendant, that such hearsay evidence is, under the particular circumstances of the case, not sufficiently reliable.

This bill became Chapter 307 of the Laws of 1975.

3. Senate 5408 (Senator Gordon)
Assembly 8041 (Rules Committee, request of Assemblyman Thorp)

This bill amended the Family Court Act to conform existing statutory provisions mandating the assignment of counsel in Family Court proceedings to current constitutional standards.

This bill became Chapter 682 of the Laws of 1975.

4. Senate 5407 (Senator Gordon)
Assembly 8040 (Rules Committee, request of Assemblyman Thorp)

This bill amended the Family Court Act to redefine and clarify the authority of a judge of the Family Court to exercise the power of contempt.

This bill became Chapter 496 of the Laws of 1975.

5. Senate 6644-A (Senator Gordon)
Assembly 8536 (Rules Committee)

This bill amended various provisions of the Uniform Justice Court Act and the Town Law to provide for the uniform maintenance of adequate judicial records in the Town and Village Courts throughout the state.

This bill became Chapter 861 of the Laws of 1975.

6. Senate 2554 (Senator Gordon)
Assembly 4470 (Assemblyman Thorp et al)

This bill amended article 21 of the Judiciary Law to provide for the internal management of Supreme Court libraries consistent with standards established by the Administrative Board.

This bill became Chapter 118 of the Laws of 1975.

7. Senate 6017 (Senator Gordon)
Assembly 8259 (Rules Committee, request of Assemblyman Thorp)

This bill amended section 35-a of the Judiciary Law to require that on the first business day of each week, any judge or

justice who has, during the preceding week, fixed or approved one or more fees or allowances of more than $100 for services performed by appointees of a court must file a statement with the Office of Court Administration on a form to be prescribed by the State Administrator. In addition, the bill repealed provisions requiring that the appointees themselves file with the Office of Court Administration detailed statements about their fees and services.

This bill became Chapter 834 of the Laws of 1975.

8. Senate 5851-A (Senator Gordon)
Assembly 8262-A (Rules Committee, request of Assemblyman Brown)

This bill amended section 1911 of the Uniform City Court Act to increase to District Court levels the filing fees payable in civil litigation in the City Courts outside the City of New York.

This bill became Chapter 507 of the Laws of 1975.

9. Senate 2552-B (Senator Gordon)
Assembly 4471 (Assemblyman Thorp et al)

This bill amended various sections of the Judiciary Law and the Court of Claims Act relating to judicial compensation so that they accurately reflect the salaries and the expenses received by judges of the Court of Appeals, justices of the Supreme Court and the Appellate Divisions thereof, and judges of the Court of Claims.

This bill became Chapter 152 of the Laws of 1975.

10. Senate 2553-A (Senator Gordon)
Assembly 4621 (Assemblyman Thorp et al)

This bill amended various sections of the Judiciary Law, the Family Court Act, the New York City Criminal Court Act, and Chapter 694 of the Laws of 1962 relating to judicial compensation so that they accurately reflect the salaries and the expenses received by judges of the County Court, the Civil and Criminal Courts of the City of New York, the District Courts and City Courts in cities having a population of 50,000 or more.

This bill became Chapter 150 of the Laws of 1975.

11. Senate 6387 (Rules Committee)
Assembly 8448 (Rules Committee, request of Assemblymen Frey and Nicolosi)

This bill amended CPLR 5515 to provide (1) that whenever an appeal is taken to the Court of Appeals, a copy of the notice of appeal shall be sent to the clerk of the Court of Appeals by the clerk of the office where the notice of appeal is required to be filed and (2) that whenever the Appellate Division grants permission to appeal to the Court of Appeals, a copy of the order granting such permission shall be sent to the clerk of the Court of Appeals by the clerk of the Appellate Division.

This bill became Chapter 491 of the Laws of 1975.

12. Senate 6665 (Senator Barclay)
Assembly 7967 (Assemblyman Fink)

This bill amended section 902 of the CPLR to require the plaintiff in a class action to move for an order requesting the court to determine whether the action is to be maintained within 60 days after the time to serve a responsive pleading has expired for all persons named as defendants.

This bill became Chapter 474 of the Laws of 1975.

13. Senate 2388-B (Senator Gordon)
Assembly 3134-B (Assemblyman Thorp)

This bill amended section 427 of the Family Court Act to permit a court to authorize, in its general discretion, service of a summons and petition in a support proceeding by ordinary mail to the last known address of the respondent.

This bill became Chapter 41 of the Laws of 1975.

14. Senate 2557 (Senator Gordon)
Assembly 5640 (Assemblyman Herbst et al)

This bill repealed section 215 of the Judiciary Law to eliminate the requirement that the State Administrator appoint a director of administration of the courts in each judicial department.

This bill became Chapter 421 of the Laws of 1975.

15. Senate 2555 (Senator Gordon)
Assembly 5920 (Assemblyman Thorp)

This bill amended section 429 of the Judiciary Law (1) to provide that the expenses of a disciplinary proceeding involving a judge of a local court shall be paid by the State, rather than by the municipality in which the judge holds office and (2) to require the Appellate Division to designate a justice of the Supreme Court, rather than a nonjudicial referee, to take the proof in such a proceeding.

This bill became Chapter 811 of the Laws of 1975.

16. Senate 3420 (Senator Lombardi)
Assembly 4382 (Assemblyman Riford)

This bill amended the Cortland City Court Act to increase from two to six years the term of office of a judge of the Cortland City Court elected after September 1, 1975.

This bill became Chapter 159 of the Laws of 1975.

17. Senate 2131 (Senator Gordon)
Assembly 2682 (Assemblyman Thorp)

This bill added to the unconsolidated laws an interim provision, expiring September 1, 1975, requiring a court to direct that women jurors be added to the jury panel for the term if a defendant in a criminal action establishes that women are grossly underrepresented.

This bill became Chapter 21 of the Laws of 1975.

18. Senate 6938 (Rules Committee)
Assembly 8817 (Rules Committee)

This bill granted all state-paid nonjudicial employees of the unified court system the same salary increases as were granted employees of the executive branch.

This bill became Chapter 820 of the Laws of 1975.

19. Senate 6937 (Rules Committee)
Assembly 8828 (Rules Committee)

This bill amended Chapter 820 of the Laws of 1975 to provide that the amount received by state-paid nonjudicial employees of the unified court system shall not be regarded as salary or compensation for retirement purposes or for the purpose of determining the right to an increase of salary or to a salary increment.

This bill became Chapter 819 of the Laws of 1975.

20. Senate 4700 (Senator Gordon et al)
Assembly 6625-B (Assemblyman Thorp et al)

This bill, modeled after the Federal Jury Selection and Service Act of 1968, would have amended the Judiciary Law to provide the courts of New York with a uniform state-wide system for the selection of juries which clearly meets all constitutional requirements that grand and petit juries are to be selected at random from a fair cross section of the citizenry.

This bill passed the Assembly, but died in the Senate.

21. Senate 6388 (Rules Committee)
Assembly 8447 (Rules Committee, request of Assemblyman Frey)

This bill would have amended CPLR 3401 and 3402 to require that a statement of readiness for trial be filed with the note of issue. In addition it would have required that the form of these court papers henceforth be as prescribed by the State Administrator.

This bill died in both the Senate and the Assembly.

22. Senate 6478 (Rules Committee)
Assembly 8449 (Rules Committee)

This bill would have amended the Judiciary Law and the CPLR to provide that a nonresident may be admitted to the New York Bar not only if, as at present, he is employed full time within the state, but also if he intends to have an office for the practice of law in New York upon his being admitted.

This bill died in both the Senate and the Assembly.

23. Senate 3733 (Senator Barclay)

This bill would have amended the Criminal Procedure Law to require prompt notification by the district attorney in a superior court criminal proceeding of his intent to offer

identification or admission evidence against a defendant, except an electronically intercepted communication. In addition, it would have required the defendant to make his motion to suppress, if any, within 45 days thereafter.

This bill passed the Senate, but died in the Assembly.

24. Senate 3404 (Senator Marino)
Assembly 4672 (Assemblyman Thorp)

This bill would have amended section 486-a of the Judiciary Law to require clerks of courts to certify to the appropriate Appellate Division all criminal convictions of attorneys.

This bill passed the Assembly, but died in the Senate.

25. Senate 3262 (Senator Stafford)
Assembly 4160 (Assemblyman Solomon)

This bill would have amended the Glens Falls City Court Act to correct an ambiguity relating to the term of office of judges of the Glens Falls City Court.

This bill passed the Assembly, but died in the Senate.

26. Senate 6172 (Rules Committee)
Assembly 8323 (Rules Committee, request of Assemblyman Schumer)

This bill would have repealed special administrative provisions in the Emergency Dangerous Drug Control Program (Chapter 603 of the Laws of 1973) that were rendered unnecessary by the integration of narcotics and predicate felony parts into the existing trial and administrative structure of the courts.

This bill passed the Senate, but died in the Assembly.

27. Senate 6168 (Rules Committee)
Assembly 8422 (Rules Committee, request of Assemblyman Thorp)

This bill would have amended section 4 of the Court of Claims Act to provide that the annual salary of the presiding judge of the Court of Claims shall be equal to the annual salary of an associate justice of the Appellate Division.

This bill passed the Senate, but died in the Assembly.

28. Senate 6386 (Rules Committee)

This bill would have amended article 5 of the CPLR to provide that an article 78 proceeding brought by an inmate of a facility under the supervision of the State Department of Correctional Services, or by a patient in a facility under the supervision of the State Department of Mental Hygiene, shall be commenced in the county where the facility is located. In addition, it would have conferred on a court the discretion to transfer such a proceeding, on motion of a party or on its own

motion, to another county in the judicial district where the facility is located.

This bill died in the Senate.

29. Senate 6365 (Rules Committee)
Assembly 8429 (Rules Committee)

This bill would have amended section 465(1) of the Judiciary Law to increase the bar examination fee from $50 to $100.

This bill died in both the Senate and the Assembly.

REPORT TO THE 1975 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS ADOPTED PURSUANT TO SECTION 229 OF THE JUDICIARY LAW

LETTER OF TRANSMITTAL

To:

The Legislature of the State of New York

Pursuant to Section 229 of the Judiciary Law, enacted by Chapter 309 of the Laws of 1962, the Judicial Conference of the State of New York respectfully submits to the 1975 Legislature:

(1) The Thirteenth Annual Report of the Judicial Conference to the Legislature, adopted January 23, 1975, which incorporates the Twelfth Annual Report to the Judicial Conference by the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules, dated January 2, 1975 and,

(2) The Proposals of the Judicial Conference, based upon the aforementioned Report, for changes in the Rules of Civil Practice of the Civil Practice Law and Rules adopted on January 23, 1975, pursuant to the provisions of Section 229 of the Judiciary Law.

February 1, 1975

Charles D. Breitel, *Chairman*
Owen McGivern
Frank A. Gulotta
J. Clarence Herlihy
John S. Marsh
Charles G. Tierney
John E. Cone
DeForest C. Pitt
Gilbert H. King
Gerald Saperstein
Douglas F. Young
John H. Cooke
Daniel J. Donahoe
M. Marvin Berger
Orest V. Maresca

Richard J. Bartlett
State Administrative Judge and Secretary

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THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE

to

THE LEGISLATURE

on

THE CIVIL PRACTICE LAW AND RULES

February 1, 1975

INTRODUCTION

The Report here submitted is the Twelfth Annual Report to the Judicial Conference by the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules. At present, the members of the Committee are: John T. Frizzell, Hyman W. Gamso, Raymond W. Hackbarth, William E. Jackson, John M. Keeler, Victor A. Kovner, Harold Meriam, Jr., Lewis M. Mullarkey, Maurice N. Nessen, Professor Herbert Peterfreund, George C. Pratt, and G. Robert Witmer, Jr. Mr. Frizzell, an attorney from Buffalo, and Mr. Kovner, an attorney from New York City, were appointed to the Committee in 1974. They replace, respectively, Philip Magner, Esq. and the Honorable Samuel Tripp, both of whom served on the Committee for many years with fidelity and distinction. Professor Adolf Homburger of the State University of New York at Buffalo is Chairman.

In addition to advising and consulting with the Judicial Conference with respect to proposed legislation derived from individual suggestions and studies, the Committee has continued to cooperate with legislative committees and the office of the Governor's Counsel in reviewing pending CPLR legislation. This cooperation involves the evaluation of the various bills pending before the Legislature. On the basis of such evaluations and the memoranda in support of the bills recommended by the Judicial Conference, the staff, on behalf of the Advisory Committee, responds to numerous inquiries from legislative staffs with reference to CPLR legislation, and the Office of Court Administration has the benefit of the views of the Advisory Committee in responding to the requests of the Governor's Counsel to comment upon bills amending the CPLR which are awaiting action by the Governor.

Turning first to last year's legislation, sponsored by the Judicial Conference on the advice of the Committee, Chapter 742 of the Laws of 1974 repealed Article 14, entitled "Action Between Joint Tort-Feasors", and inserted in lieu thereof a new Article 14, entitled "Contribution." The bill also amended General Obligations Law Section 15-108.

The purpose of enacting a new Article 14 was to codify the

fundamental rule of *Dole v. Dow Chemical Co.*, 30 N.Y. 2d 143 (1972) and its progeny and clarify its application so that (1) there is no longer the requirement of a joint money judgment against tortfeasors if contribution is to be allowed among them; and (2) the courts are no longer restricted to either apportioning liability for contribution on a *pro rata* basis, if the statutory prerequisites for contribution have been met, or shifting responsibility entirely from one tortfeasor to another under the primary-secondary tortfeasor doctrine of indemnification. Instead, under new Article 14, the courts may apportion the shares of the contributing tortfeasors on the basis of their comparative degrees of culpability.

The amendment of General Obligations Law section 15-108 was intended to remove the disincentive to settle which existed under *Dole* for a tortfeasor because he remained subject to contribution to other tortfeasors against whom a judgment in favor of the injured party might be rendered. Under the new statutory scheme, the settling tortfeasor is no longer subject to a claim for contribution by other persons who are liable to the injured party; neither can he assert a claim for contribution against them. Rather, the claim of the injured party against other tortfeasors is reduced by the amount of the settlement or by the amount of the equitable share of the damages attributable to the released tortfeasor, whichever is greater.

In addition to the above-described statutory change, the Judicial Conference promulgated five Proposals, all of which became effective September 1, 1974:

Proposal Number 1. Subdivision (a) of rule 2101 was amended, in the interests of conservation and economy, to provide that courts and other public agencies shall have an additional two years after September 1, 1974, the effective date of the 1973 amendment requiring most papers served or filed in actions to be letter size, to utilize present stocks of over-size forms.

Proposal Number 2. This proposal amended subdivisions (a) and (b) of rule 2216 governing motion practice, to make it clear that in New York City, where a moving party fails to appear, the court must deny the application for relief, but that outside of New York City, although the moving party fails to appear, the court may grant the application for relief on the basis of submitted papers.

Proposal Number 3. Subdivision (a) of rule 3042 was amended to provide that a motion to modify a demand for a bill of particulars must be made within ten, rather than five days as previously provided, after the receipt of the demand. The unamended rule was seldom observed since the court, in its discretion and in the interest of justice, generally excused the delay in not making the motion within the brief time permitted. Much difficulty and many motions will be eliminated by enlarging the time within which to move to modify a demand for a bill of particulars to ten days after receipt thereof.

Proposal Number 4. Rule 9002 was amended to read that in case of death, sickness, resignation, removal from or expiration of office or other disability or legal incapacity of a judge after verdict, report, decision, or upon the determination of a motion or special proceeding in any matter in a civil judicial proceeding, any judge of the same court may sign the judgment or order carrying out the verdict, report, decision or determination. The phraseology "or upon the determination of a motion or special proceeding" was inserted by this proposal.

Before amendment, there was no statute or rule providing for a substitute or successor judge to act on the determination of a motion or special proceeding. The amendment thus removed the necessity in such cases for duplicative proceedings.

Proposal Number 5. Rule 9406 was amended to delete the second subdivision thereof which provided that no person may be admitted to the bar in New York State unless he is a citizen of the United States. The remaining subdivisions were renumbered accordingly.

The requirement that an attorney must be a citizen of the United States is obsolete and unconstitutional in light of the United States Supreme Court decision in *In re Griffiths*, 37 L. Ed. 2d 910 (1973).

The report which follows this introduction is divided into four parts.

The first part is based on an in-depth study of proposed legislation on comparative negligence authored by Professor M. E. Occhialino of Syracuse University Law School.

Dole v. Dow Chemical Co., 30 N.Y.2d 143 (1972) established a standard of comparative negligence with respect to contribution among joint tort feasors. *Dole* stands for the proposition that each wrongdoer who is subject to liability to the injured party may seek contribution from other wrongdoers on the basis of their comparative degrees of culpability. L. 1974, ch. 742 codified that rule by new CPLR Article 14 and removed the disincentive for a tortfeasor to settle, existing under *Dole*, by an amendment of section 15-108 of the General Obligations Law, which reduces the injured party's claim by the amount of a settlement or by the amount of the equitable share of damages attributable to a release tortfeasor, whichever is larger. However, the new legislation left unimpaired the common law rule of contributory negligence, barring recovery by an injured party if he is guilty of negligence in any degree. While the Committee was fully aware that doctrinal consistency, logic and justice demand the adoption of the principle of comparative negligence, it was deemed advisable to await the adoption of the 1974 amendments before moving in that direction.

Comparative negligence applied to plaintiff and defendant has long been supported by the CPLR Advisory Committee and by the Judicial Conference. It is the law in a number of other jurisdictions. Professor Occhialino's study likewise supports the enactment of a comparative negligence standard applicable as between plaintiff and defendant. The Advisory Committee

accordingly proposes a bill for submission to the 1975 Legislature (*infra*). The proposed legislation would not be marred by the complexities and inequities of the legislation vetoed by the governor in 1974 (See Assembly 11952; Veto Memorandum #171).

The second part of the report deals with a number of proposed statutory and rule changes; some are resubmissions of past proposals in original or modified form; others are new.

The third part of the report discusses briefly a draft study, together with legislative proposals, prepared by Professor Paul S. Graziano of St. John's University School of Law. That study, which is presently under consideration by the Advisory Committee, relates to Section 50-e of the General Municipal Law (notice of claim).

The fourth and final part of the report deals with future studies planned by the Committee and past studies which have not been fully implemented by legislation but which remain under active consideration.

PART I — COMPARATIVE NEGLIGENCE

The following proposals are based on a study authored by Professor M. E. Occhialino of Syracuse University Law School. The implementing legislation recommended herein will complete the application of the principle of comparative negligence begun by *Dole v. Dow Chemical Co.*, 30 N.Y. 2d 143 (1972).

The Committee to Advise and Consult with the Judicial Conference on the CPLR has long supported the enactment of a comparative negligence statute. The Committee believes that the traditional contributory negligence rule has, by rigid application, become an obstacle to the dispensing of substantial justice.

Ever since the Court of Appeals in *Dole*, sweeping away formalistic rules, applied the more realistic and fairer standard of comparative negligence to contribution among joint tort-feasors, the time has been ripe for extending that standard to the case-in-chief.

Generally, the proposed bill provides that in any action to recover damages for personal injury, injury to property or wrongful death, where either contributory negligence or assumption of risk is asserted as a defense, that defense shall not bar recovery, but damages would be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

The Committee recommended disapproval of a comparative negligence bill in 1974 only because its many objectionable features would have subverted the desired benefit.

The main criticisms of the 1974 bill, which was vetoed by the Governor largely on the recommendation of the Office of Court Administration and the evaluation of the Advisory Committee, would be met by the proposed bill.

The 1974 bill would have barred plaintiff's recovery if he

were found to be more than fifty percent negligent. The Committee reasoned that this rigid rule was subject to the same kind of equitable criticism as the contributory negligence rule itself. The proposed bill, in contrast, would enact the more equitable standard of pure comparative negligence which would permit plaintiffs in such situations to receive proportionately diminished recoveries but would not bar recovery.

It was not clear whether the 1974 bill was intended to embrace breach of warranty and strict liability causes of action. It is intended that the provisions of the proposed bill would extend to such cases, and this intent should be clearly stated in the memorandum in support of the bill.

The 1974 bill was ambiguous in respect to the formula for diminution of claimant's damages. The proposed bill would clearly provide that the diminishment would be in the proportion which the claimant's culpable conduct bears to the culpable conduct which caused the damage. This phraseology would clearly include persons not named as parties as well as defendants named but not served.

The 1974 bill did not deal with the vital problem of retroactivity. Thus, the provision changing burden of proof in that bill might have been construed as a change in adjective law, retroactive to pending causes of action, while other provisions might have been construed as substantive and prospective. The result would have been a chaotic situation as to pending cases. The proposed bill would make it clear that all of the proposed new provisions of law would apply only to causes of action accruing after September 1, 1975.

Finally, the proposed bill is more concise in form than the 1974 bill.

The substance of the proposed statutory amendments, with brief comments, follows:

General Obligations Law, Article 10 (new) Proposed Change

It is recommended that a new article be inserted in the General Obligations Law, to be Article 10, to read substantially as follows:

ARTICLE 10 — DAMAGE ACTIONS; EFFECT OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

§10-101. Damages recoverable when contributory negligence or assumption of risk is established.

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory

negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Comment

(a) Because contributory fault is a defense in actions based upon a theory of strict products liability *(Codling v. Paglia*, 32 N.Y.2d 330 (1973)), and those based upon a theory of breach of warranty, *(Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117 (1973)) and because "assumption of risk" has been held to be a defense in an action based upon strict products liability *(Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 157 (1973); *accord*, Restatement (Second) of Torts §402 A, comment N (1965)), this article is applicable not only to negligence actions, but to all actions brought to recover damages for personal injury, injury to property or wrongful death whatever the legal theory upon which the suit is based.

(b) The phrase "culpable conduct" is used instead of "negligent conduct" because this article will apply to cases where the conduct of one or more of the parties will be found to be not negligent, but will nonetheless be a factor in determining the amount of damages. For example, in *Velez v. Craine & Clark Lumber Corp.* (33 N.Y.2d 117 (1973)), defendant was found to have breached a warranty but was not chargeable with negligence. Under existing law, the contributory negligence of the plaintiff would be a complete bar to recovery. This article permits the apportionment of damages in cases such as *Velez* in which the plaintiff's negligence may be the only *negligence*, but the defendant's conduct is nonetheless "culpable" and therefore to be considered in determining damages.

The Court of Appeals has spoken of "relative degrees of culpability" in a related context (*O'Dowd v. American Sur. Co. of New York*, 3 N.Y.2d 347, 353 (1957)), and in *Guarino v. Mine Safety Appliance Co.* (25 N.Y.2d 460 (1969)) the court clearly indicated that the phrase "culpable conduct" was broad enough to encompass not only negligence but also other breaches of legal duties ("culpable act, whether it stems from negligence or breach of warranty." *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 465 (1969)).

The phrase is consistent with that used in section 1402 of the CPLR which provides that contribution "shall be determined in accordance with the relative culpability of each person . . ." and is used in this article for the same reason that led to its adoption in article fourteen of the CPLR. See 1 *McKinney's Session Law News of New York*, p. A-25 and A-26 (1974).

(c) This article equates the defenses of contributory negligence and assumption of risk by providing that neither shall continue to serve as a complete defense in actions to which this article applies. This is consistent with the result reached in the

vast majority of states that have adopted some form of comparative negligence (*e.g.*, Oregon Laws 1971, c.688 ssl; *McConville v. State Farm Mutual Automobile Ins. Co.*, 15 Wisc. 2d 374, 113 N.W.2d 14 (1962); *Lyons v. Redding Construction Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973). *But see Dendy v. City of Pascagola*, 193 So.2d 559 (Miss. 1967)). The statute is also consistent with the position taken by the New York courts, which have found that "there is a borderline where the concept of contributory negligence merges almost imperceptibly into that of acceptance of a risk . . . Very often the difference is chiefly one of terminology." *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 349 (1928) (Cardozo).

On occasion, a New York court has taken the position that assumption of risk is not a mere defense to an action for negligence, but actually negates any duty owed by the defendant to the plaintiff: "The doctrine of assumption of risk lies in the maxim *volenti non fit injuria.* Based as it is upon the plaintiff's assent to endure a situation created by the negligence of the defendant, it relieves the defendant from performing a duty which might otherwise be owed to the plaintiff where the plaintiff has assumed the risk of harm . . . no breach of duty by the defendant is shown and consequently no negligence." *McEvoy v. City of New York*, 266 App. Div. 445, 447, (2nd Dep't 1943), *aff'd.*, 292 N.Y. 654 (1944).

Such an analysis would bar plaintiff's recovery as a matter of law, thereby undermining the purpose of this article — to permit partial recovery in cases in which the conduct of each party is culpable. Just as there has been a "general softening of the rigidities of the doctrine of contributory negligence" with "a tendency to treat it almost always as a question of fact" (*Rossman v. LaGrega*, 28 N.Y. 2d 300, 306 (1971)), as well as a growing recognition that "the great issue is not liability but the damages recoverable for injuries" (*Andre v. Pomeroy*, 35 N.Y.2d 361, 370 (1974) (Breitel, dissenting)), it is expected that the courts will treat assumption of risk as a form of culpable conduct under this article.

In appropriate cases, of course, the finder of fact may determine that the plaintiff's conduct in assuming the risk is the sole culpable conduct, and diminish damages accordingly.

(d) "Assumption of risk" and "contributory negligence" are not the only doctrines that might be included within the phrase "culpable conduct." The Court of Appeals has recently determined that "use of [a] . . . product for other than its normally intended purpose or other than in the manner normally intended" is a form of contributory "fault" which bars recovery in an action based upon a theory of strict products liability (*Codling v. Paglia*, 32 N.Y.2d 330, 343 (1973)); that defense constitutes a form of "culpable conduct." So too, the "patent danger" rule, made applicable in negligence actions in *Campo v. Schofield* (301 N.Y. 458 (1950)), and recently applied to strict products liability cases should be considered within the framework of this article as a factor to be weighed by the trier of fact in determining whether to diminish damages. *Bolm v. Triumph*

Corp., 33 N.Y. 2d 151, 159 (1973) ("the issue . . . presents a question of fact . . .")

Neither the specific examples of culpable conduct mentioned in the statute nor those used in this comment are necessarily exhaustive of the range of "culpable conduct" which may properly be considered. Judicial development of the concept of "culpable conduct" consistent with the goals of this article is not precluded.

(e) In determining the total "culpable conduct which caused the damages," the cupable conduct of the defendant as well as that of the claimant must be considered. The defendant's culpable conduct may include, but is not necessarily limited to, negligence, breach of warranty, a violation of statute giving rise to civil liability, conduct giving rise to liability upon a theory of strict liability, and intentional misconduct.

(f) In applying this article, not only the cupable conduct of the claimant or decedent is to be considered, but also any culpable conduct which is legally attributable to him though actually committed or performed by another. However, this article is not intended to create vicarious liability or to expand the doctrine of imputed contributory negligence, and should be interpreted in harmony with recent decisional law which severely restricts, if it does not entirely eliminate, the doctrine of imputed or vicarious contributory negligence. *Kalechman v. Drew Auto Rental, Inc.*, 33 N.Y. 2d 397 (1973).

(g) This article requires that the culpable conduct attributable to the decedent or claimant be compared with the total culpable conduct which caused the damages. Several specific policy decisions have been incorporated thereby.

(1) *Joint and Several Liability.* It is not intended that this article change the present rule of joint and several liability among tortfeasors (*Barrett v. The Third Avenue Ry. Co.*, 45 N.Y. 628 (1871); *Gleich v. Volpe*, 32 N.Y.2d 517, 523-524 (1973)), nor is it intended to preclude judicial reconsideration of the rule.

(2) *Causal Culpability.* Only culpable conduct which was a substantial factor in causing the harm for which recovery is sought is to be considered in determining the amount by which damages are to be diminished. For example, if P accepts a ride in an automobile driven by A, with knowledge that A is intoxicated, and P is injured when B negligently drives his vehicle into the rear of A's vehicle which is properly stopped for a red traffic signal, in P's action against B, there will be no diminution of damages. While P may have engaged in culpable conduct in accepting a ride with A, that conduct was not a substantial factor in causing the damage suffered by P.

(3) *Culpability of Non-party.* It is possible that a person whose culpable conduct contributed to the damages may not be a party to the action instituted by the claimant, as where one of several tortfeasors has settled with the claimant, or is unknown, or is not subject to the jurisdiction of the court in which the claimant has filed suit.

In the usual case the requirement that claimant's conduct be compared with the total culpable conduct of all persons, whether or not parties to the action, should not add to the complexity of the trial nor should it impose unfair burdens upon any party to the action. It is included primarily to reflect the compatability of this article with article fourteen of the CPLR, and section 15-108 of the General Obligations Law.

If the claimant sues tortfeasor A and not tortfeasor B, the culpable conduct attributable to claimant should be considered in light of the total culpable conduct—that of the claimant, of A, and of B. As under present law (*Barrett v. The Third Avenue Ry. Co.*, 45 N.Y. 628 (1871)), A will be liable for the full amount of claimant's damages less the percentage found attributable to the claimant. There is, therefore, no incentive for A to demonstrate that B was also culpable. *Cf.* James, *Connecticut's Comparative Negligence Statute:* An Analysis of Some Problems, 6 *Conn. L. Rev.* 207, 219-221 (1974).

Where B has settled with claimant, however, A will not only wish to demonstrate that claimant was chargeable with culpable conduct, but will also wish to have the finder of fact determine the percentage of culpability attributable to B, since it is possible that judgment will be entered against A only after the damages suffered by claimant have been twice reduced—once to reflect claimant's culpable conduct, and once to reflect B's culpability. *See N.Y. Gen. Obl. Law* section 15-108 (McKinney's 1974 Supp.); CPLR rule 4533(b).

(4) *Form of Verdict.* The traditional discretion of the court to determine the form that the verdict shall take (CPLR rule 4111(a); 4 Weinstein, Korn & Miller, *New York Civil Practice*, ¶ 4111.04 (1973)), remains unimpaired by this article. Experimentation with special verdicts (CPLR rule 4111(b)) and general verdicts accompanied by written answers to interrogatories (CPLR rule 4111(c)) is expected, and if subsequent experience demonstrates the superiority of a particular form of verdict for actions to which this article applies, appropriate legislative changes in this article, or appropriate modification of CPLR rule 4111 will be considered.

(h) The doctrine of "last clear chance" which has been recognized in New York (*e.g., Lee v. Pennsylvania R.R. Co.*, 269 N.Y. 53 (1935)), may be considered as a doctrine created to overcome the harsh results of the rule that bars any recovery when the claimant has been found guilty of contributory negligence. Prosser, *The Law of Torts*, p. 428 (4th ed. 1973). Because the doctrine of last clear chance overcompensates for the rule of contributory negligence by imposing full liability upon the defendant where both the claimant and the defendant are at fault, it is "obviously inadequate . . . as an ultimate just solution" (Prosser, *The Law of Torts*, p. 428 (4th ed. 1973), and has been labelled a "transitional doctrine," bridging the movement from contributory negligence to comparative negligence. James, *Last Clear Chance: A Transitional Doctrine*, 47 *Yale L. J.* 704 (1938).

Recognizing the inappropriateness of continuing to apply

"last clear chance" to a scheme of comparative negligence, some states have expressly abolished the doctrine in the statute creating comparative negligence (*e.g.*, Conn. Public Act No. 73-622, Section 1(c) (1973)), and in the only jurisdiction to establish comparative negligence by judicial decision, the court declared: "The doctrine of last clear chance would, of course, no longer have application in these cases." *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973).

Because the New York courts have consistently recognized that where contributory negligence is not claimed as a bar to recovery, the doctrine of last clear chance is not to be applied (*e.g., Polk v. New York Central R.R. Co.*, 10 A.D. 2d 703 (1st Dep't 1960); *Jasinski v. New York Central R.R. Co.*, 21 A.D. 2d 456 (4th Dep't 1964)), it was thought unnecessary to include an express provision in this article abolishing the doctrine. See *Cushman v. Perkins*, 245 A.2d 846 (Maine 1968).

The continued separate existence of the doctrine of last clear chance cannot be justified; the factors which the doctrine took into consideration can more appropriately be considered in determining the "culpable conduct" and the issue of causation of damages under this article. (*See Storr v. New York Central R.R. Co.*, 261 N.Y. 348, 351 (1933)).

(i) Under prior law, where plaintiff sued defendant in negligence for personal injuries and defendant denied negligence, and counterclaimed for damages suffered by him, only one party would be entitled to a verdict and judgment, for if both parties were guilty of negligence, neither could recover.

This article permits a finding that while each of the parties is culpable, each is entitled to recover some portion of his damages. For instance, if plaintiff sues for $5,000 and defendant asserts in a counterclaim that he is entitled to $10,000 in damages, the finder of fact could determine that each was negligent, and that the culpability of each party was fifty percent, thus entitling plaintiff to $2500 and defendant to $5,000.

It is the intent of this proposed legislation that no casualty insurance company, or other insurer, shall apply as a set-off to payment pursuant to a policy of insurance any amount by which a recovery against its insured was diminished by reason of a counterclaim or cross-claim asserted by the insured pursuant to this article.

Where only one judgment is entered (see CPLR section 3019(d)), it is the responsibility of the court to assure that the finder of fact reports its verdict in a form which will permit this legislative intent to be effectuated. *See* CPLR rule 4111; CPLR rule 5016(b).

If this legislative policy cannot be fulfilled where only one judgment is entered, the court should enter two judgments, reflecting the right of each party to recover. CPLR rule 3019(d). In such a case it is, of course, the intent of the legislature that a casualty insurance company representing one of the parties not be permitted to set off against its obligation under the policy of insurance, the judgment in favor of its

insured against the other party to the litigation.

Secion 3019(d) of the CPLR provides that a separate judgment may not be had for a cause of action contained in a counterclaim or cross-claim "unless the court so orders." It appears, therefore, that the normal procedure when such claim is asserted is to try both the claim and counterclaim together, and to enter only a single judgment for the difference between the amounts awarded in each claim. 3 Weinstein, Korn & Miller, *New York Civil Practice, ¶3019.02 (1973).*

Because there are legitimate policy reasons for preferring that routine use of multiple judgments be avoided *(see e.g., Illinois McGraw Elec. Co. v. John J. Walters, Inc.*, 7 N.Y.2d 874 (1959); *Pease & Elliman, Inc. v 926 Park Avenue Corp.*, 23 App. Div. 2d 361 (1st Dep't 1965); *Dalminter, Inc. v. Dalmine, S.P.A.*, 28 App. Div. 2d 852 (1st Dep't), *aff'd*, 23 N.Y.2d 653 (1968)), entry of two judgments has not been made mandatory in all cases.

Confident that the legislative intent will be fulfilled and that existing legislation and procedural rules are adequate to accomplish that result, it was deemed unnecessary to provide a specific prohibition against setoff. (*See, e.g.*, Rhode Island Stat. Ann. Section 9-20-4.1 (1971)).

§10-102. Burden of pleading; burden of proof.

Culpable conduct claimed in diminution of damages, in accordance with § 10-101, shall be an affirmative defense to be pleaded and proved by the party asserting the defense.

Comment

(a) The New York Court of Appeals has noted: "Although New York has clung to a rule that a living plaintiff must establish his own freedom from negligence, it is the majority rule in this country that in all negligence actions, including those maintained by living persons for injury or property damage, the defendant claiming contributory negligence of the plaintiff has the burden of showing it . . . . And it is likewise the general rule where contributory negligence is an affirmative defense the injured person 'is presumed to have used due . . . care.'" *Rossman v. LaGrega*, 28 N.Y.2d 300, 304 (1971). This section brings New York law on the issue into conformity with the majority rule and represents the culmination of the gradual but persistent erosion of the rule that freedom from contributory negligence must be pleaded and proven by the plaintiff. *Johnson v. Hudson River R.R. Co.*, 20 N.Y. 65, 70-71 (1859); *Schafer v. City of New York*, 154 N.Y. 466, 472 (1897); N.Y. EPTL 5-4.2 (McKinney's 1967) (derived from L. 1913, ch. 228); *Rossman v. LaGrega*, 28 N.Y. 2d 300 (1971); *Schecter v. Klanfer*, 28 N.Y.2d 228 (1971); *Wartels v. County Asphalt, Inc.*, 29 N.Y.2d 381 (1972) (Unusual facts "reduced plaintiff's burden of proof close to the vanishing point"); *Codling v. Paglia*, 32 N.Y.2d 330, 343 (1973) ("contributory fault of the plaintiff is a *defense* to an action for strict products liability") (emphasis added.)

(b) Because "they are both manifestations of the same or similar considerations . . . burden of pleading and burden of proof are usually parallel." James, Civil Procedure p. 265 (1965). This is generally true in New York (3 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 3018.14 (1973)), and there is no reason to make an exception where one seeks to diminish damages otherwise recoverable by asserting, pursuant to this article, that the claimant's culpable conduct contributed to his harm. This article may be viewed as having created a partial defense, the effect of which is to mitigate damages, and such defenses traditionally must be pleaded affirmatively. 3 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 3018.17 (1973); *Cf. Rehill v. Rehill*, 306 N.Y. 126 (1953).

§10-103. Applicability.

This article shall apply to all causes of action accruing on or after September 1, 1975.

Comment

(a) A clear majority of states which have passed legislation establishing some form of comparative negligence have specifically provided that the statute should be applied prospectively only, to causes of action that arise after the effective date of the statute (e.g. Texas Law: 1973, c. 28, ss.4), while the remaining few provide either that the statute shall be applied to actions filed after the effective date of the statute (Rhode Isl. Stat. Ann. ss9-20-4), or to trials commenced after the effective date of the statute (Minnesota Laws 1969, c. 624 ss.2). Where the statute has been silent, the courts have uniformly applied the statute only prospectively. *E.g.*, *Joseph v. Lowery*, 495 P.2d 273 (Oregon 1972).

While at least one court has upheld the validity of a statutory provision calling for retroactive application of a comparative negligence statute (*Peterson v. City of Minneapolis*, 173 N.W.2d 353 (1969)), the result in New York of litigation challenging such a provision is not free from doubt. *Compare Deuscher v. Cammerano*, 256 N.Y. 328 (1931) *and Sackheim v. Pigueron*, 215 N.Y. 62 (1915) with *Jacobus v. Colgate*, 217 N.Y. 235 (1916) and *Autocar Sales & Service Co. v. Hansen*, 270 N.Y. 414 (1936). The criteria for judging retroactivity established by the Court of Appeals in *Gleason v. Gleason*, 26 N.Y.2d 28 (1970) do not lead inexorably to the conclusion that retroactive application of this article would be upheld.

In order to avoid the uncertainty and confusion which might result from the retroactive application of the statute, and to protect the legitimate expectations of potential litigants and others who placed reliance upon present law, this statute is made applicable only to causes of action which accrue after its effective date.

(b) The word "accrue" used in this article should be given the meaning attached to it for purposes of determining the period within which an action must be commenced. CPLR 203(a). It is not unlikely that the rules for the determination of the date of

accrual of some causes of action may be subject to changing judicial interpretations (*see e.g., Flanagan v. Mt. Eden General Hospital* 24 N.Y. 2d 427 (1969); *compare Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340 (1969) with *Rivera v. Berkeley Superwash, Inc.*, 44 App. Div. 2d 316 (2nd Dep't 1974)), and it is intended that this article be interpreted to reflect any such developments.

(c) Under present law it is possible that one claimant will pursue two causes of action for the same or similar injury and that each cause of action will have a different accrual date. *Compare Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340 (1969), *Schmidt v. Merchants Dispatch Transp. Co.*, 270 N.Y. 287 (1936). *Cf. Caffano v. Trayana*, 35 N.Y. 2d 245 (1973). In such transitional cases, when appropriate, the court should apply this article to all related causes of action tried together with a claim to which this article does apply.

Estates, Powers And Trusts Law, Sections 5-4.2, 11-3.2(b) Proposed Change

It is recommended that sections 5-4.2 and 11-3.2(b) of the Estates, Powers And Trusts Law be amended to read substantially as follows:

§5-4.2. Trial and burden of proof of contributory negligence. On the trial of an action *accruing before September 1, 1975* to recover damages for causing death the contributory negligence of the decedent shall be a defense, to be pleaded and proved by the defendant.

§11-3.2(b) Action by personal representative for injury to person or property. No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury. On the trial of any such action *accruing before September 1, 1975*, which is joined with an action for causing death, the contributory negligence of the decedent is a defense, to be pleaded and proved by the defendant. No cause of action for damages caused by an injury to a third person is lost because of the death of the third person.

Comment

The proposed amendments to the Estates, Powers And Trusts Law are designed to bring the provisions of that Law into harmony with the provisions of proposed new Article 10 of the General Obligations Law.

PART II—OTHER PROPOSED CHANGES

1. Proposals Relating to Class Actions

This class action legislation, in substantially the same form, was submitted to the Legislature during the 1972, 1973 and 1974 sessions. It passed the Assembly in 1972, and the Senate in 1973. Because the Committee considers this legislation to be both highly desirable and urgent, the substitution of a new article governing class actions in lieu of the present outmoded section is again proposed in order to infuse the pertinent law with practical flexibility, so that it may accommodate a pressing need for an effective, but controlled group remedy in situations where neither actual joinder of a numerous class nor the maintenance of individual actions is practicable. The basic changes in New York class action procedure are designed to achieve two major goals:

1. to set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions; and

2. to prescribe basic guidelines for judicial management of class actions.

The present provision has remained in force without substantial change since the addition of its predecessor to the Field Code (L. 1849, ch. 438). A reform draft (see 18 N.Y. Jud. Council Rep. 80, 217, 223 (1952)), was enacted into law in 1962, to become effective in 1963 as part of the CPLR (L. 1962, ch. 308), but did not survive to its effective date. Under the present law, unless the subject matter of the controversy is a limited fund or specific property, or the relief sought is common to the class in the sense that satisfaction of the individual claims before the court also automatically satisfies the claims of all other class members (see 18 N.Y. Jud. Council Rep. 217,230 (1952)), a class action can qualify only if a bond of "privity" exists between the multiple parties forming the class (*Society Milion Athena, Inc. v. National Bank of Greece*, 281 N.Y. 282 (1939)). In the main, class actions in New York are confined to the closely associated relationships growing out of trusts, partnerships, or joint ventures, and ownership of corporate stock. (*Hall v. Coburn Corp. of Amer.*, 26 N.Y. 2d 396, 402 (1970)).

Aside from the undesirable vagueness of the term "privity" (denoting the existence of a jural relationship of one sort or another between the parties) the privity doctrine, derived from ancient feudal law, prevents the use of the class action device in the adjudication of such typically modern claims as those associated with mass exposure to environmental offenses, violations of consumer rights, civil rights cases, the execution of adhesion contracts and a multitude of other collective activities reaching virtually every phase of human life. What is needed is a more flexible and functional approach which maintains judicial control, but does not unduly restrict the court within tradition-

al legalisms and the passive role it habitates within the adversary system.

In introducing the foregoing changes into New York law, the proposed bill follows the earlier New York drafts mentioned above, as further developed and brought to fruition by Rule 23 of the Federal Rules of Civil Procedure, in effect in the federal district courts since 1966 and subsequently adopted by at least eleven states. One state, California, has reached similar results by expansive judicial construction of the old Field Code Rule.

The basic feature of the proposed bill is the abandonment of the sterile notion of privity which for over 120 years has blocked the effective implementation of the class action device, producing results under which "class actions were not permitted where they should have been and were allowed where they should not have been." 2 Weinstein, Korn, Miller, New York Practice ¶1005.02. For a critical discussion of illustrative cases see 18 Jud. Council Rep 217 (1952); 2 Weinstein, Korn, Miller, New York Practice ¶1005.11; Homburger, State Class Actions and the Federal Rule (17 Judicial Conference Report (1972), reprinted from 71 Columbia L. Rev. 609, 612-21 (1971)). In place of the amorphous privity concept, the bill would substitute functional criteria which would take into account the practicalities of life and pressing contemporary needs of our society while at the same time assuring adequate judicial control of the remedy.

Flexible treatment of class actions, and the need for a balanced statute geared to contemporary complexities has been emphasized recently by the Court of Appeals in leading class action cases.

In *Moore v. Metropolitan Life Ins. Co.*, 33 N.Y. 2d 304 (1973), the Court, in dismissing a class suit on the ground that the complaint merited no such procedure, went on to criticize CPLR 1005 and to comment favorably on the proposed bill, which was before the 1972 Legislature, in the following words: "[The court] notes, however, that the restrictive interpretation in the past of CPLR 1005 and its predecessor statutes no longer has the viability it may once have had. (See, *Hall v. Coburn Corp. of Amer.*, 26 N.Y. 2d 396, 401; *Zachary v. Macy & Co.*, 31 N.Y. 2d 443; Seventeenth Annual Report of N.Y. Judicial Conference, 1972, p. 242; Eighteenth Annual Report of N.Y. Judicial Conference, 1973, p. A 35.) The court is also aware that there was pending before the Legislature last year and will be again this year a comprehensive proposal to provide a broadened scope and a more liberal procedure for class actions, an objective shared by the members of this court. (See, Senate Bill No. 8544; Assembly Bill No. 10488 [1972].) Because the proposed statute would assure limitations and safeguards which would be highly desirable in broadening the jurisdiction of the courts of this State over class actions, legislation in this area is highly preferable to the alternative of judicial development in the same direction. In our view there is urgency for early legislation to accomplish these purposes, in light of the general and judicial dissatisfaction with the existing restrictions on class

action which in many instances may mean a total lack of remedy, as a practical matter, for wrongs demanding correction" (p. 313).

In *Ray v. Marine Midland Grace Trust*, 35 N.Y. 2d 147 (1974), in a class action brought by a debenture owner who charged the debenture trustee with breach of trust, gross negligence and conflict of interest, based on alleged failure to act at the appropriate time, resulting in a sharp decline in value of the debentures, the Court unanimously denied a motion to dismiss the class action. In the main opinion, Chief Judge Breitel pointed out that there was a sufficient common tie among the holders to maintain the class action. The main factor cited was the predominance, over individual questions, of the common question that of the alleged breach of trust by the trustee, peculiarly an issue cognizable in equity and appropriate as a subject of declaratory relief. In the course of his opinion, Chief Judge Breitel stated: "In the many cases decided over the years, there has been a continuing development and definition of the appropriate sphere of class actions, consonant with the development of remedies and substantive rights in equity, sometimes more restrictive and at other times more expansive depending upon current attitudes" (p. 151). The new article proposed in this bill would codify the flexible interpretation of the present statute, in keeping with the general trend of the recent cases.

In so doing, the proposed bill adopts the general scheme of the Federal Rule, but is simpler in its basic structure and more consistent in its functional orientation. For a detailed explanation of the modifications of the Federal Rule, see Homburger, State Class Actions and the Federal Rule (17 Judicial Conference Report (1972) reprinted from 71 Colum. L. Rev. 609 (1971)). The proposed statutory text with brief comments follows:

Article 9 Proposed Change

It is recommended that present section 1005, which governs class actions, be repealed, and that a new article, to be Article 9, entitled "Class Actions" be inserted in lieu thereof, to read substantially as follows:

ARTICLE 9—CLASS ACTIONS

§901. Prequisites to a class action

One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Comment

Section 901 contains a unitary scheme of prerequisites for all class actions, as opposed to the overlapping and more complex classification scheme of the Federal Rule. The reach of proposed section 901 is co-extensive with Federal Rule 23(a) and (b) (1), (2) and (3). Like the Federal Rule the proposed section states the prerequisites to the class actions in pragmatic and functional terms avoiding any reference to the abstract nature of the substantive rights involved.

§902. Order allowing class action.

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. the impracticability or inefficiency of prosecuting or defending separate actions;

3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. the difficulties likely to be encountered in the management of a class action

Comment

Proposed section 902 would adopt the federal policy of determining, at least tentatively, the propriety of maintaining a class action in the initial stages of the proceedings. A wide range of discretion would enable the court to vary the order at any time before reaching a decision on the merits. The section lists factors which the court should consider in determining the propriety of maintaining a class action. In contrast to the Federal Rule, these factors would be significant in any class action and the proposed section would expressly include impracticability or inefficiency of prosecuting or defending separate actions among the relevant factors. The list is non-exhaustive. For example, the apparent merits of the claims asserted may have a bearing on the court's determination.

§903. Description of class.

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice.

Comment

In addition to requiring the description of the class by the order permitting the action, the bill would give to the court discretionary power to direct notice to each member that he may request exclusion from the class within a specified time after notification. Presumably the court would exercise its discretion in favor of granting a right to opt-out when representation of the entire class is not needed for a just disposition of the controversy, when the class members have a significant practical interest in individually controlling the litigation, and when individual notice is feasible without imposing a prohibitive economic or administrative burden on the parties.

§904. Notice of class action.

Unless the court dispenses with notice, reasonable notice of the commencement of a class action shall be given to the members of the class in such manner as the court directs. The content of the notice shall be subject to court approval. Unless the court orders otherwise, the plaintiff shall bear the expense of notification and be responsible for the giving of the notice.

Comment

In place of the variegated notice scheme of the Federal Rule, partially mandatory and partially discretionary, proposed section 904 would substitute a far more pliable mechanism, both for notice and opting-out. This is not to downgrade the importance of notice as a hallmark of integrity of the proceedings and of adequacy of representation. Indeed, in contrast to the Federal Rule, notice is normally required in *all*

class actions. However, it is one thing to recognize the general desirability of notice, and quite another to impose notice as an inflexible and indiscriminate requirement, even in the absence of pressing functional needs and at the expense of unduly hampering class treatment. The flexible scheme, proposed in the bill, requires notice in such manner as the court directs, subject however to the court's power to dispense with notice in appropriate cases. The court should grant dispensation sparingly, as, for example, in cases where notice would be burdensome and costly, the interests of the individual member of the class in controlling the litigation minimal, and effective representation of the class interests attainable without notification.

The bill would round out the notice provisions by allocating the financial and mechanical burden of notification to the plaintiff unless the court orders otherwise, a provision not contained in the federal counterpart. A reallocation of that burden may be appropriate, depending on the relative strength of two competing policies, as viewed in the light of the circumstances of a particular case: protection of the opponent of the class from harassment on the one hand, and the accessibility of the courts to claimants seeking a determination of the merits of the controversy on the other. A flexible rule giving the court a wide range of discretion is needed. Factors bearing on the exercise of the court's discretion include the meritoriousness of the claims asserted on behalf of the class, the financial status of the representative of the class and their opponent, the interest of the latter in obtaining a binding adjudication, and the availability of inexpensive notification facilities to the opponent of the class. Thus, in litigation charging a large corporation with manipulation of stock prices, a federal court noted "mechanics for addressing and mailing by the corporation are normally readily at hand and all that would be required would be an additional enclosure in the next communication to shareholders." (*Dolgow v. Anderson*, 43 F.R.D. 472, 500 (E.D.N.Y.), rev'd on other grounds, 438 F.2d 825 (2d Cir. 1970)).

Finally, the bill contains express provision, also not contained in the Federal Rule, requiring court approval of the content of the notice in order to forestall the transmittal of improper or misleading information to the class membership.

§905. Judgment

The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

Comment

As under the Federal Rule, the judgment under the proposed section would embrace the entire class whether or not it is favorable to the class. The binding effect on a non-appearing member of the class could of course be determined only in a subsequent action to which such member is a party.

§906. Actions conducted partially as class actions.

When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or

2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

Comment

Following the lead of the Federal Rule, the proposed section expressly authorizes class treatment with respect to particular issues and the formation of subclasses.

Rule 907. Orders in conduct of class actions.

In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;

3. imposing conditions on the representative parties or on intervenors;

4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;

6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

Comment

The proposed rule like the Federal Rule would provide important guidelines that assist the court in the management of the action. Deviating from the Federal Rule, proposed rule 907 authorizes the court in the exercise of its discretion to determine whether represented parties may enter an appearance without first seeking permission to intervene, and to tailor the effect of an appearance to the exigencies of the particular case.

There is also a special provision, not found in the federal rule, which would allow the court to set terms for payment of a judgment to a victorious class in accordance with the financial capacity of the defendant so as to avoid harsh economic and social consequences such as loss of employment. The desirability of this change is self-evident.

Rule 908. Dismissal, discontinuance or compromise.

A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Comment

The proposed provision is stricter than the present law. In addition to court approval, it requires in all cases notice to the members of the class in such manner as the court directs.

2. Proposals Relating to a Right of Direct Action Against Liability Insurance Carriers

Insurance Law, Article 17-D (new) Proposed Change

It is recommended that a new Article be inserted in the Insurance Law to be Article 17-D, to read substantially as follows:

ARTICLE 17-D — DIRECT ACTION AGAINST INSURER

§663. Right of direct action created; limitation of time.

A New York resident who, while outside the state, sustains bodily injury or property damage as a result of the tortious act of a person insured against liability for such injury or damage, and in the event of his death resulting from such injury, his personal representative, shall have a right of action directly against the insurer, based upon such tortious act, regardless of any contrary provision of the insurance contract, provided:

(a) the injury or damage was sustained in connection with operation of a vehicle of transportation as defined in section six hundred sixty-eight; and

(b) the person causing the injury or damage is not amenable to personal jurisdiction of a court of this state; and

(c) the insurer has qualified to do business, or is doing business, in this state; and

(d) the action is commenced within three years from the date of the tortious act.

§664. Elements of the right of direct action; defenses.

1. The action herein authorized shall

(a) confer a right to recover all sums the insurer is obligated to pay as indemnification under the contract of insurance, and

(b) be limited by and subject to the terms and conditions of the insurance contract

2. The insurer may assert any defenses available to the insured, had the action been brought against the insured, as well as any defense available to the insurer against the insured.

§665. Rights of contribution and indemnification.

The insurer may assert any claim for contribution or indemnification which the insured could have asserted against any person, had the action been brought against the insured.

§666. Exclusivity; election of remedy.

A direct action under this article bars any other action based upon the same injury or damage while the direct action is pending or after a judgment in favor of the plaintiff has been satisfied. An action in another state against a tortfeasor subjected to personal jurisdiction bars the maintenance thereafter of an action under this article against the insurer based upon the same injury or damage.

§667. Discovery of insurance agreements.

A plaintiff who comes within section 663, subdivisions (a) and (b) is entitled to obtain discovery of the existence and contents of any insurance agreement obligating the insurer to satisfy part or all of a judgment which may be entered against the tortfeasor. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence.

§668. Vehicle of transportation defined.

For purposes of this article, a vehicle of transportation is any device in, upon, or by which any person or property may be drawn, except devices moved by human power or used exclusively upon stationary rails or tracks.

Section 6202 Proposed Change

It is also recommended that CPLR Section 6202 be amended by inserting, at the end of the first sentence, the following phraseology, "except the obligation of an insurer to an insured under a liability insurance policy, before the plaintiff has obtained judgment against the insured."

It is further recommended that the cross-reference to subdivision (h) of section 105 be amended by substituting subdivision (i) for subdivision (h).

Comment

The proposed changes would abrogate the doctrine of *Seider v. Roth*, 17 N.Y. 2d 111 (1966) and create a right of direct action against the insurance carrier, as a more straightforward approach to the jurisdictional problems which *Seider* was designed to ameliorate. The proposed legislation in no way affects the judgment creditor's right to bring suit against the judgment debtor's insurer when a judgment has not been timely satisfied, as provided by section 167 of the Insurance Law.

In 1973, a bill intended to effect these changes passed the Legislature, but was vetoed by the Governor (Veto Memorandum No. 26 (1973)). The Governor's memorandum, without reaching the merits of the bill, noted the following four drafting deficiencies which prompted the veto:

1. The 1973 bill failed to make it clear that the right of action against the insurer is based on the tortious act of the insured.

To meet the objection, language has been added in the proposed bill to indicate that the right of action against the insurer resulting from the tortious act of its insured is "based upon such tortious act" (proposed section 663).

2. The term "vehicle of transportation" was not defined in the 1973 bill.

The present bill defines the term (proposed section 668) to accord with case law involving vehicles of transportation in *Seider*-based cases. *Seider v. Roth*, 17 N.Y. 2d 111 (1966) (automobile); *Simpson v. Loehmann*, 21 N.Y. 2d 305 (1967), rearg. den. 21 N.Y. 2d 990 (1968) (boat) (cf. Vehicle and Traffic Law section 159).

3. There was no express provision in the 1973 bill permitting the insurer to assert any defense which the insured could have asserted in an action against him. The bill spoke only of defenses the insurer might raise in an action by the insured.

The current bill spells out the defenses available to the insurer, including both defenses which the insured could have asserted had the action been brought against him, and defenses available to the insurer against the insured.

4. There was no provision in the 1973 bill expressly permitting the insurer to avail itself of any substantive rights which would have been available to the insured (cf. *Dole v. Dow Chemical Corp.* 30 N.Y. 2d 143 (1972); CPLR Article 14 (L. 1974, ch. 742)).

To specify such rights, this bill would insert a section safeguarding the insurer's rights of contribution and indemnification (proposed section 665).

The foregoing changes are designed to meet the Governor's objections to the 1973 bill.

A brief account of the background of this legislation may be in order. In *Seider v. Roth*, 17 N.Y. 2d 111 (1966), the New York plaintiff, a driver injured in an auto accident in Vermont, acquired *in rem* jurisdiction over the defendant driver, a

Canadian, by attaching the liability insurance policy issued to the defendant by the Hartford Accident and Indemnity Company, which was doing business in New York. The Court of Appeals sustained jurisdiction on the rationale that the New York plaintiff could seize as a "debt" the obligations of the insurance company to investigate the accident, and to defend and indemnify the insured for any liability that might arise from the use of his automobile.

In a later case which upheld the constitutionality of the *Seider* procedure, former Chief Judge Stanley H. Fuld questioned its adequacy and practicability, stating that "it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of *in rem* jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally". *Simpson v. Loehmann*, 21 N.Y. 2d at 312 (1971).

Accordingly a study entitled *Report on the Draft of Proposed Direct Action Statute*, authored by Professor Maurice Rosenberg of the Columbia University School of Law, was jointly commissioned by the Judicial Conference and the Law Revision Commission. This bill is based upon the study, which was published in the *Sixteenth Annual Report* of the Judicial Conference 264 (1971).

Proposed Amendments

While the present proposal falls short of the ambitious goal stated by the former Chief Judge, it takes a significant step in that direction by transforming the venturesome method of acquisition of *in rem* jurisdiction through attachment under *Seider* into a straightforward and yet simple direct action statute permitting suit against the insurance carrier based upon the insured's tortious act.

While direct action statutes of other jurisdictions are mainly concerned with providing a local forum for victims of local injury, the proposed statute, following the policy of *Seider*, would provide a locally obtainable remedy for an injury sustained elsewhere. It would create a limited *in personam* right of action against the tortfeasor's insurance company.

The new right would be accorded only to residents of New York State, that is, to persons domiciled in the state or to their representatives in cases of wrongful death. Such limitation, together with the requirement that the carrier be qualified to, or actually be doing business here would avoid constitutional difficulties involved in legislating, in effect, the nullity of a "no-action" clause validly made in another state. Moreover, to provide differently would, because of the lure of New York's reputedly generous verdicts, make this state a mecca for non-residents injured elsewhere by non-New York residents. Once it is accepted, in the light of the foregoing, that the statute in New York should be drafted to cover only the case in

which no other reasonable basis exists for a local suit, it follows that the statute becomes a subsidiary, rather than a primary, remedy. This means that the statute would not provide an option to sue either the tortfeasor or the insurance company. It also means that its availability would be restricted to cases that match its purpose. Since in most non-vehicular torts, the wrongdoer is amenable to *in personam* jurisdiction in New York, either under the long-arm statute for causing local consequence or by reason of doing business in the state, the direct action statute would restrict actions thereunder to those based upon tortious acts committed in connection with the operation of a vehicle of transportation, as defined in the proposed statute. Again, from the practical standpoint, to provide otherwise would, despite the coverage of the *Seider* doctrine, create serious problems of administration and acceptability.

The statute would establish a right of direct action against the insurer, based upon the tortious act of the insured person or corporation, to recover for bodily injury, including fatal injury, or property damage as a result of such tortious act. The action would be limited by and subject to the terms and conditions of the insurance contract. Thus, the statute would limit the insurer's cash obligation to the indemnity coverage.

The statute would provide that the insurer may assert any defense available had the action been brought against the insured, or available to the insurer against the insured. The statute would provide that the insurer may assert any claim for contribution or indemnification which the insured could have asserted had the action been brought against the insured.

The statute would require the plaintiff to elect his remedy as between the direct action and the action against the tortfeasor in another state, and would make the elected remedy exclusive during its pendency or after satisfaction of judgment, by barring the other. To provide otherwise would unreasonably discriminate between the New Yorker injured here, who would have one remedy, and the New Yorker injured elsewhere, who would be afforded a double remedy.

The proposed statute does not attempt to regulate the *res judicata* effect of judgments in a direct action. However, problems of *res judicata*, traditionally left to court decision, were carefully considered by the Judicial Conference and the Law Revision Commission. For a detailed discussion, see *Report on the Draft of Proposed Direct Action Statute*, by Professor Maurice Rosenberg, in the *Sixteenth Annual Report of the Judicial Conference*, pp. 264, 281 et seq. (1971).

The proposed statute would provide that a plaintiff is entitled to obtain disclosure of the tortfeasor's insurance company. Since the tortfeasor would be out-of-state, the best method may be to bring a "John Doe" action against the company, then conduct out-of-state discovery against the tortfeasor, and after learning the identity of the insurer, substitute its true name for the "John Doe" soubriquet.

It was intended from the outset that the direct action statute

would apply to wrongful death actions as well as those for personal injuries and property damage. Since all three types of action are to be susceptible to direct actions, it is deemed wisest to provide for a flat three year statute of limitations, to be placed in the direct action statute itself, rather than in CPLR Article 2, in consideration of the convenience of litigants, and also to make clear, by explicit phraseology in the applicable context (proposed §663) that any direct action, including one for wrongful death, must be "commenced within three years from the date of the tortious act". Thus, the statute of limitations governing a cause of action for wrongful death brought as a direct action would not begin to run from the date of death.

In the interests of fairness and a more straightforward approach to the jurisdictional problems confronted in *Seider*, and to prevent the possible extension of the *Seider* doctrine to categories of tort other than personal injury, with unpredictable complexities, the enactment of the proposed direct action statute would be accompanied by a legislative overruling of the *Seider* doctrine. This would be accomplished by the proposed amendment of CPLR 6202, to exclude from "the debt or property subject to attachment" designated therein, "the obligation of an insurer to an insured under a liability insurance policy before the plaintiff has obtained judgment against the insured." The corrected cross-reference in CPLR 6202 is proposed because of the renumbering of the subdivisions of CPLR 105 by L. 1973, ch. 238.

3. Additional Recommended Statutory and Rule Changes.

Section 213(7) Proposed Change

It is recommended that subdivision 7 of section 213 be repealed, and that subdivisions 8 and 9 be renumbered subdivisions 7 and 8, respectively.

Comment

Section 213 is a statute of limitations governing actions to be commenced in six years. Subdivision 7 lists an action to establish a will, and contains discovery and imputed discovery provisions where the will has been lost, concealed or destroyed.

Article 8 (sections 200-204) of the Decedent Estate Law, which provided for an action to establish a will or construe a devise was repealed by L. 1966, Ch. 952, effective September 1, 1967, when the new Estates, Powers and Trust Law became effective.

Thus, the retention of a six year statute of limitations on an action to establish a will in the Supreme Court, when the statutory basis for the action no longer exists, is an anomaly and misleading to lawyers, and the provision should be repealed, as proposed.

Although there is no statute of limitations on a proceeding to probate a will in Surrogate's Court (see *Matter of Canfield*, 165

Misc. 66 (Surr. Ct., Kings 1937)), the proposed repeal would not necessitate the enactment of such a statute. The purpose of such a provision would be to quiet titles (see Uniform Probate Code, section 3-108) and this purpose is accomplished by EPTL 3-3.8. That provision validates title of a bona fide purchaser of real property from the distributees unless a will containing a different disposition of the property has been admitted to probate within two years after the testator's death. In addition, SCPA 2113 sets forth the procedure for probate of heirship, in order to determine who the distributees are and to create a record of their interests.

Sections 408, 7701 Proposed Change

It is recommended once again that section 408 be amended to make Article 31 applicable to *inter vivos* trust proceedings, thus allowing disclosure without court order. Furthermore, it is recommended that section 7701 be amended to provide that any interested person can examine the trustee of an express trust, under oath, either before or after the filing of an answer or objections. In addition, section 7701 would be amended to correct the cross-references to provisions which have been transferred to other statutes.

Comment

This bill would conform the practice under the CPLR relating to *inter vivos* trust proceedings to that in Surrogate's Court, thus rectifying a previous legislative oversight.

At present, by virtue of the general provisions of section 408, a court order is required for disclosure in *inter vivos* trust proceedings, whereas in testamentary trust proceedings, under SCPA 2211, no such order is necessary. SCPA 2211 also provides that in testamentary trust accountings the fiduciary may be examined under oath by any party to the proceeding, either before or after filing objections. There is no comparable provision in Article 77 of the CPLR with respect to *inter vivos* trusts.

There is no good reason why the procedure in *inter vivos trust* accountings should be different in this respect from testamentary trust accountings. The general provision in CPLR 408, which requires a court order for disclosure in all special proceedings, was originated by the revisers in order to preserve the summary nature of special proceedings. They felt that to allow disclosure on notice before the hearing would amost certainly extend the eight day notice of petition period. However, this general rule should bend to certain exceptions where examination, because of its inherent importance, should apply when a fiduciary is making an accounting, so that interested parties may be afforded full protection. This is already the rule in testamentary trust proceedings in Surrogate's Court.

Section 1206(c) Proposed Change

It is recommended that subdivision (c) of section 1206, which relates to court orders concerning the disposition of the proceeds of claims of infants or judicially declared incompetents, be amended to provide, in substance, that reference to the age of twenty-one years in any order made pursuant to this subdivision or its predecessor, prior to September 1, 1974, directing payment to an infant without further court order when he reaches the age of twenty-one years, shall be deemed to designate the age of eighteen years.

Comment

This proposal, which is designed to be retroactive, relates to the recent lowering of the age of majority. In a package of fifty-two bills, recommended by the Law Revision Commission, the Legislature in 1974 lowered the age of majority from twenty-one years to eighteen years. As part of that change, section 1206(c) was amended to provide that with respect to the proceeds of an infant's claim, the court may direct that the depository shall, upon the infant's demand, without further court order, pay the funds to the infant when he reaches the age of eighteen years (L. 1974, Ch. 924, effective September 1, 1974), rather than twenty-one years, as previously provided.

The amendment would provide, therefore, in substance, that in any order made pursuant to that subdivision or its predecessor prior to September 1, 1974, directing payment to the infant without further court order when he reaches the age of twenty-one years, reference to the age of twenty-one years shall be deemed to designate the age of eighteen years.

The amendment is designed to save much paper work and court time otherwise necessitated by a piecemeal amendment of each deposit order to reflect the new age of majority.

The Committee has been informed that the Law Revision Commission is planning to submit more extensive legislation, also amendatory of subdivision (c) of section 1206 of the CPLR, as well as certain provisions of the Surrogate's Court Procedure Act, which will make it clear that, in the ordinary case, there is no need for a separate court order for the release of deposited funds when an infant attains majority and becomes entitled to possession and control of moneys held during his infancy. This change, unlike the change proposed by the Advisory Committee, would not be retroactive, and would continue the authority of the court, in a particular case, and in its discretion, to order the depository to withhold payment until such time, and under such conditions, as the court might direct.

In order to ensure that there will be uniformity and consistency in these provisions, the Advisory Committee recommends that all of these changes be included in a single bill to be recommended by the Law Revision Commission. The Law Revision Commission has agreed to include the recommendation of the Advisory Committee in the bill which it will prepare and recommend.

Section 2512 Proposed Change

It is recommended that section 2512 be amended in two respects:

1. to number the present text as paragraph 1, and to delete therefrom the words "which municipal corporation" and to commence a new sentence immediately following such deletion to begin with the words "Such parties" before the words "shall, however, be liable for damages."

2. to insert a new paragraph, to be paragraph 2, to read substantially as follows: "2. Where an appeal is taken by any such party, only the court to which the appeal is taken may fix the amount which shall limit the liability for damages".

Comment

This bill would amend section 2512 in two respects: first, to restore its original wording whereby the state and public officers, as well as domestic municipal corporations, as at present, would be liable for damages while being exempt from giving undertakings; secondly, to make clear that where such parties appeal, only the court to which an appeal is taken may fix the maximum liability.

1. When the CPLR was first enacted it continued the exemptions from giving undertakings contained in the C.P.A., but expanded liability for damages to include the state and public officers, in addition to municipal corporations. In 1965 the Legislature restored the old rule (L. 1965, Ch. 628). The 1965 amendment is regressive. The present day trend is toward making the state responsive in damages when it has injured a private citizen. This should be the case here, especially since the state will not be exposing itself to unforseeable or unlimited liability; for it would be liable to the same extent as sureties on an undertaking, had such undertaking been given. Sureties are liable to an extent not greater than sums specified by the court or judge (see *City of Yonkers v. Federal Sugar Refining Co.* 221 N.Y. 206, 210, 211 (1917), where it was held that if the limit of the responsibility of the municipal corporation for damages is not specified in the injunction order, there is no liability in the event that it is later determined that such plaintiff was not entitled to the injunction).

The *City of Yonkers* case *(supra)* was somewhat limited in *City of Utica v. Hanna*, 249 N.Y. 26 (1928), which held a city liable for damages where the city accepted the benefit of a stay on appeal (after procuring a temporary injunction) upon express condition that it pay any resulting damages, although no limit had been set upon the amount of damages.

Subsequent lower court decisions have imposed an upper limit on the city's liability for damages (*Bonert v. White*, 19 Misc. 2d 742 (Supreme, New York 1959); *City of White Plains v. Griffen*, 169 Misc. 2d 706 (Supreme, Westchester 1938), aff'd *without opinion*, 255 App. Div. 1003 (Second Dept. 1938)).

In view of the foregoing, and because this bill would

re-subject the state to liability in this area, it seems advisable to retain the present codification of the *City of Yonkers* rule of limited liability.

2. Under present law, the conditioning of an appeal by the state or any political subdivision thereof is governed by section 5519(c), which provides that only the court to which appeal is taken may vacate, limit or modify the unconditional stay on appeal provided for in section 5519(a) (1). For this reason, section 2512 must be read to exclude authority to fix an amount in lieu of an undertaking in connection with an appeal (*Matter of Demisay*, 59 Misc. 2d 729, 731, 732 (Supreme, Nassau 1969)). This is clarified in the bill by the proposed paragraph 2 of section 2512.

Section 5236(c) Proposed Change

It is recommended that the second and third sentences of subdivision (c) of section 5236 be amended to read as one sentence, substantially as follows: "Service by the sheriff of a copy of said notice on the judgment debtor shall be made as provided in section 308".

Comment

This bill would amend subdivision (c) of section 5236, which governs notice of sale of real property by the sheriff to the judgment debtor in connection with the enforcement of money judgments, to reword those segments of the provision which are outmoded, inadequate and stylistically improper.

The unamended text can be faulted on several grounds: (1) reference to section 308 is improperly made by designating the title of the law and by spelling out the section number, rather than by simple numerical designation of the section; (2) personal service is incorrectly equated with personal delivery; (3) the cross-reference to section 308 (3) and (4) is outmoded, since it predates the 1970 and 1971 amendments of section 308 (L. 1970, Ch. 852; L. 1971, Ch. 176; see also L. 1969, Ch. 1089 amending section 5236 (c)); (4) service of a copy of the notice of sale on the judgment debtor does not include the method set forth in subdivision (5) of section 308.

The proposed amendment would make the desired changes and would update the cross-reference to section 308 by providing for service of a copy of the notice of sale on the judgment debtor pursuant to all methods set forth in section 308. This would include service under section 308(5), which permits the court to fashion an expedient method where the methods available under section 308(1), (2) and (4) are impracticable.

Section 5519(e) Proposed Change

It is recommended that subdivision (e) of section 5519 be amended by adding thereto a final sentence, to read as follows: "Subject to an order providing otherwise, any stay granted pending the determination of a motion for leave to appeal shall,

in the event such motion is denied, continue for five days after service upon the movant of a copy of the order denying such motion, together with notice of entry thereof."

Comment

This bill would amend subdivision (e) of section 5519 to provide that, subject to an order providing otherwise, any stay granted on a motion for leave to appeal shall, in the event such motion is denied, continue for five days after service upon the movant of a copy of the order denying such motion, together with notice of entry thereof.

Currently section 5519(e) provides that upon an affirmance or modification of a judgment or order appealed from, any existing stay continues for a period of five days after service of a copy of the order determining the appeal. However, there is no such provision applicable after determination of a motion for leave to appeal. Often a losing party, after being denied leave to appeal by the court which determined the appeal, will seek leave from the next highest court. Such party should have the same short five day stay after determination of such motion as he did after the determination of the appeal. During this short period, appellant would have the opportunity to prepare papers for the further motion for leave. Of course, if no stay was granted by the affirming court pending the determination of the motion for leave, then the five day stay period would not apply. Furthermore, the proposed statutory five day continuance would be subject to an order of the court providing otherwise.

Rule 5525(c) Proposed Change

It is recommended that subdivision (c) of rule 5525, which governs the procedure for settlement of a transcript on appeal, be amended by designating the present text as paragraph 1; by changing the ten day time limits in the first and second sentences to fifteen day time limits; and by inserting in the first sentence, following the phrase "after receiving the transcript", the clause "from the court reporter or from any other source".

It is further recommended that the same subdivision be amended by adding thereto two new paragraphs, to be paragraphs 2 and 3, to read substantially as follows:

2. If the appellant has timely proposed amendments and served them with a copy of the transcript on respondent, and no amendments or objections are proposed by the respondent within the time limited by paragraph 1, the transcript, certified as correct by the court reporter, together with appellant's proposed amendments, shall be deemed correct without the necessity of a stipulation by the parties certifying to its correctness or the settlement of the transcript by the judge or referee. The appellant shall affix to such transcript an affirmation, certifying to his compliance with the time limitation, the service of the notice provided by paragraph 3 and the respondent's failure to propose amendments or objections within the time prescribed.

3. Appellant shall serve on respondent together with a copy of the transcript and the proposed amendments, a notice of settlement containing a specific reference to subdivision (c) of this rule, and stating that if respondent fails to propose amendments or objections within the time limited by paragraph 1, the provisions of paragraph 2 shall apply.

Comment

This proposal would amend subdivision (c) of rule 5525 in order to facilitate the settlement of the transcript on appeal.

Rule 5525(c) states that after time for respondent to serve amendments or objections has expired, appellant may, on four days' notice, submit his amendments and the transcript for settlement to the judge or referee before whom the proceedings were had.

The difficulty with this approach is that it has built-in limitations. Respondent may not be available on the return day, appellant may be otherwise occupied, the judge or referee may not be available, and postponements and adjournments often occur.

In order to eliminate these problems, it is recommended that rule 5525(c), which governs the settlement of the transcript, be amended to provide, in substance, that if appellant has timely proposed amendments and served them with a copy of the transcript on respondent, and no amendments or objections are proposed by respondent within the time prescribed, the transcript, certified as correct by the court reporter, together with appellant's proposed amendments, shall be deemed correct without stipulation or settlement (see 22 NYCRR 699.10). Provision would also be made that appellant give notice to respondent of the new provision.

Preparation of the record on appeal is not always easy where a stenographic transcript was made of the proceedings leading to the order or judgment sought to be reviewed. Rule 5526, providing for the content and form of the record on appeal, requires that if there has been a transcript of the proceedings below it must be included as part of the record on appeal. The correctness of that transcript has to be agreed upon by the parties: the time limits for obtaining such agreement are set forth in Rule 5525(c) and the rules of the Appellate Division.

Trouble arises for the appellant when the respondent is either too busy with new matters to review the transcript of a former trial or for other reason is in no hurry to see the appeal perfected and noticed for argument. Where the respondent does not adhere to the time limitations within which he must make his proposed amendments or objections to the transcript or stipulate as to its correctness, the appellant is stymied as term after term of the Appellate Division passes by.

Another source of potential aggravation arises when there are multiple parties to the appeal and the appellant must obtain the consent of each as to the correctness of the transcript.

The proposed amendment has been approved by the Clerk of the Court of Appeals and the Clerks of the Appellate Divisions

of the Supreme Court in the four Judicial Departments.

Rule 5529(a)(3) Proposed Change

It is recommended that the second sentence of paragraph 3 of subdivision (a) of rule 5529, which governs the form of brief and appendices reproduced by offset printing, mimeographing or any method of reproduction other than printing, be amended. The sentence presently reads: "The margin shall be at least two inches". It would be amended to read substantially as follows: "The bound margin shall be at least one inch, and typed matter shall not exceed seven by nine and one-half inches, with double spacing between each line of text".

Comment

The proposed amendment of rule 5529(a)(3) is recommended in order to eliminate certain problems which have arisen under the present rule. Reproducers of briefs and records on appeal often conform with rule 5529(a)(3) by providing a 2 inch margin on all four sides of the text, leaving a very attractive page with very little typed matter on it. This increases bulk and the cost of reproduction.

Others submit briefs and records with type starting at the top of the page and finishing at the page bottom, with type lines extending almost to the paper edge. Such pages are hard to read.

It is suggested that rule 5529(a)(3) be amended so as to provide for a more reasonable typed paper and to conform more closely with the size of typed matter for reproduced pages specified in the Federal Rules of Appellate Procedure (rule 32). The Federal Rule states:

> "Those produced by any other process [than printing] shall be bound in volumes having pages not exceeding 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches, with double spacing between each line of text".

Accordingly, it is recommended that rule 5529(a)(3) be amended as indicated above. This would provide that the bound margin be at least one inch and the typed matter a half inch longer than provided in the federal rule.

The proposed amendment has been approved by the Clerks of the Appellate Divisions of the Supreme Court in the four Judicial Departments.

Rule 9701 Proposed Change

It is recommended that rule 9701 be amended substantially as follows:

Rule 9701. [Books] *Records* to be kept by the clerk of the appellate division.

The clerk of the appellate division in each department shall keep:

1. a book, properly indexed, *or an index*, in which shall be entered the title of all [civil judicial] proceedings [which are pending] in that court, [and all civil judicial proceedings commenced in the appellate division,] with entries under each, showing the proceedings taken therein and the final disposition thereof;

2. a minute book showing the proceedings of the court from day to day; *and*

3. a book [, properly indexed,] in which shall be [recorded at large] *indexed* all undertakings filed in his office, with a statement of the [civil judicial] proceedings in which they are given, and a statement of any disposition or order made of or concerning them; and

4. a book, properly indexed, *or an index*, which shall contain *(a)* the [names] *name* of each attorney admitted to practice *in the department*, with the date of his admission, [and a book, properly indexed, which shall contain] *and (b)* the name of each person who has been refused admission or who has been disbarred, disciplined or censured by the court. The clerk of each department shall transmit to the clerk of the court of appeals and to the clerks of the other departments the names of all attorneys who had been admitted to practice, the names of all applicants who have been refused admission, and the names of all attorneys who have *resigned or who have* been disbarred, disciplined [or], censured *or reinstated* by the court. [The clerk of each department is directed to enter in the proper book the name of each attorney who has been admitted to practice, with the date of his admission, and the name of each person who has been disbarred, refused admission, or disciplined or censured, with the date of such disbarment, refusal of admission, or discipline or censure, received from the other departments of the state, together with the date when and department in which the order was made.]

Comment

The proposed amendment of rule 9701 is recommended to conform the language to actual practice.

With respect to paragraph 1, some departments have discontinued large index books of cases, decisions and orders in favor of an alphabetical card index system. The proposed amendment includes authorization for use of such a card index. Also, the limitation of the index of cases to "civil judicial" proceedings has been deleted as all Appellate Divisions maintain an index of all types of proceedings filed in their offices.

Paragraph 4 has been amended to accord with actual practice. All departments maintain a card index system of attorneys admitted in the department, and some a book of admissions as well. Any disciplinary action against an attorney is recorded on an index card. The requirement that each department include in its index the names of attorneys admitted and disciplined in other departments has not been followed in some departments and is unnecessary. One justification for requiring each depart-

ment to keep an index of attorneys admitted in other departments would be if each department issued certificates of admission and good standing to all attorneys. In actual practice, however, each department issues such certificates only to attorneys who have been admitted in the department. It, therefore, is unnecessary to require each department to maintain an index of thousands of persons admitted in other departments. An official register of persons admitted to the Bar, showing the department of either admission, is required by section 468 of the Judiciary Law to be kept by the Clerk of the Court of Appeals. Each Appellate Division must notify the Clerk of the Court of Appeals and the Clerks of the other Appellate Divisions of admissions, disbarments, etc. Any department that deems it advisable may continue to maintain a complete index of attorneys.

The proposed amendment has been approved by the Clerk of the Court of Appeals and the Clerks of the Appellate Divisions of the Supreme Court in the four Judicial Departments.

PART III — STUDY RELATING TO A REVISION OF SECTION 50-e OF THE GENERAL MUNICIPAL LAW

Professor Paul S. Graziano of St. John's University Law School has submitted to the Committee the first draft of a comprehensive study of section 50-e of the General Municipal Law. That section, together with a multitude of notice of claim provisions and short statutes of limitations scattered throughout the consolidated and unconsolidated laws, governs the commencement of legal proceedings in tort cases against municipalities, public authorities, and other political subdivisions. The study, together with a draft statute, was received by the Committee as a tentative or "working" proposal late in 1974. On the basis of extended consultations held by the Committee with Professor Graziano, a revision of both the draft statute and the supporting study is now being undertaken by Professor Graziano. Further consultations and additional study will be required before final legislative recommendations can be presented by the Committee to the Judicial Conference.

At this time it is recommended that, pending submission of the Committee's final recommendations, the Judicial Conference authorize the publication of Professor Graziano's study, when completed, and the filing of a study bill in the current legislative session, if statutory formulation of the proposal can be completed by the Committee before the close of the current legislative session.

By way of preview, some of the major defects of the present law which are receiving the Committee's close attention are summarized as follows:

(1) Section 50-e of the General Municipal Law fails to warn claimants by clear and express statutory language that timely notice of claim to a public corporation is a condition precedent not only to an action in tort against the public corporation, but

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also to an action against its employee if the public corporation is required by statute to indemnify the employee.

(2) The present requirement that a notice of claim be served within 90 days after the claim arises applies to all claimants, including persons under disability by reason of infancy or mental or physical disability (subd. 1). The harshness of the law is relieved to some extent by a provision that authorizes the court to permit a late filing of the claim if the person under disability, and by reason of his disability, fails to serve a timely notice and if application for an extension of time is made within a reasonable time, but no later than one year after the happening of the event, and before commencement of an action to enforce the claim (subd. 5). The shortness of the statutory period, which even against persons under a disability runs from the happening of the event, rather than the removal of the disability, and, to some extent, the required nexus between the disability and the untimeliness of the notice, have produced grossly unjust results, and urgently require statutory relief.

(3) Under the present law timely but improper service may be a serious defect (subd. 3). Keeping in mind that the functional purpose of the notice of claim is to protect a public corporation against stale or unwarranted claims and to enable it to investigate claims timely and efficiently, the provision appears to be unduly harsh. If the notice has been actually received by a proper person, a waiver of a defect in the manner of service may well be appropriate not only if the public corporation examines the claimant or other person in interest, as presently provided (subd. 3), but also if the public corporation demands an examination of the party in interest or, quite generally, if it fails to put the claimant on notice of the defect within a specified time.

(4) The tightly woven provisions of the present law governing leave to serve a late notice of claim (subd. 5) should be loosened, keeping in mind the functional purpose of the notice, stated above, and the need to balance the interests of the public and of the injured person. A broad, general relief provision modeled on subdivision 5 of §10 of the Court of Claims Act, permitting service of a late notice in the Court's discretion may well be in order where the claimant shows that he has a reasonable excuse for his failure to serve a notice of claim within the time specified and that the public corporation against which the claim is asserted or its insurance carrier had actual notice of the essential facts constituting the claim, unless the corporation or carrier shows that it has been substantially prejudiced by the failure to serve the notice within the time specified.

(5) A serious problem resulting in possible loss of meritorious claims has been created in the past decade by the existence of private stock corporations which derive their public character from the fact that they are subsidiaries of public corporations. Under vaguely worded statutory provisions, failure to serve any notice of claim, or even service upon the parent corporation

alone, may be a fatal error (see e.g. §1276, subd. 6, Public Authorities Law). The injured party may have only a claim against the subsidiary private stock corporation and that claim he may have lost by failing to satisfy the condition precedent to its assertion. It can hardly be doubted that this trap ought to be removed.

While the Committee has not reached any final conclusions on amendatory legislation addressed to the defects listed above or to other defects revealed by a close study of the present statutory scheme, the general thrust of the proposals envisaged by the Committee should be clear. It is the sense of the Committee that the present statute is unduly restrictive and inflexible and that appropriate relief can be provided to claimants without jeopardizing the legitimate public interest in the financial security of its institutions.

PART IV — AREAS OF FUTURE STUDY AND REVIEW

In addition to the studies discussed earlier in this report, there are several others to which the Committee attaches importance. The Committee desires to commission some of these in the near future. Others, already completed, will be reviewed with a view to possible implementation through legislation or rule changes. Among these studies are the following:

1. *Study on Standing to Sue.* This study would be commissioned to consider the revision of Article 78, and other related statutes, to give a citizen the right to bring a proceeding to contest the legality of a state action, and to establish procedures relative thereto.

In *St. Clair v. Yonkers Raceway, Inc.*, 13 N.Y.2d 72 (1963), the Court of Appeals announced the doctrine that only one personally aggrieved could test the constitutionality of a state statute, although New York has long permitted taxpayer suits against city and other local officials to prevent any illegal official acts (General Municipal Law, §51).

Through the years, the Committee has opposed various bills, as inadequate, which have sought to remedy this problem. A full scale study in this area is required, particularly since the law of New York seems to be out of line with the prevailing state of the law throughout the country.

2. *Study of the Adequacy of Costs Allowable in Litigation.* This study was published in the *Sixteenth Annual Report of the Judicial Conference*, p. 246 (1971) and concluded that the present provisions in Articles 81, 82 and 83 are inadequate and that the most reasonable way to restore costs to their proper role is to award reasonable attorney's fees as a percentage of the amount in controversy.

Much interest has been expressed in this topic and the problem remains that the present system of costs is inadequate to accomplish its purposes. Remedial action should be considered.

3. *Study of the Constitutionality of New York State's Provisional Remedies.* This topic, which would be the subject of a major study, is of paramount importance by virtue of the recent federal cases on the constitutionality of attachment and replevin procedures, and the significance of this for New York procedure.

In the first of this line of cases, the Supreme Court in *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337 (1969) held unconstitutional a Wisconsin garnishment statute under which a debtor's wages were frozen by service of process on the garnishee without prior judicial authorization.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Florida and Pennsylvania replevin statutes that allowed possession by a sheriff of goods sold without notice or hearing or judicial order were declared unconstitutional.

In *Mitchell v. W. T. Grant Company*, U.S. , 40 L.Ed. 2d 406 (1974), a Louisiana statute allowing ex parte pre-judgment seizure of property subject to a lien was upheld because, unlike the Florida and Pennsylvania laws, it required court approval, demonstration of the grounds for the seizure, posting of a bond by the creditor, the right of the debtor to regain possession by posting a bond, and an immediate hearing for the debtor to seek dissolution of the attachment order.

In *Sugar v. Curtis Circulation Company*, N.Y.L.J. 10/28/74, p.1 (S.D.N.Y.) a three-judge federal court declared unconstitutional CPLR 6201, the New York attachment statute which permits ex parte pre-judgment attachment of the property of a defendant.

The court stated that unlike the Louisiana statute in *Mitchell*, the New York provisions are fatally defective in that they do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds upon which the writ issued.

In its ruling, the Court said that the sole basis for vacating the attachment under CPLR 6223 is not that the grounds upon which it has been issued are unproven but rather that the attachment is unnecessary to the security of the plaintiff and the burden of proof is not, as in *Mitchell*, on the plaintiff but on the defendant.

The Committee has given careful attention to the problem of lack of notice and hearing in replevin procedures under CPLR 7102 (see *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970)) and opposed a 1971 bill intended to remedy this problem. The bill became law (L. 1971, ch. 1051), but the Governor noted that, although failure to approve would leave the State without any effective replevin procedure, the bill had failed to establish clear and easily usable standards to guide attorneys and the courts in taking action under the statute (see *Finkenberg Furniture Corp. v. Vasquez*, 67 Misc. 2d 154 (Civil Court of the City of New York, 1971)).

The Committee now believes, especially in the light of the *Sugar* case, that an in-depth study should be commissioned in 1975 to examine the constitutionality of the New York

provisional remedy and replevin procedures and to propose corrective legislation as may be needed.

4. *Study of Evidence.* The need for the drafting of a Code of evidence for New York State was made clear in the *Study of the Feasibility of Formulating a Code of Evidence for the State of New York (Twelfth Annual Report of the Judicial Conference*, p. 182 (1967)) by Professor Edith L. Fisch, formerly of New York Law School. This study covers so extensive and specialized an area that the Committee has repeatedly recommended the appointment by the Judicial Conference of a special advisory committee to prepare a codification of the law of evidence. This has become even more appropriate since the promulgation of the Federal Rules of Evidence by the United States Supreme Court, which are to become effective on July 1, 1975. However, until the necessary budgetary authorization is forthcoming from the Legislature, or until some other body, such as a Temporary State Commission, is entrusted with this task, the CPLR Committee will continue to consider, and to recommend, where warranted, amendments of the Evidence Article.

5. *Study on Use of Videotape in the Courts.* Related to the need for a Code of Evidence, serious attention is being given to commissioning a study on the use of videotape as a technological tool to insure justice, a speedier disposition of trials and the procedural changes necessary to implement this new approach.

Ohio has been the pioneer in the use of videotape both for depositions and for entire trials (McCrystel and Young, Prerecorded Videotape Trials—An Ohio Innovation, Brooklyn Law Rev. 39:560 (1973)). California followed soon after (Judicature 57:171 (1973)).

A complete videotape trial is a procedure whereby the whole presentation of evidence is videotaped and edited in advance of jury selection. The jury would have only limited contact with the judge and attorneys after jury selection and no contact with witnesses. The tape is then shown to an audience in a movie theater. The primary advantage of this method of trial practice is its time saving factor and efficiency (Asperk, Introducing Videotape to the Courts, Judicature 56:363 (1973)).

In 1973 the Judicial Conference submitted a bill to amend CPLR 4544 to authorize the Administrative Board to establish a program on an experimental basis for the pre-trial recording of medical testimony on videotape and a procedure for introduction of such testimony into evidence during the trial of a civil action, where the doctor is unavailable, because of medical commitments, to testify at the trial (Senate 4312, Assembly 6163). The bill passed the Senate.

In 1974 the Judicial Conference submitted a similar bill, amending Judiciary Law section 213(9) (Senate 8253, Assembly 11709). The bill died in Committee in both houses.

The Committee considers that a study should be commissioned on the use of videotape in the court system, with appropriate proposals for legislation.

6. *Infants' settlements.* The Committee will continue to study the possiblity of devising a simplified settlement procedure in respect to infants' claims satisfactory to both bench and bar.

7. *Appendix of Official Forms.* The Committee will consider revision of the appendix of official CPLR forms and the addition of new forms.

Among other items on the Committee's agenda and deserving future consideration are: the simplification and modernization of procedures and terminology relating to the use of orders to show cause, possible replacement of service of process by personal delivery by service by mail, revision of Article 11 (poor persons), further modification of some of the provisions governing statutes of limitations, and modernization of the exemptions from execution. Consideration should be given to bringing New York procedure into greater conformity with federal procedure in such areas as necessary parties, disclosure and intervention.

CONCLUSION

The Committee intends to continue to assist the Judicial Conference in its statutory mandate to keep the CPLR up to date and to revise it from time to time wherever such revision can assist in the more equitable and speedier disposition of causes. The Committee, moreover, will continue to examine every suggestion received from any interested source concerning the improvement of the CPLR, either with respect to statutory and rule changes or the Appendix of Official Forms. In this connection, the Committee again solicits comments and suggestions from the profession. All recommendations should be sent to:

Professor Adolf Homburger
Chairman
Committee to Advise and Consult with the Judicial
Conference on the CPLR
% The Office of Court Administration
270 Broadway
New York, New York 10007

January 2, 1975

Respectfully submitted,

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1975 Proposals of the Judicial Conference of the State of New York Amendatory of the Civil Practice Law and Rules

The Judicial Conference hereby amends the Rules of the Civil Practice Law and Rules, effective September first, nineteen hundred seventy-five, by the following proposals:

Proposal Number 1. Subdivision (c) of rule fifty-five hundred twenty-five of the civil practice law and rules is hereby amended to read as follows:

(c) Settlement of transcript. *1.* Within [ten] *fifteen* days after receiving the transcript *from the court reporter or from any other source,* the appellant shall make any proposed amendments and serve them and a copy of the transcript upon the respondent. Within [ten] *fifteen* days after such service the respondent shall make any proposed amendments or objections to the proposed amendments of the appellant and serve them upon the appellant. At any time thereafter and on at least four days' notice to the adverse party, the transcript and the proposed amendments and objections thereto shall be submitted for settlement to the judge or referee before whom the proceedings were had if the parties cannot agree on the amendments to the transcript. The original of the transcript shall be corrected by the appellant in accordance with the agreement of the parties or the direction of the court and its correctness shall be certified to thereon by the parties or the judge or referee before whom the proceedings were had. When he serves his brief upon the respondent the appellant shall also serve a conformed copy of the transcript or deposit it in the office of the clerk of the court of original instance who shall make it available to respondent.

2. If the appellant has timely proposed amendments and served them with a copy of the transcript on respondent, and no amendments or objections are proposed by the respondent within the time limited by paragraph 1, the transcript, certified as correct by the court reporter, together with appellant's proposed amendments, shall be deemed correct without the necessity of a stipulation by the parties certifying to its correctness or the settlement of the transcript by the judge or referee. The appellant shall affix to such transcript an affirmation, certifying to his compliance with the time limitation, the service of the notice provided by paragraph 3 and the respondent's failure to propose amendments or objections within the time prescribed.

3. Appellant shall serve on respondent together with a copy of the transcript and the proposed amendments, a notice of

settlement containing a specific reference to subdivision (c) of this rule, and stating that if respondent fails to propose amendments or objections within the time limited by paragraph 1, the provisions of paragraph 2 shall apply.

Proposal Number 2. Paragraph three of subdivision (a) of rule fifty-five hundred twenty-nine of the civil practice law and rules, as amended by proposal number five of the proposals of the Judicial Conference of nineteen hundred sixty-eight, is hereby amended to read as follows:

3. Briefs and appendices reproduced by offset printing, mimeographing or any method of reproduction other than printing shall be on white paper eleven inches along the bound edge by eight and one-half inches. The *bound* margin shall be at least [two inches] *one inch, and typed matter shall not exceed seven by nine and one-half inches, with double spacing between each line of text.* The reproduction shall be a [full sized] facsimile of the material neatly prepared on the typewriter in clear type of no less than elite in size.

Proposal Number 3. Rule ninety-seven hundred one of the civil practice law and rules is hereby amended to read as follows:

Rule 9701. [Books] *Records* to be kept by the clerk of appellate division. The clerk of the appellate division in each department shall keep:

1. a book, properly indexed, *or an index*, in which shall be entered the title of all [civil judicial] proceedings [which are pending] in that court, [and all civil judicial proceedings commenced in the appellate division,] with entries under each, showing the proceedings taken therein and the final disposition thereof;

2. a minute book showing the proceedings of the court from day to day; *and*

3. a book [, properly indexed,] in which shall be [recorded at large] *indexed* all undertakings filed in his office, with a statement of the [civil judicial] proceedings in which they are given, and a statement of any disposition or order made of or concerning them; and

4. a book, properly indexed, *or an index*, which shall contain *(a)* the [names] *name* of each attorney admitted to practice *in the department*, with the date of his admission, [and a book, properly indexed, which shall contain] *and (b)* the name of each person who has been refused admission or who has been disbarred, disciplined or censured by the court. The clerk of each department shall transmit to the clerk of the court of appeals and to the clerks of the other departments the names of all attorneys who have been admitted to practice, the names of all applicants who have been refused admission, and the names of all attorneys who have *resigned or who have* been disbarred, disciplined [or], censured *or reinstated* by the court. [The clerk of each department is directed to enter in the proper book the

name of each attorney who has been admitted to practice, with the date of his admission, and the name of each person who has been disbarred, refused admission, or disciplined or censured, with the date of such disbarment, refusal of admission, or discipline or censure, received from the other departments of the state, together with the date when and department in which the order was made.]

I, Richard J. Bartlett, State Administrative Judge and Secretary to the Judicial Conference of the State of New York, do hereby certify that the above proposals were adopted by the Judicial Conference of the State of New York on January 23rd, 1975, pursuant to the provisions of section 229 of the Judiciary Law as added by Chapter 309 of the Laws of 1962.

Dated: January 24, 1975
New York, New York

RICHARD J. BARTLETT
STATE ADMINISTRATIVE JUDGE AND SECRETARY

REPORT TO THE 1976 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS ADOPTED PURSUANT TO SECTION 229 OF THE JUDICIARY LAW

LETTER OF TRANSMITTAL

TO:

The Legislature of the State of New York

Pursuant to Section 229 of the Judiciary Law, enacted by Chapter 309 of the Laws of 1962, the Judicial Conference of the State of New York respectfully submits to the 1976 Legislature:

(1) The Fourteenth Annual Report of the Judicial Conference to the Legislature, adopted January 29, 1976, which incorporates the Thirteenth Annual Report to the Judicial Conference by the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules, dated December 5, 1975 and,

(2) A Proposal of the Judicial Conference, based upon the aforementioned Report, for changes in the Rules of Civil Practice of the Civil Practice Law and Rules, adopted on January 29, 1976, pursuant to the provisions of Section 229 of the Judiciary Law.

February 1, 1976

Charles D. Breitel, *Chairman*
Harold A. Stevens
Frank A. Gulotta
Harold E. Koreman
John S. Marsh
Charles G. Tierney
John E. Cone
DeForest C. Pitt
Gilbert H. King
Gerald Saperstein
George W. Marthen
John H. Cooke
Daniel J. Donahoe
M. Marvin Berger
Orest V. Maresca
Alfred S. Robbins

H. Buswell Roberts
Duncan S. MacAffer

Richard J. Bartlett
State Administrative Judge
and Secretary

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FOURTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE

to

THE LEGISLATURE

on

THE CIVIL PRACTICE LAW AND RULES

February 1, 1976

INTRODUCTION

This is the Thirteenth Annual Report to the Judicial Conference by the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules. At present, the members of the Committee are: John T. Frizzell, Hyman W. Gamso, Raymond W. Hackbarth, John M. Keeler, Harold A. Meriam, Jr., John A. Murray, Maurice N. Nessen, Professor Herbert Peterfreund, George C. Pratt and G. Robert Witmer, Jr. Mr. Murray, an attorney from Albany, was appointed to the Committee in 1975, replacing Lewis M. Mullarkey, Esq., who rendered distinguished service to the Committee for several years. Professor Adolf Homburger of the State University of New York at Buffalo is Chairman.

Last year the Judicial Conference, on the recommendation of the Committee, proposed legislation that brought two historic changes in civil procedure: a new class action law and the comparative negligence law. Passage of these bills was obtained through the principal sponsorship of Hon. Stanley Fink, Chairman of the Assembly Codes Committee, and Hon. H. Douglas Barclay, Chairman of the Senate Codes Committee.

For several years, a modern class action provision has been a project of the Committee. Bills were submitted by the Judicial Conference to the Legislature in 1972, 1973 and 1974, passing the Assembly in 1972 and the Senate in 1973.

In 1975, class action legislation sponsored by the Judicial Conference on the recommendation of the Committee was enacted as L. 1975, ch. 207. A chapter amendment making purely technical changes was enacted as L. 1975, Ch. 474.

In approving the class action bill, the Governor made the following remarks:

This bill provides the people of New York with the type of strong class action statute which I have repeatedly requested.

In many instances, an individual's own damages resulting from a pattern of illegal behavior by another may not be sufficient to justify the costs of litigation although the aggregate damages of all others similarly injured by the illegal behavior certainly would. Under present law, unless the individual thus injured is willing and able to press his legal claim as a matter of principle despite the financial loss, there is no economic deterrent to poor workmanship, deceptive or unconscionable trade practices and illegal conduct.

The need for this legislation is obvious. The present law and its precursors have caused extraordinary judicial confusion extending over the past 125 years and have resulted in needlessly restricting meaningful access to state courts for countless people. Such an anachronism has no place in a legal system which has to cope with contemporary problems.

This bill, modeled on similar federal law, will enable individuals injured by the same pattern of conduct by another to pool their resources and collectively seek relief. By permitting common questions of law or fact affecting numerous persons to be litigated in one forum, the bill would result in greater conservation of judicial effort.

While this bill adds a major weapon to the consumer protection arsenal, it also provides legitimate enterprises with a shield against its abuse. The bill promulgates detailed guidelines and prerequisites to the maintenance of a class action suit. It vests great discretion in the court in fashioning the class, in providing for notice to its members and in controlling the course of proceedings. In short, it empowers the court to prevent abuse of the class action device and provides a controlled remedy which recognizes and respects the rights of the class as well as those of its opponent.

Approval of this bill is urged by the Office of Court Administration, by the Committee to Advise and Consult with the Judicial Conference on the CPLR which is largely responsible for its drafting, by the Attorney General and Lieutenant Governor, the Association of the Bar of the City of New York and the Consumer Protection Board, among others.

I am pleased to give my approval of this historic advance for the people of New York.

In 1975, the Judicial Conference on the advice of the Committee, also recommended the enactment of a comparative negligence provision. The new law (L. 1975, ch. 69) completes the reform begun with *Dole v. Dow Chemical Co.*, 30 N.Y. 2d

143 (1972). That case established a standard of comparative negligence with respect to contribution among joint tort feasors. L. 1974, ch. 742 enacted new CPLR Article 14 as recommended by the Judicial Conference on the advice of the Committee, codifying and clarifying the *Dole* rule and restoring the incentive to settle in multi-party suits, by placing the risk of a settlement for less than the settlor's equitable share of the damages upon the injured party.

L. 1975, ch. 69 completed the reform by enacting a comparative negligence statute applicable to plaintiff and defendant. New CPLR Article 14-A provides for a standard of pure comparative negligence which permits plaintiffs to receive proportionately diminished recoveries but does not bar recovery if plaintiff were found to be more than fifty percent negligent, as under the Wisconsin rule.

The diminishment of claimant's damages is in the proportion which the claimant's culpable conduct bears to the culpable conduct of all persons who caused the damages, whether or not they are named as parties or served. The new law embraces breach of warranty and strict liability causes of action, as well as suits sounding in negligence. The new provisions apply only to causes of action accruing after September 1, 1975. This forestalls the question as to which provisions are adjective and thus retroactively applicable to pending causes of action, and which substantive and thus prospective in operation.

In addition to the foregoing major changes, the following bills sponsored by the Judicial Conference on the advice of the Committee were enacted into law in 1975:

1. L. 1975, ch. 43 repealed subdivision 7 of CPLR section 213 which limited the time within which to establish a will. Since the Estates, Powers and Trusts Law, which became effective on September 1, 1967, no longer provides for an action to establish a will, the CPLR provision had become obsolete.

2. L. 1975, ch. 570 amended subdivision (c) of section 5236, which governs notice of sale of real property by the sheriff to the judgment debtor in connection with the enforcement of money judgments, to conform the notice provision to the service of process provision (CPLR 308), and to reword those segments of the provision which were outmoded, inadequate, and stylistically improper.

3. L. 1975, ch. 70 amended subdivision (e) of section 5519 to extend the provisions relating to the continuation of a stay pending an appeal. Under the amended section, a stay pending determination of a motion for leave to appeal is continued for 5 days after service upon the movant of a copy of the order denying the motion with notice of entry, unless the court directs otherwise. The short stay gives the appellant the opportunity to seek leave to appeal from the next highest court without being subjected to enforcement proceedings.

In addition to the foregoing statutory changes, the Judicial Conference promulgated three Proposals, all of which became effective September 1, 1975.

Proposal Number 1.

Subdivision (c) of Rule 5525, which governs the procedure for the settlement of a transcript of the record on appeal, was reorganized, and amended in several respects including the time within which respondent must make proposed amendments or objections to the transcript. The changes under certain conditions permit the certification of the transcript by the court reporter without the necessity of a stipulation by the parties or settlement of the transcript by the judge or referee.

Proposal Number 2.

Paragraph 3 of subdivision (a) of Rule 5529 was amended to change the margin requirement on briefs and appendices on appeal to avoid waste of space and difficulty in reading. The amended rule, similar to the federal rule, requires a bound margin of at least an inch, with typed matter not to exceed 7 by 9 1/2 inches, with double spacing between each line of text.

Proposal Number 3.

Rule 9701, which prescribes the books which are to be kept by the Clerk of the Appellate Division, was amended to conform the text of the rule governing the records kept by the clerks of the Appellate Divisions to the actual practice. Some departments have discontinued large index books of cases, decisions and orders in favor of an alphabetical card index system, which the rule now authorizes. All departments maintain a card index system of attorneys admitted in the department, and some a book of admissions as well. The amended rule authorizes both.

The requirement that each department include in its index the names of attorneys admitted and disciplined in other departments has not been followed in some departments, and was stricken.

REPORT

The report which follows is divided into five parts.

(1) The first part contains proposed amendments to Section 50-e of the General Municipal Law, CPLR 311, and related provisions, based in part upon a study by Professor Paul S. Graziano of the St. John's University School of Law.

(2) The second part contains recommendations for amending statutes governing civil arrest. These recommendations are based in part on a study of provisional remedies authored by Professor Samuel J. M. Donnelly of the Syracuse University College of Law. Remaining under consideration by the Committee are those portions of Professor Donnelly's study devoted to attachment, replevin and receivership.

(3) The third part presents recommendations based upon a study of videotaping in the courts by Judge William P. McCooe of the New York City Civil Court.

(4) The fourth part of the report recommends various statutory amendments and rule changes in other areas of the CPLR and related statutes. Some of these are new; others have been submitted to previous sessions of the legislature, but the Committee felt they merited re-submission.

(5) The fifth part contains a brief discussion of topics of future study and review

PART I - REVISION OF SECTION 50-e OF THE GENERAL MUNICIPAL LAW, CPLR 311, AND RELATED STATUTES REGARDING NOTICE OF CLAIM, FOR GREATER FLEXIBILITY AND FAIRNESS

Section 50-e, together with a multitude of notice of claim provisions and short statutes of limitation scattered throughout the consolidated and unconsolidated laws, governs the commencement of legal proceedings in tort cases against municipalities, public authorities and other political subdivisions.

Some of the major defects of the present law, which are among the problems addressed in this study, were summarized in last year's Report of the CPLR Advisory Committee to the Judicial Conference, in the following words:

(1) Section 50-e of the General Municipal Law fails to warn claimants by clear and express statutory language that timely notice of claim to a public corporation is a condition precedent not only to an action in tort against the public corporation, but also to an action against its employee if the public corporation is required by statute to indemnify the employee.

(2) The present requirement that a notice of claim be served within 90 days after the claim arises applies to all claimants, including persons under disability by reason of infancy or mental or physical disability (subd. 1). The harshness of the law is relieved to some extent by a provision that authorizes the court to permit a late filing of the claim if the person under disability, and by reason of his disability, fails to serve a timely notice and if application for an extension of time is made within a reasonable time, but no later than one year after the happening of the event, and before commencement of an action to enforce the claim (Subd. 5). The shortness of the statutory period, which even against persons under a disability runs from the happening of the event, rather than the removal of the disability, and, to some extent, the required nexus between the disability and the untimeliness of the notice, have produced grossly unjust results, and urgently require statutory relief.

(3) Under the present law timely but improper service may be a serious defect (subd. 3). Keeping in mind that the functional purpose of the notice of claim is to protect a public corporation against stale or unwarranted claims and to enable it to investigate claims timely and efficiently, the provision appears to be unduly harsh. If the notice has been actually received by a proper person, a waiver of a defect in the manner

of service may well be appropriate not only if the public corporation examines the claimant or other person in interest, as presently provided (subd. 3), but also if the public corporation demands an examination of the party in interest or, quite generally, if it fails to put the claimant on notice of the defect within a specified time.

(4) The tightly woven provisions of the present law governing leave to serve a late notice of claim (subd. 5) should be loosened, keeping in mind the functional purpose of the notice, stated above, and the need to balance the interests of the public and of the injured person. A broad, general relief provision modeled on subdivision 5 of §10 of the Court of Claims Act, permitting service of a late notice in the Court's discretion may well be in order where the claimant shows that he has a reasonable excuse for his failure to serve a notice of claim within the time specified and that the public corporation against which the claim is asserted or its insurance carrier had actual notice of the essential facts constituting the claim, unless the corporation or carrier shows that it has been substantially prejudiced by the failure to serve the notice within the time specified.

(5) A serious problem resulting in possible loss of meritorious claims has been created in the past decade by the existence of private stock corporations which derive their public character from the fact that they are subsidiaries of a public corporation. Under vaguely worded statutory provisions, failure to serve any notice of claim, or even service upon the parent corporation alone, may be a fatal error (see e.g., §1276, subd. 6, Public Authorities Law). The injured party may have only a claim against the subsidiary private stock corporation and that claim he may have lost by failing to satisfy the condition precedent to its assertion. It can hardly be doubted that this trap ought to be removed.

In preparing its recommendations, the Committee had the benefit of a comprehensive study submitted by Professor Paul S. Graziano of St. John's University School of Law, commissioned by the Office of Court Administration upon recommendation of the Committee, which will be published in the *Twenty-first Annual Report of the Judicial Conference* (1976). After consideration of that study, and lengthy discussions, the Committee recommends statutory amendments which will provide relief to claimants without jeopardizing the legitimate requirement that the public purse be protected against stale claims. The statutory recommendations of the Committee reflect many of the recommendations of Professor Graziano, but in some respects differ from them.

The basic purpose of the statutory recommendations is to follow the suggestion of the Court of Appeals in *Camarella v. East Irondequoit School Board*, 34 N.Y. 2d 139 (1974) to reconsider the harsher aspects of section 50-e of the General Municipal Law "in order that a more equitable balance may be achieved between a public corporation's reasonable need for

prompt notification of claims against it and an injured party's interest in just compensation."

A more equitable balance has been sought by (1) breathing greater flexibility into section 50-e without defeating its basic purpose, (2) codifying and clarifying existing decisional law on troublesome questions, and (3) overruling decisional law and repealing or amending statutes that do not reflect the basic purpose of notice of claim statutes or that have led to unjust results.

The added flexibility in section 50-e is attained primarily by enlarging the period within which a late notice of claim may be filed, not to exceed the limits set by a statute of limitations, and articulating some of the factors which should guide the court's discretion in permitting a late filing.

It is intended that older judicial decisions construing the provisions of section 50-e rigidly and narrowly will be inapplicable as a result of these remedial amendments, which will enable the courts to apply these provisions in a more flexible manner to do substantial justice.

The statutory recommendations, of course, are not intended to affect statutes that are more liberal than section 50-e, for example, with respect to the time within which a notice of claim must be served.

Some of the statutory recommendations are purely formal, for example, the addition of captions to each subdivision of section 50-e and the slight improvements in terminology or grammar.

Recommendation

The Committee recommends that legislation be submitted to amend section 50-e of the General Municipal Law and related provisions of the CPLR, County Law, and Public Authorities Law, and that such legislation be substantially in the following form:

AN ACT To amend the civil practice law and rules, the general municipal law, the county law, and the public authorities law, in relation to notice of claim

The People of the State of New York, represented in Senate and Assembly, do hereby enact as follows:

Section 1. Section three hundred eleven of the civil practice law and rules is hereby amended to read as follows:

§311. Personal service upon a corporation or governmental subdivision. Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service;

EXPLANATION—Matter in *italics* is new, matter in brackets [ ] is old law to be omitted.

2. upon the city of New York, to the corporation counsel or to any person designated by him to receive process in a writing filed in the office of the clerk of New York county;

3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;

4. upon a county, to the chairman or clerk of the board of supervisors, clerk, attorney or treasurer;

5. upon a town, to the supervisor or clerk;

6. upon a village, to the mayor, clerk, or any trustee; [and]

7. upon a school district, to a school officer, as defined in the education law; and

[7.] *8.* upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

§ 2. Section fifty-e of the general municipal law, as amended by chapter two hundred fifty-two of the laws of nineteen hundred sixty-seven, is hereby amended to read as follows:

§ 50-e. Notice of claim. *1. When service required; time for service; upon whom service required.*

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general [corporation] *construction* law, or any officer, appointee or employee thereof, the notice of claim shall comply with *and be served in accordance with* the provisions of this section [and it shall be given] within ninety days after the claim arises.

(b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.

(2) *Form of notice contents.* The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and postoffice address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

3. *How served; when service by mail complete; defect in manner of service; return of notice improperly served.*

(a) The notice shall be served on the [party] *public corporation* against [whom] *which* the claim is made by delivering a copy thereof [, in duplicate,] personally, or by

registered *or certified* mail, to the person [, officer, agent, clerk or employee] designated by law as [a person] *one* to whom a summons in an action in the supreme court issued against [such party] *corporation* may be delivered, *or to an attorney regularly engaged in representing such public corporation* [: provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim].

(b) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it or if the notice is actually received by a proper person within the time specified by the section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received

(d) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

4. *Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice.* No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk, or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. *Application for leave to serve a late notice.*

Upon application, [The] *the* court, in its discretion, may [grant leave] *extend the time* to serve a notice of claim [within a reasonable time after the expiration of the time] specified in *paragraph (a) of* subdivision one. [of this section in the following cases: (1) where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the proposed notice of claim. The application shall be made returnable at a trial or special term of the supreme court or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made, in the manner specified in subdivision three.] *The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all the other relevant facts and circumstances including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.*

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

6. *Mistake, omission, irregularity or defect. At* [Any] *any* time after the [date of] service of [the] *a* notice of claim and at [or before the trial of an action or the hearing upon a special proceeding] *any stage of an action or special proceeding* to

which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby. [Application for such relief, if made before trial, shall be by motion, on affidavits; if made before the action is commenced, shall be by motion, on the petition of the claimant, or someone on his behalf. Failure to serve more than one copy may be corrected by such motion.]

7. *Applications under this section. All applications under this section shall be made to the supreme court or to the county court in a county where the action may properly be brought for trial or, if an action to enforce the claim has been commenced, where the action is pending. Where the application is for leave to serve a late notice of claim, it shall be accompanied by a copy of the proposed notice of claim.*

8. *Inapplicability of section.* This section shall not apply to claims arising under the provisions of the workmen's compensation law, or [,] the volunteer firemen's benefit law, or to claims [of infant wards of] *against* public corporations [where the claim is against such public corporation] by [its] *their* own infant [ward] *wards*.

§ 3. Section fifty-two of the county law, as amended by chapter seven hundred eighty-eight of the laws of nineteen hundred fifty-nine, is hereby amended to read as follows:

§ 52. Presentation of claims for torts; commencement of actions. 1. Any claim or notice against a county for damage, injury of death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the general municipal law. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. The place of trial shall be in the county against which the action is brought.

[2. No action shall be maintained against an officer, agent, servant or employee of a county unless the notice of claim for damages was filed in the manner and within the time prescribed in subdivision one and also served personally or by registered mail upon such officer, agent, servant or employee within the same period of time.]

[3.] 2. This section shall not apply to claims for compensation for property taken for a public purpose, nor to claims under the workmen's compensation law.

§ 4. Subdivision six of section twelve hundred seventy-six of the public authorities law, as amended by chapter four hundred fifteen of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

6. *The provisions of this section which relate to the requirement for service of a notice of claim shall not apply to a subsidiary corporation of the authority. In all other respects,* [Each] *each* subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.

§ 5. Subdivision six of section twelve hundred ninety-nine-p, as such section was added by chapter seven hundred seventeen of the laws of nineteen hundred sixty-seven, is hereby amended to read as follows:

6. *The provisions of this section which relate to the requirement for service of a notice of claim shall not apply to a subsidiary corporation of the authority. In all other respects,* [Each] *each* subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.

§ 6. Subdivision six of section twelve hundred ninety-nine-rr of such law, as such section was added by chapter eleven hundred twenty-four of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

6. *The provisions of this section which relate to the requirement for service of a notice of claim shall not apply to a subsidiary corporation of the authority. In all other respects,* [Each] *each* subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.

§ 7. Subdivision six of section thirteen hundred seventeen of such law, as such section was added by chapter four hundred

sixty of the laws of nineteen hundred seventy, is hereby amended to read as follows:

6. *The provisions of this section which relate to the requirement for service of a notice of claim shall not apply to a subsidiary corporation of the authority. In all other respects* [Each] *each* subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.

§ 8. Subdivision six of section thirteen hundred forty-two of such law, as such section was added by chapter seven hundred fourteen of the laws of nineteen hundred seventy, is hereby amended to read as follows:

6. *The provisions of this section which relate to the requirement for service of a notice of claim shall not apply to a subsidiary corporation of the authority. In all other respects*, [Each] *each* subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.

§ 9. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

A brief discussion of each of the proposed amendments follows:

DISCUSSION

A. It is recommended that CPLR 311, which relates to personal service upon a corporation or governmental subdivision, be amended to add thereto a new paragraph 7 and to renumber present paragraph 7 as 8. New paragraph 7 would read as follows:

7. *upon a school district, to a school officer, as defined in the education law; and*

Comment

The purpose of the proposed amendment is to broaden the category of persons designated by law as persons to whom a summons, and thus a notice of claim, in a Supreme Court action against a school district may be delivered to include those

identified in section 2 of the Education Law. By so doing, notice to school officers to whom parents are most likely to give notice will constitute effective notice, thereby avoiding results like that Mr. Justice Bernard S. Meyer felt compelled to reach in *Bayer v. Board of Education*, 58 Misc. 2d 259 (Sup. Ct. Nassau 1968). In that case a letter stating a claim was timely served upon the superintendent of schools but the action was dismissed because the superintendent was not one of those identified by statute as a person upon whom service could be made. The recommended change adopts one of the solutions suggested by Mr. Justice Meyer in his decision.

B. It is recommended that subdivision 1 of Section 50-e of the General Municipal Law be amended substantially as follows:

§ 50-e Notice of claim. *1. When service required; time for service; upon whom service required.*

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general [corporation] *construction* law, or any officer, appointee or employee thereof, the notice of claim shall comply with *and be served in accordance with* the provisions of this section [and it shall be given] within ninety days after the claim arises.

(b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person, under this chapter or any other provision of law.

Comment

Subdivision 1 has been divided into two paragraphs to facilitate treatment of the subject matter. Captions have been added for ease of reference.

Paragraph (a)

The proposed amendments to subdivision 1, as reflected in new paragraph (a), are purely formal. One concerns the place where the definition of a "public corporation" is to be found. It was formerly in section 3 of the General Corporation Law, which was repealed, effective September 1, 1974. The definition, unchanged, is now in section 66 of the General Construction Law. The other purely formal amendment is the substitution of the term "served in accordance with" for the word "given" since service of the notice is the act otherwise

consistently referred to in the rest of section 50-e.

Paragraph (b)

The basic purposes of proposed new paragraph (b) are (1) to state when a notice of claim must be served upon a public corporation where an action is being brought against an officer, appointee, or employee; and (2) to make it clear that in no case is service of a notice upon an officer, appointee or employee of a public corporation required in order to commence a suit against such person, although service of a notice of claim upon the public corporation would still be required to commence such a suit, where the public corporation is obligated to save its employee harmless.

It is intended by proposed new paragraph (b) to codify the holding of *Sandak v. Union School District No. 3*, 308 N.Y. 226, 124 N.E. 2d 295 (1954), and to overrule the holding in *Siegel v. Epstein*, 21 App. Div. 2d 821, 251 N.Y.S. 2d 538 (2d Dept. 1964) (mem.) aff'd without opinion, 17 N.Y. 2d 639, 216 N.E. 2d 341, 269 N.Y.S. 2d 138 (1966). In *Sandak* the Court of Appeals held that section 50-e did not require service of the notice on an allegedly negligent employee defendant but only upon the public corporation defendant. In *Siegel* the plaintiff sued the employee of a municipality, but not the municipality, and did not serve any notice of claim. The Appellate Division, in a decision affirmed without opinion by the Court of Appeals, dismissed the case for failure to serve a notice of claim on the municipality as required by the city charter. The Advisory Committee believes that *Sandak* furthers the basic purpose of notice of claim statutes, but that *Siegel* does not. The statutes, however, in the main, do not expressly reflect the holding in *Sandak*. New paragraph (c) of subdivision 1 of section 50-e would do so.

C. It is recommended that subdivision 2 of section 50-e be amended to read substantially as follows:

> 2. *Form of notice; contents.* The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

Comment

Aside from the addition of a caption, no amendment to this subdivision is recommended. Its requirements are reasonable and have been liberally interpreted by the courts.

D. It is recommended that subdivision 3 of section 50-e be amended to read substantially as follows:

3. *How served; when service by mail complete; defect in manner of service; return of notice improperly served.*

(a) The notice shall be served on the [party] *public corporation* against [whom] *which* the claim is made by delivering a copy thereof [, in duplicate,] personally, or by registered *or certified* mail, to the person [, officer, agent, clerk or employee] designated by law as [a person] *one* to whom a summons in an action in the supreme court issued against such [party] *corporation* may be delivered *or to the attorney for such public corporation* [; provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim].

(b) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(d) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

Comment

A caption is added and the subdivision is divided into four lettered paragraphs.

Paragraphs (a) and (b)

Several changes in language are made with no intended change in substance. The words "public corporation" and "corporation" are substituted for the word "party" to emphasize that the corporation is the only party upon which service need be made. The reference to "officer, agent, clerk or employee" is deleted because the word "person" is sufficient.

Service of only one copy of a notice of claim is required. Present subdivision 3 requires service "in duplicate," but failure to serve more than one copy may be corrected by motion under present subdivision 6. In this day of quick, convenient and inexpensive duplicating processes, the public corporation should easily be able to make as many copies of a notice of claim as it needs.

Service by certified mail is expressly approved in the amendment. It has generally been accepted under present subdivision 3, although that subdivision expressly authorizes only service by registered mail. Under present law, service by registered mail is complete upon mailing, but service by certified mail is complete upon receipt. Service in either fashion should be complete upon mailing, and it is so provided in paragraph (b).

Paragraphs (c) and (d)

Proposed paragraph (c) requires a public corporation that has been served in an unauthorized manner to decide with reasonable promptness (30 days after receipt) whether to return the notice or to waive the defect. Under present subdivision 3, service in an unauthorized manner is deemed valid only if the public corporation causes the claimant or another person interested in the claim to be examined. There is no present requirement that the public corporation return the notice. A demand for such examination should suffice to validate the service and, absent such demand, a failure to return the notice within thirty days after it is received, specifying the defect in the manner of service, should also validate the service. Actual receipt of a timely notice—not the ritual of service—should control.

If a notice is duly returned, proposed paragraph (d) allows a claimant ten days after receipt of the returned notice within which properly to serve another notice and this service will, under paragraph (d), relate back to the time of service of the original notice.

These provisions, it is hoped, will encourage public corporations to ignore defects in the manner of service of a timely notice and to proceed to a prompt investigation of the merits of the claim.

E. It is recommended that subdivision 4 of section 50-e be amended to read substantially as follows:

4. *Requirements of section exclusive except as to conditions precedent to liability for certain defects or*

snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

Comment

The only amendment proposed to this subdivision is the addition of a caption. The Committee is aware that requirements that prior notice be given, as a condition precendent to liability arising from "the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or cross-walk, or of the existence of snow or ice thereon," can result in even greater injustices than those caused by notice of claim provisions.

The effect of these provisions is that a municipality may by law injure at least one person with impunity. The most frequently stated justification for these provisions is that a large judgment might ruin a small municipality. The Advisory Committee believes it advisable to further study this area before formulating specific recommendations.

F. It is recommended that subdivision 5 of section 50-e be amended to read substantially as follows:

5. *Application for leave to serve a late notice.*

Upon application, [The] *the* court, in its discretion, may [grant leave] *extend the time* to serve a notice of claim [within a reasonable time after the expiration of the time] specified in paragraph (a) of subdivision one. [of this section in the following cases: (1) where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its

insurance carrier.

Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the proposed notice of claim. The application shall be made returnable at a trial or special term of the supreme court or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made, in the manner specified in subdivision three.] *The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudicied the public corporation in maintaining its defense on the merits.*

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

Comment

The proposed amendment to subdivision 5 would significantly extend the discretion of the court to grant leave to file a late notice of claim. The subdivision, as amended, reflects a substantial change of policy in respect to applications for leave to file late notices of claim, giving the court greater flexibility in exercising discretion in this area.

Present subdivision 5 allows the court to permit late filing of

a notice of claim within a reasonable time after the expiration of the 90-day period, but not later than one year after the event underlying the claim. However, the court possesses such discretion only in three narrow circumstances: (1) where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

The proposed amendment to subdivision 5 would give the court broad discretion, upon application, to extend the time to serve a notice of claim beyond the 90-day limit prescribed in paragraph (a) of subdivision 1. The extension, however, could not exceed the time limited for the commencement of an action against the public corporation. In determining whether to grant such permission the court is permitted to consider all relevant circumstances.

In order to provide guidance for the exercise of the Court's discretion and to assure a functional and flexible use of the power vested in the court, the subdivision enumerates some of the facts that are pertinent to the granting of leave to file a late notice. Brief explanatory comments relating to these factors may be helpful.

> "*Whether the claimant was an infant, or mentally or physically incapacitated or died before the time limited for service of the notice of claim.*"

Infancy, mental or physical incapacity and death of the claimant before expiration of the time limited for service of the notice are grounds on which permission to file a late notice of claim may be granted under present law. However, it should be noted that under the proposed new statute the court would be free to consider such disability as an element bearing on the court's determination even though the disability may not have been the reason for the failure to serve the late notice, as for example, when the claimant's lawyer neglected to serve a timely notice. The recent trend of decisions in that area has been in the same direction (see *Murray v. City of New York* 30 N.Y. 2d 113, 282 N.E. 2d 103, 331 N.Y.S. 2d 9 (1972)).

> "*Whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter.*"

Under the present statute the court has no power to grant an extension of the time to serve a notice of claim upon the ground that the public corporation or its attorney or insurance carrier had timely actual notice of the facts underlying the

claim. The absolute bar to the assertion of a just claim under these circumstances is harsh and dysfunctional. The only legitimate purpose served by the notice is to protect a public corporation against stale or unwarranted claims and to enable it to investigate the facts surrounding the occurrence on which the claim is based. Most important of all, the court, in a proper case, should have the discretionary power to consider actual knowledge, however acquired, by the public corporation, its attorney or insurance carrier, of the essential facts within the statutory period or a reasonable time thereafter in determining whether to permit a late service of notice. A typical illustration of a case within the scope of this factor is *Economou v. New York City Health and Hospitals Corporation*, 47 A.D. 2d 877 (1st Dept. 1975). In that case service of the notice of claim upon the attorney for the public corporation (Corporation Counsel of the City of New York) against which the claim was made was held sufficient where the individual served was also the attorney for the public corporation against which the claim should have been made.

> "*Whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier.*"

This factor corresponds to one of the grounds on which a claimant under the present statute may rely when he applies for leave to serve a late notice. However, under the present law, the settlement representations must have been made in writing. It appears unnecessary to encumber the stated ground with a limitation in the nature of a statute of frauds. If the claimant can show that he was induced to refrain from filing a timely notice by settlement representations, he has laid a solid basis for the exercise of the court's discretion, whether or not the representations were in writing.

> "*Whether the claimant in serving the notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted.*"

To ascertain the identity of the public corporation against which a particular claim should be asserted is a formidable task in many cases. The shortness of the statutory period for filing a notice of claim and the difficulty of unraveling the intricacies of the corporate set-up of public corporations have baffled many experienced lawyers. Excusable errors leading to the service of a timely notice upon the wrong party should be considered as a factor bearing on the court's discretion.

> "*Whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.*"

Substantial prejudice to the public corporation in maintaining its defense on the merits, if caused by the delay in serving

the notice of claim, should weigh against the claimant. Thus, if neither the corporation nor its attorney nor its insurance carrier had actual knowledge of the essential facts constituting the claim and if, as a result of claimant's default in serving a timely notice of claim, the public corporation was deprived of the opportunity to make an efficient and reliable investigation of the event on which the claim is based, the court in the exercise of its discretion might well deny leave to file a late claim.

Turning finally to the period of extension, it will be noted that no attempt has been made by the draftsmen of the statute to extend the short statutes of limitation which normally govern the maintenance of an action against a public corporation (usually one year or one year and ninety days). In consonance with that "hands-off" policy, as far as the statute of limitations is concerned, the proposed statute provides that an extension of the time period within which a notice of claim may be filed shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. However, the statute of limitations may be tolled when the claimant is a person under disability because of infancy or insanity at the time when the cause of action accrued (CPLR 208). Furthermore, the statute of limitations is tolled under the provisions of CPLR 204(a) during the pendency of a proceeding to obtain leave to file a late notice. See *Barchet v. New York City Transit Authority*, 20 N.Y. 2d 1 (1967). See also *Amex Asphalt Corp. v. City of New York*, 263 App. Div. 968 (2d Dep't 1942), aff'd 288 N.Y. 721 (1942).

G. It is recommended that subdivision 6 of section 50-e be amended to read substantially as follows:

> 6. *Mistake, omission, irregularity or defect. At* [Any] *any* time after the [date of] service of [the] *a* notice of claim and at [or before the trial of an action or the hearing upon a special proceeding] *any stage of an action or special proceeding* to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby. [Application for such relief, if made before trial, shall be by motion, on affidavits; if made before the action is commenced, shall be by motion, on the petition of the claimant, or someone on his behalf. Failure to serve more than one copy may be corrected by such motion.]

Comment

The proposed amendment to subdivision 6 consists of adding a caption and permitting a good faith, nonprejudicial

mistake, omission, irregularity or defect in a notice of claim "not pertaining to the manner or time of service thereof," to be corrected, supplied or disregarded at *any* stage of an action or special proceeding, even on appeal, thus incorporating into section 50-e the liberal, discretionary power vested in the court under CPLR 2001.

The present provision for correcting the failure to serve more than one copy of a notice of claim becomes unnecessary by the proposed elimination from present subdivision 3 of the requirement to serve more than one copy. Certain additional verbiage in present subdivision 6, relating to procedures upon an application to correct defects in the notice, would be deleted by the amendment as surplusage.

H. It is recommended that a new subdivision 7 be inserted into this section, to read substantially as follows:

> 7. *Applications under this section. All applications under this section shall be made to the supreme court or to the county court in a county where the action may properly be brought for trial or, if an action to enforce the claim has been commenced, where the action is pending. Where the application is for leave to serve a late notice of claim, it shall be accompanied by a copy of the proposed notice of claim.*

Comment

No major change in present procedure is intended by this proposed new subdivision. Its purposes are only to place in a single subdivision all essential procedural provisions governing applications for leave to file a late notice, and to require, for the court's convenience, that a copy of the proposed notice of claim be presented to the court.

I. It is recommended that present subdivision 7 of section 50-e be renumbered as subdivision 8 and be amended to read substantially as follows:

> 8. *Inapplicability of section.* This section shall not apply to claims arising under the provisions of the workmen's compensation law, or [,] the volunteer firemen's benefit law, or to claims [of infant wards of] *against* public corporations [where the claim is against such public corporation] by [its] *their* own infant [ward] *wards.*

Comment

Aside from the addition of a caption the only changes intended are to renumber present subdivision 7 and to make slight grammatical improvements.

J. It is recommended that subdivision 2 of section 52 of the County Law be deleted, as follows:

> § 52. Presentation of claims for torts; commencement of actions. 1. Any claim or notice of claim

against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section 50-e of the general municipal law. Every action upon such claim shall be pursuant to the provisions of section 50-i of the general municipal law. The place of trial shall be in the county against which the action is brought.

[2. No action shall be maintained against an officer, agent, servant or employee of a county unless the notice of claim for damages was filed in the manner and within the time prescribed in subdivision one and also personally or by registered mail upon such officer, agent, servant or employee within the same period of time.]

[3.] *2.* This section shall not apply to claims for compensation for property taken for a public purpose, nor to claims under the workmen's compensation law.

Comment

The purpose of the proposed repeal of subdivision 2 is to eliminate the only statute in this State that could be located requiring service of a notice of claim upon the employee of a public corporation as a condition precedent to the commencement of an action against him. This recommendation, when read with the second sentence of proposed new paragraph (b) of subdivision (1), will make clear that in no case will such service be required.

No good reason exists for retaining this provision which is inconsistent with several provisions of the General Municipal Law and with decisional law. See *Stephens v. Department of Health of Orange County*, 64 Misc. 2d 81 (1970) in which the court described subdivision 2 of section 52 of the County Law as "an anachronism which is in direct conflict with the legislative intent found in the provisions of section 50-e by the Court of Appeals in the *Sandak* case . . . " See also *DeAngelo v. Lattimer*, 26 Misc. 2d 20 (1960).

Examples could be multiplied. There is a patent inconsistency between subdivision 2 of section 52 of the County Law and other statutes covering specific types of actions against counties and other public corporations, and subdivision 2 does not further the basic purpose of notice of claim statutes. Unless immunized by statute, an employee of a public corporation is liable for his own tort. No legitimate public purpose is served by requiring the service of a notice of claim upon him. If his

employer, the public corporation, is under a duty to indemnify its employee, a notice of claim must be served upon it. This seems ample protection for the public purse.

K. It is recommended that each of the identically worded subdivisions numbered 6 in sections 1276, 1299-p, 1299-rr, 1317 and 1342 of the Public Authorities Law, be amended as follows:

> 6. *The provisions of this section which relate to the requirement for service of a notice of claim shall not apply to the subsidiary corporation of the authority. In all other respects,* [Each] *each* subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on or after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.

Comment

Each of the subdivisions to be amended relates to actions brought against a particular public authority, and provides that each subsidiary corporation of the authority shall be subject to the provisions of the section as if such subsidiary were separately named therein. This means that a notice of claim upon the subsidiary is required before an action may be brought against such a subsidiary. An intolerable situation exists because many such subsidiaries are "anonymous" in the sense that the corporate affiliation of the subsidiary is not a matter of general knowledge, and the subsidiary is not named specifically in the general statutory provision that imposes the notice of claim requirement. Thus, even a diligent claimant may serve only the parent public corporation, not realizing that a subsidiary must be served, or may fail to serve the notice of claim because he is unaware that what appears to be a private stock company has become a subsidiary of a public corporation. It is often difficult enough for a claimant to select which of two identified public corporations is the public corporation against which the claim exists. Even worse, to have to determine at the peril of the 90-day bar whether a notice of claim must be served upon what appears to be a private stock corporation is a burden no injured person should have to bear.

The amendment would provide, however, that in all other respects, each subsidiary shall be subject to the provisions of the section as at present. Thus, no change would be made in subdivision 3 which states that the authority shall save harmless any officer or employee of the authority for his negligence in the course of his employment.

CONCLUSION

The amendments to section 50-e of the General Municipal Law, CPLR 311, and related statutes, proposed in this Report, may prove to be merely a first step in a procedural reform of the laws relating to claims against public corporations. In general, the amendments here proposed are conservative, retaining the basic notice of claim requirements, and liberalizing them only within the framework of existing short statutes of limitations. No attempt is now made to overhaul the relevant statutes of limitations, although this complex task should eventually be undertaken. Other areas of change which might be considered in the future are total abolition of notice of claim or alternatively, the extension of the 90-day period to six months, and, ultimately, the adoption of a Tort Claims Act, as proposed by Professor Graziano, containing in one consolidated law all the substantive and procedural provisions relating to tort claims against public corporations as well as the state.

PART II - ATTACHMENT, REPLEVIN, ARREST AND RECEIVERSHIP - ABOLITION OF ARREST IN ACTIONS FOR DAMAGES

A Study Relating to Attachment, Replevin, Arrest and Receivership, prepared by Professor Samuel J. M. Donnelly of the Syracuse University College of Law, will be published in the *Twenty-first Annual Report of the Judicial Conference* (1976). The study, which was occasioned by major decisions of the United States Supreme Court in the area of provisional remedies, was commissioned by the Office of Court Administration upon the recommendation of the Advisory Committee.

In the first of a line of cases the Supreme Court in *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337 (1969) held unconstitutional a Wisconsin garnishment statute under which a debtor's wages were frozen by service of process on the garnishee without prior judicial authorization.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Florida and Pennsylvania replevin statutes that allowed possession by a sheriff of goods sold without notice or hearing or judicial order were declared unconstitutional.

In *Mitchell v. W. T. Grant Company* 416 U.S. 600 (1974) a Louisiana statute allowing an ex parte pre-judgment seizure of property subject to a lien was upheld because, unlike the Florida and Pennsylvania laws, it required court approval, demonstration of the grounds for the seizure, posting a bond by the creditor, the right of the debtor to regain possession by posting a bond, and an immediate hearing for the debtor to seek dissolution of the attachment order. Moreover, in this case the court noted that there was an adequate balancing of the rights of both parties incorporated into the statute.

In *North Georgia Finishing Company, Inc. v. Di-Chem, Inc.* 95 S. Ct. 719 (1975) the Court declared the Georgia

pre-judgment garnishment statute unconstitutional. Unlike the Wisconsin statute struck down by *Sniadach*, the Georgia statute did not permit pre-judgment garnishment of wages. The debt garnished in this case was a corporation's bank account. In the majority opinion Mr. Justice White found the Georgia taking unconstitutional because of the absence of an early hearing on the notice.

These four cases provide the basis for the reexamination, in Professor Donnelly's study, of the constitutionality of the replevin statute and the provisional remedies of attachment, arrest and receivership.

A. Attachment

Upon thorough examination, the Committee has decided that it would be premature at present to recast New York's attachment provisions.

First of all, New York's attachment statutes do not fit the mold of the statutes under consideration by the Supreme Court. *Sniadach* involved a garnishment statute which authorized, without notice of hearing, the pre-judgment garnishment of up to fifty percent of a defendant's wages, property characterized by Mr. Justice Douglas as a specialized type presenting distinct problems in our economic system. *Fuentes* and *Mitchell* are addressed to replevin statutes. While the statute involved in *North Georgia Finishing Company* more closely resembled New York's attachment statute, and while in that case the statute was held unconstitutional because of the absence of an early hearing on notice, the New York statute provides for a vacatur or modification of the order of attachment, on notice, prior to the application of the property to the satisfaction of the judgment.

The only federal case involving attachment in New York is *Sugar v. Curtis Circulating Company*, 383 F. Supp. 643 (S.D. N.Y. 1974), where a three judge federal court declared unconstitutional certain provisions of CPLR 6201, the New York attachment statute which permits ex parte pre-judgment attachment of the property of defendants. At the time of this writing, the case is pending before the United States Supreme Court, its effect having been stayed in the interim.

Meantime, several recent Supreme Court cases in New York have declared attachment constitutional despite *Sugar* (e.g. *New York Auction Company Division v. Belt*, 81 Misc. 2d 1032 (Supreme, New York 1975), *Regnell v. Page*, 82 Misc. 506 (Supreme, New York 1975), *Wade Oil Company, Inc. v. Rowes*, N.Y.L.J., September 17, 1975, p. 8, col. 5-6 (Supreme, New York 1975).

In view of the present uncertainty in this area the Committee felt it wiser to wait until the law settles before proposing amendments to the attachment provisions. The Committee, however, will give careful consideration to recommending amendments to the attachment provisions next year if the constitutional question has been largely clarified by the Supreme Court by that time.

B. Replevin

Before 1970, the replevin statute allowed seizure of property by the sheriff without providing for notice and hearing thereon (see *Laprease v. Reymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970)). L. 1971, ch. 1051 was intended to solve the problem by providing that in the affidavit accompanying the petition, the plaintiff who seeks authorization for the sheriff to break open, enter and search for the chattel, shall state facts sufficient under the due process of law requirements of the United States Constitution. Although the governor approved the legislation he pointed out that the bill had failed to establish clear and easily usable standards to guide attorneys and the courts in taking action under the statutes.

In the view of the Committee, the present replevin statute, although imprecise, is constitutional; because of the unsettled state of the law, the problem of more specific guidelines should be left for consideration next year, together with attachment and receivership.

C. The provisional remedy of civil arrest

The grounds for civil arrest under C.P.A. § 826 were considerably reduced in the CPLR. Arrest both before and after judgment now is available primarily in cases where the plaintiff would be entitled by the judgment to a remedy in equity directing the defendant to perform an act. However, CPLR 6101(1) also allows arrest in some instances in an action at law for damages although there are fewer types of action than under the Civil Practice Act.

Civil Arrest in Equity

The reason for permitting arrest as a provisional remedy in certain actions in equity is to secure the presence of the defendant so that the court may punish him for contempt if he neglects or refuses to obey a judgment or order directing him to perform some act. Under CPLR 6101(2) three conditions must be met before the court may grant an order for arrest: (1) the plaintiff must be seeking "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"; (2) the defendant must be either a non-resident of the state or about to depart from it; and (3) the non-residency or imminent departure of the defendant must create a danger that the judgment or order will be rendered ineffectual.

Dean McLaughlin in his Supplementary Practice Commentary to CPLR 6101, in *McKinneys Consolidated Laws of New York*, states that "virtually the only equity actions" which survive these restrictions are:

"(1) actions for alimony (see Domestic Relations Law § 245); (2) actions to compel the conveyance of property not located in New York (see CPLR 5104); (3) actions to compel a defendant to pay money into court in tort actions (see CPLR 5105); (4)

actions to compel a fiduciary to pay damages for a wilful wrong (see CPLR 5105)."

In the circumstances permitted by CPLR 6101(2) an order of arrest may be granted under CPLR 6111 either before or after judgment.

Civil arrest at law

Arrest in an action at law for damages originally was designed to secure the presence of the defendant so that after judgment body execution could be issued against him. The Third Report of the Advisory Committee severely criticized arrest at law and body execution "as an undesirable vestige of imprisonment for debt." (3 Adv. Comm. Rpt. 320, 321 (1959)). The CPLR abolished execution against the person and most instances of arrest at law. Dean McLaughlin has described "the retention of civil arrest in certain actions at law" as "one of the great mysteries of the CPLR." (CPLR 6101 Supplementary Practice Commentary, *McKinneys Consolidated Laws of New York*). Although the revisers had abolished civil arrest in actions at law for damages, the provisions of CPLR 6101(1) appeared in the final draft without comment. That subdivision allows arrest:

> "where there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit, and the person to be arrested is not a woman."

Hearing

Under CPLR 6111 the sheriff is required to bring the arrested defendant "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." Under Rule 6113, "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 the defendant has not been brought before the court for a hearing within the time specified by the order, "he [the sheriff] shall immediately release the defendant from custody."

Purpose of amendments

The basic purpose of the proposals for amendment of some of the present provisions on arrest is to abolish the provisional remedy of arrest in actions at law presently contained in 6101(1), and to strengthen the rights of defendants under order of arrest. Arrest in law actions was condemned over seventy-five years ago by the distinguished jurist, Charles Evans Hughes, later Chief Justice of the Supreme Court of the United States, who called the provision punitive and indefensible.

In 1946 the Judicial Council went on record as opposed to civil arrest in law actions, supporting its opinion with a

trenchant study *Twelfth Annual Report of the Judicial Council of the State of New York*, Leg. Doc. (1946) No. 17, p. 337-362). Abolition of civil arrest in law actions was recommended by this Advisory Committee as long ago as 1970.

Recently, the provisional remedy decisions of the Supreme Court, although not considering arrest directly, emphasized strongly the constitutional rights of those whose property is seized. The principles embodied in these cases extend with even greater force to those who are apprehended in person (see *Sniadach v. Family Finance Corp.*, 315 U.S. 337 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) and *North Georgia Finishing Company, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975)).

Section 6101 Proposed Change

It is recommended that CPLR 6101 be amended to eliminate subdivision 1 thereof, which contains the first of two presently enumerated instances where the provisional remedy of civil arrest may be granted, viz., in conversion, fraud and deceit actions where the person to be arrested is not a woman. Cross-references to this subdivision which appear in other sections of Article 61 would be eliminated, and consequently present subdivision 2 of CPLR 6101 would no longer be designated or referred to as such.

Further, immediately before the phrase "where the plaintiff has demanded" which now appears at the beginning of subdivision 2, the following phrase would be inserted: "where the court finds it probable that the plaintiff will succeed on the merits, and"

Comment

It is entirely consistent with modern procedural reform and the actualities of present day practice that the provisional remedy of civil arrest no longer be permitted in law actions. In addition to its archaic character, the subdivision is also objectionable on the basis that any selection of law actions in which an order of civil arrest may issue is bound to be arbitrary. Thus it is difficult to justify arrest in an action for conversion but deny it in other wilful torts such as assault and battery. Finally, the elimination of body execution as a final enforcement device in any action including those in which civil arrest is available destroys a rational foundation for this harsh and oppressive remedy. The clear need for such a revision of the law of civil arrest was fully discussed in the Study on the subject published in the *Twelfth Annual Report of the Judicial Council* (1946) at pages 337-362, and in the study by Professor Samuel J. M. Donnelly, *supra*, which will be published in the *Twenty-first Annual Report of the Judicial Conference* (1976). Professor Donnelly's study examines the arrest provisions within the constitutional framework posed by the four Supreme Court cases referred to above. (See also *Repetti v. Gil*, 372 N.Y.S. 2d 840 (Supreme, Nassau 1975), which held that the

rule which permits arrest of the defendant in a civil action involving damages for the conversion of personal property or for fraud or deceit so long as the person to be arrested is not a woman denies equal protection; and that where arrest is sought merely as a punitive measure, it could not be supported by the rule permitting civil arrest where the plaintiff has demanded and would be entitled 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.)

To guard against abuses and to insure the constitutionality of the arrest provisions, this bill would abolish arrest in civil actions at law, and would also provide, at the beginning of the provision governing arrest in equity actions, for a standard of proof that the court must find it probable that the plaintiff shall succeed on the merits. This procedure would apply in situations where the order is issued with or without notice.

The proposed amendment would leave as the sole instance where an order of arrest may be granted the only reasonable and practical one: a situation requiring the issuance of a *ne exeat* writ, which would prevent the defendant from leaving the jurisdiction to escape being held in contempt for refusing to perform an act required by a judgment in equity.

This proposed restriction on the use of the provisional remedy of arrest is the culmination of the reform initiated with the enactment of the CPLR.

Section 6111 Proposed Change

It is recommended that in the first sentence the word "judgment" and the phrase "in a case specified in paragraph two of section 6101" be eliminated, since the words would no longer apply after subdivision 1 has been eliminated.

The section would be further amended by substituting in the third sentence, the word "forthwith" for the phrase "within a time specified in the order, not exceeding forty-eight hours, exclusive of Sundays and public holidays, from the time of arrest." This would expedite the hearing, in consonance with the spirit of the cases.

A last sentence would list further rights of the defendant as follows:

> *The order shall contain a notice to defendant of his right to the aid of counsel, as well as his right to apply to the court for reduction of bail and to challenge the legality of the arrest. At the hearing following arrest the court shall determine whether to confirm the order of arrest.*

Comment

By amending CPLR 6111 as indicated, the proposal would bring New York law on civil arrest in line with the general trend on defendant's rights. A defendant subjected to civil arrest is as much entitled to due process of law as a defendant who is deprived of his liberty because he is charged with a crime.

Rule 6112(a)

It is recommended that paragraph 1 of subdivision (a) be eliminated since it refers to actions at law and that present paragraph 2 no longer be designated as such.

It is also recommended that the content of the initial clause of present paragraph 2 of subdivision (a) be amended to read as follows: "the existence of a meritorious cause of action and the probability that plaintiff will succeed on the merits."

Comment

The striking of paragraph 1 would conform the provision to the primary change which would be made by striking, in section 6101, all reference to actions at law as a ground for arrest.

The additional phrase proposed to be added would formulate the standard of proof that the court must find it probable that the plaintiff succeed on the merits in order to confirm the order of arrest. This would insure the constitutionality of the arrest. The procedure would apply in situations where the order is issued with or without notice.

Section 6115 Proposed Change

It is recommended that subdivision (a) of section 6115 be amended by deletion of the following phraseology:

> that the defendant will at all times render himself amenable to any mandate which may be issued to enforce a final judgment in the action or, where the order of arrest was granted under paragraph two of section 6101.

It is further recommended that subdivision (b) of section 6115 be amended to strike the first phrase "Where the order of arrest was granted under paragraph two of section 6101," and that the portions of the text following the first sentence which relate to paragraph one of section 6101, be deleted.

Comment

The recommended deletions would conform section 6115 to section 6101 as proposed to be amended by the excision of paragraph 1 thereof which presently provides for arrest in certain civil actions at law.

The Advisory Committee is well aware that in addition to the provisions of the CPLR governing the provisional remedy of arrest, there are other provisions of law permitting arrest in civil cases which also raise serious constitutional questions. For example, in *Vail v. Quinlan*, F. 2d (SDNY, 1976; see NYLJ p. 1, col. 2, 1/8/76) a three-judge court recently held unconstitutional several sections of the Judiciary Law relating to imprisonment for civil contempt. Section 245 of the Domestic Relations Law has also been criticized for similar reasons.

While the Advisory Committee felt that it was preferable to

turn its attention first to the provisional remedy of arrest governed by the CPLR, the Committee intends to consider other areas of law relating to imprisonment in civil cases, possibly in conjunction with its consideration of replevin and the provisional remedies of attachment and receivership. In his study of the provisional remedies referred to earlier, Professor Samuel Donnelly alluded to the provisions of the Judiciary Law relating to imprisonment for civil contempt as an area where statutory revision should be considered.

D. Receivership

Although none of the recent Supreme Court cases on provisional remedies discussed above involves receivership, this remedy may be deemed to fall within the protective range of these cases. However, because of the present unsettled state of the law, and the lack of urgency in this area, the Committee felt that proposals on receivership should await next year, to be treated together with attachment and replevin.

PART III — VIDEOTAPING OF DEPOSITIONS AND EXPANDED USE OF VIDEOTAPED DEPOSITIONS AT TRIAL

At the request of the Advisory Committee, Hon. William P. McCooe, Judge of the Civil Court of the City of New York, undertook to examine the feasibility of utilizing videotape in the civil trial process and to propose certain limited clarifying and enabling legislation, which later may possibly be expanded if experience warrants. The relatively slight New York experience in utilizing videotaped depositions is discussed in the study.

The study considers and recommends permitting a party's own medical witness's deposition to be taken and used at trial without the necessity of showing special circumstances. The scope of CPLR 3101(a) would be enlarged to accomplish this aim. CPLR 3117(a) would be conformed to provide that a foundation need not be laid for using the videotaped testimony of a party's medical witness. These proposals, limited to medical witnesses, are conservative, though important. In addition, the study also recommends that videotaping may be used whenever the deposition of any witness is taken.

There is nothing in New York law which prohibits videotaped testimony. The proposal, however, would clarify this and, it is hoped, advance the use of this extremely valuable tool. The provision to allow medical testimony to be recorded without laying a foundation is proposed because it is in connection with medical witnesses, whose duties often render them unavailable for court appearance when scheduled, that the problem of court appearance of the witness is most acute. This is especially the case in many counties where a shortage of medical personnel exists. If experience under these proposals proves favorable, the scope of the proposals may be expanded.

Generally, the study demonstrates that videotape has the

potential to improve the quality of justice and to alleviate court congestion. It offers both the audio and visual perspective to the non-appearing witness's testimony. The advantages are fully listed in McCrystel and Young, Pre-recorded Videotaped Trials — An Ohio Innovation, 39 *Brooklyn Law Review* 560, 563 (1973).

The extent of the implementation of videotape has ranged from full trials to depositions of single witnesses. Ohio has been the pioneer in the use of videotape both for depositions and entire trials (McCrystel and Young, Pre-recorded Videotape Trials — An Ohio Innovation, 39 *Brooklyn Law Review* 560 (1973)), with California closely following (57 *Judicature* 171 (1973)).

The use of videotape for depositions is authorized by the procedural rules of numerous states (Florida, Ohio, Michigan, Minnesota, Pennsylvania, Missouri and Hawaii) and the federal courts (Fed. R. Civ. Proc. §30(b) (4)). Once it is determined that videotape is clearly authorized by statute, rules peculiar to videotape must be adopted. The technical nature of the videotape process requires the inclusion of certain ingredients in the rules, in order to insure the integrity of the process. A list of the most important ingredients may be found in Judge McCooe's Study on Proposals for Amendments to Article 31 of the CPLR Authorizing Videotape Depositions and Depositions of a Party's Own Expert, to be published in the *Twenty-first Annual Report of the Judicial Conference* (1976).

The National Center for State Courts has compiled voluminous material on videotape in the court. The Federal Judicial Center has recently developed videotape rules and is engaged in pilot projects implementing the rules (Guidelines for Pre-recording Testimony on Videotape Prior to Trial, FJC PUB. No. 74-9). It is recommended that similar special rules be promulgated after the proposed statutory changes become law, and become part of the Rules of the Administrative Board, the Rules of the Appellate Divisions, or the Rules of the Office of Court Administration, as may be appropriate.

Rule 3113(b) Proposed Change

It is recommended that subdivision (b) of rule 3113 be amended by deleting the word "transcribed" and substituting for it the phrase "recorded by stenographic or other means."

Comment

So far New York has enacted no statute or rule permitting videotaped depositions, although court decision has allowed the procedure.

In *Rubino v. G. D. Searle & Co.*, 73 Misc. 2d 447 (Supreme, Nassau 1973) the defendant moved to perpetuate the testimony of its former director of research who had suffered a heart attack, by videotaped deposition. In granting the motion conditioned upon a simultaneous stenographic examination, the court referred to the procedure as "an avenue of great

procedural significance in the efficient and economic administration of justice" and expressed the opinion "that the use of videotaped deposition at trial could result in the obtaining of expert testimony which often is impossible to obtain because of the expenses involved and could expedite the trial of the action which often is delayed because of the unavailability of the expert witness." See also *Bichler v. Eli Lilly and Co.*, AD 2d (First Department) NYLJ p. 1, col. 6 (1/5/76) wherein the Appellate Division permitted the simultaneous videotaping and deposing of the testimony of a medical witness who had retired and was residing in California, and quoted with approval a recommendation of the American Bar Association that "the use of videotape as a means of presenting the testimony of physicians should be encouraged."

The time has come to amend the CPLR to clarify by statute, that the videotaped pre-trial testimony of a witness is permissible. This, it is hoped, will increase the use of videotaped testimony. Stenographically re-recorded depositions should be considered a last resort, and with good reason. The reading of a deposition to a jury reduces its impact and jurors tend to attach less weight to the testimony of a witness they have never seen. The reading of a deposition is a tedious procedure. The videotaped deposition offers the opportunity to the jury to see the witness and to hear his testimony. However, it is recommended that utilization of videotape to depose a witness be optional with the parties, and subject to the discretion of the court.

In the Supplementary Practice Commentary to CPLR 3113 (McKinney's Consolidated Laws of New York), Professor David D. Siegel states, in respect to videotaping testimony: "The experiment deserves the full support of bench and bar. The merits of videotaping a deposition, if it faithfully reproduces the scene and the sound are manifest. . . . The ability of the fact trier to observe the demeanor of the witness, whether the deposition is being used for impeachment purposes or for evidence-in-chief, is an integral part of the package of rights that our historical jurisprudence has always treasured."

The purpose of the proposed amendment would be to permit, generally, the testimony of a witness to be recorded by videotape, provided, of course, that he meets the conditions of CPLR 3101 and 3117. CPLR 3101 regulates what shall be disclosable, and 3117 provides for the laying of a foundation and governs the use that may be made of a deposition.

Rules 3101(a)(5)(New) and 3117(a)(4)(New) Proposed Change

It is recommended that a new paragraph 5 of subdivision (a) of CPLR 3101 should be added to make disclosable "A party's own medical witness."

It is further recommended that a new paragraph 4 of subdivision (a) of CPLR 3117 be added, to read as follows:

> 4. The deposition of a medical witness may be used by any party without the necessity of showing

unavailability or special circumstances subject to the right of any party to move pursuant to rule 3103 to prevent abuse.

Comment

A special problem is presented by the deposition of a party's own medical expert.

CPLR 3101(a) (3) (4) sets forth the grounds for deposing of a non-party witness. The grounds include the geographical basis, illness and adequate special circumstances. There is presently no provision authorizing the examination of a party's own medical witness unless he fits into one of those categories.

CPLR 3117(a) (3) controls the use of the deposition of a non-party witness and states the foundation necessary to authorize its use at trial. The grounds are similar to those under CPLR 3101 and are restrictive in that they make no provision for the deposition of a medical witness to be read at trial unless he fits within one of the enumerated exceptions, as stated.

There is a judicial trend toward liberalizing the "special circumstances" provision of CPLR 3101. In *Villano v. Conde Nast Publications, Inc.*, 46 A.D. 2d 118 (1st Dept. 1973), defendant moved to examine plaintiff's treating physicians in an action for invasion of privacy, claiming "special circumstances." The Appellate Division reversed Special Term's denial of the motion, stating that a mere showing by the lawyer that he needs such witnesses' pretrial deposition in order to prepare fully for the trial should suffice as a "special circumstance."

This case is authority for a party's taking the testimony of his adversary's medical witness, not the testimony of his own medical witness. The need remains for statutory provision permitting a party to depose his own medical witness without the necessity of laying a foundation or showing special circumstances. By doing this the proposed amendment would provide an additional and valuable tool for the trial lawyer. Busy physicians find it extremely difficult to appear in court and often charge large fees when they do. For this reason, it is particularly important for the testimony of a party's medical expert to be perpetuated without the restrictive technicalities of laying a foundation. The advantages of videotaped testimony would apply here.

Furthermore, in order to ease the burden on the attorney and because of the frequent difficulty of physicians to attend court, CPLR 3117(a) would be amended in order to dispense with the laying of a foundation for the purpose of recording, preferably by videotape, the physician's testimony.

Experience under the proposed amendments would indicate whether to extend the use of videotape, and whether, eventually, other than medical witnesses should be able to testify without showing special circumstances.

Thus, a proposal to authorize the taking and using of a physician's deposition without the necessity of laying a foundation has been submitted. Also, proposals have been

submitted authorizing the use of video-tape for depositions. The promulgation of appropriate rules is suggested to protect the integrity of the technical procedure. All this constitutes an experimental step, in one area, for improving justice and streamlining litigation. The experiment could well develop, depending on need and experience, into a full and beneficial program of videotaped proceedings.

PART IV — OTHER RECOMMENDATIONS

A. Proposal Permitting a Direct Action Against Liability Insurance Carrier Under Certain Circumstances

It is recommended that a new article be inserted in the Civil Practice Law and Rules, to be Article 29, to read substantially as follows:

ARTICLE 29 — DIRECT ACTION AGAINST INSURER

Section
2901. Right of direct action created; limitation of time.
2902. Elements of the right of direct action; defenses.
2903. Rights of contribution and indemnification.
2904. Exclusivity; election of remedy.
2905. Discovery of insurance agreements.
2906. Vehicle of transporation defined.

§ 2901. Right of direct action created; limitation of time.

A New York resident who, while outside the state, sustains bodily injury or property damage as a result of the tortious act of a person insured against liability for such injury or damage, and in the event of his death resulting from such injury, his personal representative, shall have a right of action directly against the insurer, based upon such tortious act, regardless of any contrary provision of the insurance contract, provided:

(a) the injury or damage was sustained in connection with operation of a vehicle of transportation as defined in section 2906; and

(b) the person causing the injury or damage is not amenable to personal jurisdiction of a court of this state; and

(c) the insurer has qualified to do business, or is doing business, in this state; and

(d) the action is commenced within three years from the date of the tortious act.

§ 2902. Elements of the right of direct action; defenses.

1. The action herein authorized shall

(a) confer a right to recover all sums the insurer is obligated to pay as indemnification under the contract of insurance, and

(b) be limited by and subject to the terms and conditions of the insurance contract.

2. The insurer may assert any defenses available to the insured, had the action been brought against the insured, as well as any defense available to the insurer against the insured.

§ 2903. Rights of contribution and indemnification.

The insurer may assert any claim for contribution or indemnification which the insured could have asserted against any person, had the action been brought against the insured.

§ 2904. Exclusivity; election of remedy.

A direct action under this article bars any other action based upon the same injury or damage while the direct action is pending or after a judgment in favor of the plaintiff has been satisfied. An action in another state against a tortfeasor subjected to personal jurisdiction bars the maintenance thereafter of an action under this article against the insurer based upon the same injury or damage.

§ 2905. Discovery of insurance agreements.

A plaintiff who comes within section 2901, subdivisions (a) and (b), is entitled to obtain discovery of the existence and contents of any insurance agreement obligating the insurer to satisfy part or all of a judgment which may be entered against the tortfeasor. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence.

§ 2906. Vehicle of transportation defined.

For purposes of this article, a vehicle of transportation is any device in, upon, or by which any person or property may be drawn, except devices moved by human power or used exclusively upon stationary rails or tracks.

It is also recommended that section 6202 be amended by inserting, at the end of the first sentence, the following phraseology, "except the obligation of an insurer to an insured under a liability insurance policy, before the plaintiff has obtained judgment against the insured."

It is further recommended that the cross-reference to subdivision (h) of section 105 be amended by substituting subdivision (i) for subdivision (h).

Comment

The proposed changes would abrogate the doctrine of *Seider v. Roth*, 17 N.Y. 2d 111 (1966) and create, under certain circumstances, a right of direct action against an insurance carrier, as a more straightforward approach to the jurisdictional problems which *Seider* was designed to ameliorate. The proposed legislation in no way affects the judgment creditor's right to bring suit against the judgment debtor's insurer when a

judgment has not been timely satisfied, as provided by section 176 of the Insurance Law.

In 1973, a bill intended to effect these changes passed the Legislature, but was vetoed by the Governor (Veto Memorandum No. 26 (1973)). The Governor's memorandum, without reaching the merits of the bill, noted the following four drafting deficiencies which prompted the veto:

1. The 1973 bill failed to make it clear that the right of action against the insurer is based on the tortious act of the insured.

To meet the objection, language has been added in the proposed bill to indicate that the right of action against the insurer resulting from the tortious act of its insured is "based upon such tortious act" (proposed section 2901).

2. The term "vehicle of transportation" was not defined in the 1973 bill.

The present bill defines the term (proposed section 2906) to accord with case law involving vehicles of transportation in *Seider*-based cases. *Seider v. Roth*, 17 N.Y. 2d 111 (1966) (automobile); *Simpson v. Loehmann*, 21 N.Y. 2d 305 (1967), rearg. den. 21 N.Y. 2d 990 (1968) (boat) (cf. Vehicle and Traffic Law section 159).

3. There was no express provision in the 1973 bill permitting the insurer to assert any defense which the insured could have asserted in an action against him. The bill spoke only of defenses the insurer might raise in an action by the insured.

The current bill spells out the defenses available to the insurer, including both defenses which the insured could have asserted had the action been brought against him, and defenses available to the insurer against the insured.

4. There was no provision in the 1973 bill expressly permitting the insurer to avail itself of any substantive rights which would have been available to the insured (cf. *Dole v. Dow Chemical Corp.*, 30 N.Y. 2d 143 (1972); CPLR Article 14 (L. 1974, ch. 742)).

To specify such rights, this bill inserts a section safeguarding the insurer's rights of contribution and indemnification (proposed section 2903).

The foregoing changes, incorporated in the 1975 bill, were designed to meet the Governor's objections to the 1973 bill. The amendments would be retained in the bill proposed in this Report.

The bill introduced in 1975 passed the Assembly, but died in Committee in the Senate. Several objections were raised to the bill, as indicated hereafter:

1. The bill would expand the *Seider* doctrine by making the insurance company a party to any action where it now has only an attachable "duty to defend."

The bill is restrictive rather than expansive in that it abolishes

Seider and creates a direct action limited to vehicular torts only. This would reduce the number of suits available under *Seider* (see e.g. *Rosenthal v. Warren*, 475 F. 2d 438 (2d Cir. 1974)). The bill also precludes expansion of the *Seider* doctrine into areas other than those involving vehicular torts. At present, there is no logical impediment to such an expansion.

2. Since insurance companies would be named as parties under the bill, juries would be overly influenced in favor of plaintiffs.

This would no more be so under a direct action bill limited to vehicular torts than it is at present under the compulsory automobile insurance law, under which juries may assume that the defendant in an automobile accident case has insurance coverage.

3. Insurance companies would suffer under the provision that all policy defenses are preserved, because these technical defenses, if pleaded in the main liability action, would confuse juries.

It must be remembered that policy defenses may be raised by preliminary motion or in a separate action for a declaratory judgment.

4. Direct action will reduce the defendant's opportunity to change venue upon removal to federal court in diversity cases, with the attendant benefits.

Upon careful examination, these benefits turn out to be largely unreal. A venue transfer to the out-of-state accident site might help *both* sides to obtain witnesses. And New York law would apply in the new venue by virtue of the *Van Dusen* doctrine (see *Van Dusen v. Barack*, 376 U.S. 612 (1964)).

5. The discovery of policy limits, permitted under the bill, would discourage settlement.

This objection has been rendered moot by L. 1975, ch. 668, which provides for discovery of the existence and contents of the insurance policy. New CPLR 3101(f), enacted by L. 1975, ch. 668, would undoubtedly suffice to authorize discovery of the policy limits in a direct action. It is preferable, however, to specifically provide for such discovery in the direct action article as well, as is proposed in § 2905, so that the basic procedures relating to a direct action are readily located in a single article.

A brief account of the background of this legislation may be in order. In *Seider v. Roth*, 17 N.Y. 2d 111 (1966), the New York plaintiff, a driver injured in an auto accident in Vermont, acquired *in rem* jurisdiction over the defendant driver, a Canadian, by attaching the liability insurance policy issued to the defendant by the Hartford Accident and Indemnity Company, which was doing business in New York. The Court of Appeals sustained jurisdiction on the rationale that the New York plaintiff could seize as a "debt" the obligations of the

insurance company to investigate the accident, and to defend and indemnify the insured for any liability that might arise from the use of his automobile.

In a later case which upheld the constitutionality of the *Seider* procedure, former Chief Judge Stanley H. Fuld questioned its adequacy and practicability, stating that "it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of *in rem* jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally." *Simpson v. Loehmann*, 21 N.Y. 2d at 312 (1971).

Accordingly, a study entitled *Report on the Draft of Proposed Direct Action Statute*, by Professor Maurice Rosenberg of the Columbia University School of Law, was jointly commissioned by the Judicial Conference and the Law Revision Commission. This bill is based upon the study, which was published in the *Sixteenth Annual Report of the Judicial Conference* 264 (1971).

Proposed Amendments

While the present proposal falls short of the ambitious goal stated by the former Chief Judge, it takes a significant step in that direction by transforming the cumbersome method of acquisition of *in rem* jurisdiction through attachment under *Seider* into a simple direct action permitting suit against the insurance carrier based upon the insured's tortious act.

While direct action statutes of other jurisdictions are mainly concerned with providing a local forum for victims of local injury, the proposed statute, following the policy of *Seider*, would provide a locally obtainable remedy for an injury sustained elsewhere. It would create a limited *in personam* right of action against the tortfeasor's insurance company.

The new right would be accorded only to residents of New York State, that is, to persons domiciled in the state or to their representatives in cases of wrongful death. Such limitation, together with the requirement that the carrier be qualified to do business here or actually be doing business here, would avoid constitutional difficulties involved in legislating, in effect, the nullity of a "no-action" clause validly made in another state. Moreover, to provide differently would, because of the lure of New York's reputedly generous verdicts, make this state a mecca for non-residents injured elsewhere by non-New York residents. Once it is accepted, in the light of the foregoing, that the statute in New York should be drafted to cover only the case in which no other reasonable basis exists for a local suit, it follows that the statute becomes a subsidiary, rather than a primary, remedy. This means that the statute would not provide an option to sue either the tortfeasor or the insurance company. It also means that its availability would be restricted to cases that match its purpose. Since in most non-vehicular torts, the

wrongdoer is amenable to *in personam* jurisdiction in New York, either under the long-arm statute for causing local consequence or by reason of doing business in the state, the direct action statute would restrict actions thereunder to those based upon tortious acts committed in connection with the operation of a vehicle of transportation, as defined in the proposed statute. Again, from the practical standpoint, to provide otherwise would, despite the coverage of the *Seider* doctrine, create serious problems of administration and acceptability.

The statute would establish a right of direct action against the insurer, based upon the tortious act of the insured person or corporation, to recover for bodily injury, including fatal injury, or property damage as a result of such tortious act. The action would be limited by the terms and conditions of the insurance contract. Thus, the statute would limit the insurer's cash obligation to the indemnity coverage.

The statute would provide that the insurer may assert any defense available had the action been brought against the insured, or available to the insurer against the insured. The statute would provide that the insurer may assert any claim for contribution or indemnification which the insurer could have asserted had the action been brought against the insured.

The statute would require the plaintiff to elect his remedy as between the direct action and the action against the tortfeasor in another state, and would make the elected remedy exclusive during its pendency or after satisfaction of judgment, by barring the other. To provide otherwise would unreasonably discriminate between the New Yorker injured here, who would have one remedy, and the New Yorker injured elsewhere, who would be afforded a double remedy.

The proposed statute does not attempt to regulate the *res judicata* effect of judgments in a direct action. However, problems of *res judicata*, traditionally left to court decision, were carefully considered by the Judicial Conference and the Law Revision Commission. For a detailed discussion, see *Report on the Draft of Proposed Direct Action Statute*, by Professor Maurice Rosenberg, in the *Sixteenth Annual Report of the Judicial Conference*, pp. 264, 281 et seq. (1971).

As has been pointed out earlier, the proposed statute would provide that a plaintiff is entitled to obtain disclosure of the tortfeasor's insurance company. Since the tortfeasor would be out of the state, the best method may be to bring a "John Doe" action against the company, then conduct out-of-state discovery against the tortfeasor, and after learning the identity of the insurer, substitute its true name for the "John Doe" soubriquet.

It was intended from the outset that the direct action statute would apply to wrongful death actions as well as those for personal injuries and property damage. Since all three types of action are to be susceptible to direct actions, it is deemed wisest to provide for a flat three year statute of limitations, to be placed in the direct action Article itself, rather than in CPLR Article 2, in consideration of the convenience of litigants, and

also to make clear, by explicit phraseology in the applicable context (proposed § 2901) that any direct action, including one for wrongful death, must be "commenced within three years from the date of the tortious act." Thus, the statute of limitations governing a cause of action for wrongful death brought as a direct action would not begin to run from the date of death.

In the interests of fairness and a more straightforward approach to the jurisdictional problems confronted in *Seider*, and to prevent the possible extension of the *Seider* doctrine to categories of tort other than personal injury involving a vehicle of transportation, with unpredictable complexities, the enactment of the proposed direct action statute would be accompanied by a legislative overruling of the *Seider* doctrine. This would be accomplished by the proposed amendment of CPLR 6202, to exclude from "the debt or property subject to attachment" designated therein, "the obligation of an insurer to an insured under a liability insurance policy before the plaintiff has obtained judgment against the insured." The corrected cross-reference in CPLR 6202 is proposed because of the renumbering of the subdivisions of CPLR 105 by L. 1973, ch. 238.

B. Additional Recommended Statutory and Rule Changes

Proposed Change

It is recommended once again that section 408 be amended to make Article 31 of the CPLR applicable to *inter vivos* trust proceedings, thus allowing disclosure without court order. Furthermore, it is recommended that section 7701 be amended to provide that any interested person can examine the trustee of an express trust, under oath, either before or after the filing of an answer or objections. In addition, section 7701 would be amended to correct the cross-reference to provisions which have either been repealed or transferred to other statutes.

Comment

This bill would conform the practice under the CPLR relating to *inter vivos* trust proceedings to that in Surrogate's Court, thus rectifying a previous legislative oversight.

At present, by virtue of the general provisions of CPLR 408, a court order is required for disclosure in *inter vivos* trust proceedings, whereas in testamentary trust proceedings, under SCPA 2211, no such order is necessary. SCPA 2211 also provides that in testamentary trust accountings the fiduciary may be examined under oath by any party to the proceeding, either before or after filing objections. There is no comparable provision in Article 77 of the CPLR with respect to *inter vivos* trusts.

There is no good reason why the procedure in *inter vivos trust* accountings should be different in this respect from testamentary trust accountings. The general provision in CPLR 408, which requires a court order for disclosure in all special

proceedings, was originated by the revisers in order to preserve the summary nature of special proceedings. They felt that to allow disclosure on notice before the hearing would almost certainly extend the eight day notice of petition period. However, this general rule should bend to certain exceptions where examination, because of its inherent importance, should be obtainable more conveniently. Such an exception should apply when a fiduciary is making an accounting, so that interested parties may be afforded full protection. This is already the rule in testamentary trust proceedings in Surrogate's Court.

The mechanical changes proposed are designed merely to up-date the cross-references contained in CPLR 7701 without changing substance.

Section 2512 Proposed Change

It is recommended that section 2512 be amended in two respects:

1. to number the present text as paragraph 1, and to delete therefrom the words "which municipal corporation" and to commence a new sentence immediately following such deletion to begin with the words "Such parties" before the words "shall, however, be liable for damages."

2. to insert a new paragraph, to be paragraph 2, to read substantially as follows: "2. Where an appeal is taken by any such party, only the court to which the appeal is taken may fix the amount which shall limit the liability for damages."

Comment

This bill would amend section 2512 in two respects: first, to restore its original wording whereby not only domestic municipal corporations, as at present, but also the state, would be liable for damages while being exempt from giving undertakings; secondly, to make clear that where such parties appeal, only the court to which an appeal is taken may fix the maximum liability.

1. When the CPLR was first enacted it continued the exemptions from giving undertakings contained in the C.P.A., but expanded liability for damages to include the state and public officers, in addition to municipal corporations. In 1965 the Legislature restored the old rule (L. 1965, Ch. 628). The 1965 amendment is regressive. The present-day trend is toward making the state responsive in damages when it has injured a private citizen. This should be the case here, especially since the state will not be exposing itself to unforseeable or unlimited liability; for it would be liable to the same extent as sureties on an undertaking, had such undertaking been given. Sureties are liable to an extent not greater than sums specified by the court or judge (see *City of Yonkers v. Federal Sugar Refining Co.* 221 N.Y. 206, 210, 211 (1917), where it was held that if the limit of the responsibility of the municipal corporation for damages

is not specified in the injunction order, there is no liability if it is later determined that such plaintiff was not entitled to the injunction).

The *City of Yonkers* case *(supra)* was somewhat limited in *City of Utica v. Hanna*, 249 N.Y. 26 (1928), which held a city liable for damages where the city accepted the benefit of a stay on appeal (after procuring a temporary injunction) upon express condition that it pay any resulting damages, although no limit had been set upon the amount of damages.

Subsequent lower court decisions have imposed an upper limit on the city's liability for damages *(Bonert v. White*, 19 Misc. 2d 742 (Supreme, New York 1959); *City of White Plains v. Griffen*, 169 Misc. 2d 706 (Supreme, Westchester 1938), aff'd *without opinion*, 255 App. Div. 1003 (Second Dept. 1938).

Section 3130 Proposed Change

It is recommended that the phrase "other than in an action to recover damages for an injury to property, or a personal injury, resulting from negligence, or wrongful death," be excised from CPLR 3130.

Comment

At present, under CPLR 3130, interrogatories may not be utilized in negligence actions and wrongful death actions. The proposed amendment would permit the use of interrogatories in all actions, as provided in the Federal Rules of Civil Procedure (see Fed. R. of Civ. Proc. 33).

The 1961 proposals for the revision of civil practice included the use of interrogatories as a disclosure device (6 Sen. Fin. Comm. Rpt. 17-20, Leg. Doc. (1962) No. 8). After public hearings, it appeared that a large segment of the bar, particularly the negligence bar, was opposed to the use of interrogatories, and they were not included in the 1962 proposals (6 Sen. Fin. Comm. Rpt. 21, Leg. Doc. (1962) No. 8). In 1963 a Judicial Conference bill on interrogatories was approved (1963 N.Y. State Leg. Ann. 53, 82). However, it provided that interrogatories could not be used in negligence and wrongful death actions, because the negligence bar apprehended harassment. The Committee is of the opinion that the fear of harassment is largely unfounded, and there is no reason to think that the negligence bar would fare any differently than the rest of the bar (1963 N.Y. Leg. Ann. 82). In addition, much of the opposition in past years to proposals to extend interrogatories to negligence cases apparently was aimed not at those proposals, but at another proposal often linked to the one beforementioned, namely, abolition of the bill of particulars. A majority of the Committee, it should be noted, favors retention of the bill of particulars. Where interrogatories could be abused, appropriate safeguards are available: a protective order (CPLR 3103), a motion to strike out an interrogatory (CPLR 3133) and the provision that interrogatories and bills of particulars may not be employed in the same

case without leave of court (CPLR 3130).

Bills of particulars, valuable as they are, by no means constitute adequate substitutes for written interrogatories. Bills of particulars, but not written interrogatories, must be confined to issues on which the responding party has the burden of proof (*Matter of Buono*, 14 Misc. 2d 760, 763 (Surr. Ct. 1958)). Unlike written interrogatories, bills of particulars cannot properly be used to obtain facts from other parties relating to claims or defenses asserted in the proponent's own pleadings (*Meltsner v. Posmanick*, 197 Misc. 1056, 1057 (Mun. Ct. 1950); *Silberfield v. Swiss Bank Corp.*, 263 App. Div. 1017 (2d Dept. 1942)).

CPLR Rule 4312(3), Jud. L. § 251-a Proposed Change

It is recommended that a new paragraph (5) be added to CPLR rule 4312 to provide substantially that "in uncontested matrimonial actions, a court clerk, law secretary, or any other non-judicial employee of the court, who is an attorney in good standing admitted to practice in the state, may be appointed by an administrative judge to serve without fee as a referee for the purpose of hearing and reporting to the court." A cross-reference to this new paragraph is recommended in paragraph (3) of CPLR 4312 and it is recommended that a conforming amendment also be made to § 251 of the Judiciary Law.

It is further recommended that Judiciary Law § 251-a be amended by adding the phrase "or law secretary" between the terms "confidential clerk" and "to a justice," and that the following language be added at the end of the section: ", except that in uncontested matrimonial actions, a confidential clerk or law secretary who is an attorney in good standing admitted to practice in the state may be appointed by an administrative judge to serve without fee as a referee for the purpose of hearing and reporting to the court."

Comment

This bill would permit an administrative judge to appoint any court employee, who is a lawyer, as a referee to hear and report, without a fee, in an uncontested matrimonial action.

At present, an administrative judge is precluded by Judiciary Law § 251-a from appointing "confidential clerks" (now generally referred to as law secretaries), and by CPLR 4312(3) from appointing clerks and secretaries, as referees. Although a similar prohibition was contained in Surrogate's Court Act § 32(7), Surrogate's Court Procedure Act 2609(3)(a) now permits the surrogate to designate "the chief clerk, one of the other clerks, a law assistant or any assistant, to take and report testimony in any proceeding . . . ." There is no reason why this procedure should not be permitted to an administrative judge in the Supreme Court in uncontested matrimonial actions.

Judiciary Law § 251, which also prohibits certain court personnel from serving as referees, would be conformed accordingly.

The statistics of the Tenth Judicial District (Nassau and Suffolk Counties) strikingly indicate the large numbers of uncontested matrimonials processed by the courts. In that District the court disposed of 4,732 uncontested matrimonial actions in 1974 as contrasted with 2,291 in 1971; the statistical estimate is that the present workload of these cases consumes the full time of three judges. The time that a judge spends in these cases can be more effectively utilized and may be conserved by the appointment of a referee to hear and report, with the determination by the court.

The power of appointment is vested in the administrative judge to facilitate speedy implementation as the need arises, since he is acquainted with local calendar conditions and availability of personnel for immediate assignment without disruption of other functions.

This amendment is supplementary to, and in no way diminishes or affects the existing power of the Appellate Division, pursuant to CPLR 4312(2) and 4317 to designate special referees, who also may be court personnel such as law assistants, to hear and determine matrimonial actions without fee. It would, however, facilitate references to hear and report in uncontested matrimonial actions by permitting a more flexible use of qualified court personnel by an administrative judge.

Rules 5526 and 5529(c) Proposed Change

It is recommended that rule 5526 be amended by adding the following two sentences to the rule, to read substantially as follows:

> *The subject matter of each page of the record shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or recross examination shall be stated at the top of each page.*

Further, it is recommended that subdivision (c) of rule 5529 be amended to read substantially as follows:

> (c) Page headings. The subject matter of each page of the appendix shall be stated at the top [including, in] *thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In* the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross [or], redirect *or recross* examination *shall be stated at the top of each page.*

Comment

At present, Rule 5526, which governs the content and form of the record on appeal, does not specify the form of page headings. Subdivision (c) of Rule 5529, which governs the form of page headings in appendices, requires that the subject matter of each page of the appendix must be stated at the top thereof, including, in the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross or redirect examination.

The proposed amendment, which would explicitly provide for records, as well as appendices, on appeal, would permit the subject matter of all papers, except those containing testimony, to be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In the case of testimony, the existing provision governing the form of appendices would be continued, with minor technical changes, and it would be made explicitly applicable to records on appeal in Rule 5526. Thus, the CPLR would conform to the rules in the First and Second Departments (22 NYCRR 600.10(a)(7); 670.1, 670.8).

This proposal would eliminate running heads on typewritten sheets to be reproduced in records and appendices on appeal. Almost invariably, motions are sent to the printer without running heads, thus necessitating an additional and unnecessary expense to the client. The elimination of running heads on other papers would further reduce expenses.

The elimination of running heads would provide additional space at the top of every page where extra lines could be typed. This would reduce the volume of pages needed, and thus lower expenses.

The proposed amendment is also intended as a first step toward statewide uniformity in this area of appellate practice.

Jud. L. §§90(1)(b), 460, 464, 470; CPLR Rules 9402, 9403(1), 9404, 9406(2) Proposed Change

It is recommended that the Judiciary Law §90(1)(b), 460, 464 and 470, and CPLR rules 9402, 9403(1), 9404 and 9406(2), which provide for admission to the bar, be amended in order to provide for the admission to the New York bar of otherwise qualified applicants who intend to practice law in New York but have not been residents of the state for six continuous months. The bill would also require extensive technical changes because of the archaic wording of the present statutes, but the changes do not signify a substantial change in the law.

Under this proposed amendment, a nonresident applicant for admission to the New York bar, who is otherwise qualified, may be admitted to practice in New York not only if, as permitted by present law, he is employed full time within the state, but also if he intends to have an office for the practice of law in New York upon his being admitted. The latter concept, which is new, is defined in the proposed amendment, and would include

any person who intends to practice law, whether in the private or the public sector. The proposal specifies the judicial district where a nonresident should be examined for character and fitness and the department where such applicant should be admitted.

This proposal would cure several inequities which have arisen under existing law. For example, at present, a graduate of a New York State law school who has taken the New York bar examination and intends to practice law in this state immediately upon admission to the New York bar is precluded from accepting employment and establishing a residence in another state while he awaits the result of the bar examination and admission to practice in New York.

The requirement that every attorney practicing law in New York State must maintain an office in the state for such practice is retained and made clearer than it is at present but the archaic rule that an attorney practicing law in New York must reside either in New York State or in an adjoining state is discarded.

The term "actual" residence would be discarded as adding nothing to the concept of residence.

Under the present state of the law, the following amendments would be necessary to achieve this moderate end.

Jud. L. §90(1)(b) Proposed Change

It is recommended that paragraph b of subdivision 1 of section 90 of the Judiciary Law be amended to read substantially as follows:

> b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another [state or territory or the District of Columbia of the United States, or in a foreign country] *jurisdiction within or outside the United States*, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the *appropriate* department [in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall], *as hereinafter defined, may* admit him to practice as such attorney and counsellor-at-law [,] in all the courts of this state, [provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys] *if it shall be satisfied that he possesses the character and general fitness requisite therefor and he has in all respects complied with the applicable rules of the court of appeals and the appellate divisions. The appropriate department for the purposes of this*

paragraph, shall be the department in which, as shown by the proof submitted by him, the applicant resides, or if he is not a resident of this state, in which he is employed full time or intends to have an office for the practice of law upon being admitted to practice in this state.

Jud. L. § 460 Proposed Change

It is recommended that section 460 of the Judiciary Law be amended to read substantially as follows:

§ 460. [Examination and] *Eligibility for* admission [of attorneys] *as attorney and counsellor-at-law.*

[A citizen of the state, of full age, applying to be admitted] *No person shall be eligible for admission* to practice as an attorney [or] *and* counsellor-*at-law* in [the courts of record of] this state [, must be examined and licensed to practice as prescribed in this chapter.] *unless he furnishes satisfactory proof that he is a resident of this state, or, if he is not a resident, that he is employed full time within this state or intends to have an office for the practice of law therein upon being admitted to practice. For the purposes of this article, regular employment in a law office maintained in this state by an attorney or attorneys duly admitted to practice therein shall be the equivalent of having an office for the practice of law therein.* Race, creed, color, national origin or sex shall constitute no cause for refusing any person examination or admission to practice.

Jud. L. § 464 Proposed Change

It is recommended that section 464 of the Judiciary Law be amended to read substantially as follows:

§ 464. Certification by state board of successful candidates.

Every person who shall pass the examination [, and every person] *or* who has received a dispensation from the taking of the examination, shall be certified by the state board of law examiners to the appellate division of the supreme court of the *appropriate* department, *as hereinafter defined,* [in which such person actually resided at the time of application for admission to such examination, or at the time of application for such dispensation,] provided such person shall have in other respects complied with the rules regulating admission to practice as attorneys and counsellors-*at-law,* which fact shall be determined by said board before certification. [For the purpose of all provisions of the judiciary law, the civil practice law and rules, the rules of the state board of law

examiners and the rules of the court of appeals and of the appellate divisions of the supreme court, regulating admission to practice as attorneys and counsellors, a person otherwise eligible for certification by said board who is not an actual resident of the state shall be considered to be an actual resident and citizen of the state during any period of time in which he is employed full time within the state of New York. Such person shall be considered to be a resident of the judicial department and district in which he is employed at the time of his application for certification by said board.] *The appropriate department for the purposes of such certification shall be the department in which, as shown by the proof submitted by the applicant to the state board of law examiners either at the time of application for admission to the examination or for dispensation therefrom, or thereafter, the applicant resides, or if he is not a resident of the state, in which he is employed full time within the state or intends to have an office for the practice of law upon being admitted to practice.*

Jud. L. § 470 Proposed Change

It is recommended that section 470 of the Judiciary Law be amended to read substantially as follows:

§ 470. Attorneys *required to have* [having] offices in this state [may reside in adjoining state].

A person, regularly admitted to practice as an attorney and counsellor-*at-law*, in the courts [of record] of this state, [whose] *who has an* office for the [transaction of law business is] *practice of law* within the state, may practice as such attorney [or] *and* counsellor-*at-law*, although he resides [in an adjoining] *outside the* state *or the country*.

CPLR Rule 9402 Proposed Change

It is recommended that rule 9402 be amended to read substantially as follows:

Rule 9402. Application for admission.

Every application for admission to practice pursuant to the provisions of *either* paragraph a *or paragraph b* of subdivision one of section ninety of the judiciary law, by a person who has been certified by the state board of law examiners, in accordance with the provisions of section four hundred sixty-four of said law, *or* [shall be referred to the committee for the district in which such person actually resided at the time of his application to take the bar examination or to dispense with such examination, as the case may be. Every application for admission to practice, which is

made on motion without the taking of such examination, pursuant to the provisions of paragraph b of subdivision one of section ninety of the judiciary law] by a person already admitted to practice in another jurisdiction *who is applying for admission on motion without taking the regular bar examination, as the case may be,* shall be referred to the committee for the *appropriate judicial* district [in which such person actually resided at the time of such application], *as hereinafter defined. The appropriate judicial district, for the purposes of this rule, shall be the district in which, as shown by the proof submitted by him, the applicant resides, or if he is not a resident of this state, in which he is employed full time or intends to have an office for the practice of law upon being admitted to practice in this state.*

CPLR Rule 9403(1) Proposed Change

It is recommended that paragraph 1 of rule 9403 be amended to read substantially as follows:

1. that the applicant, since he applied to take the bar examination or to dispense with such examination or since he applied on motion to be admitted to practice, has changed his [actual] residence, *or if he is not a resident, has changed his place of full time employment or the place where he intends to practice law,* to such other judicial district in the same or other department; or

CPLR Rule 9404 Proposed Change

It is recommended that rule 9404 be amended to strike the word "actual" which precedes the word "residence."

CPLR Rule 9406(2) Proposed Change

It is recommended that paragraph 2 of rule 9406 be amended to read substantially as follows:

2. that he [has been an actual] *is* a resident of the state of New York [for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice;] *or if he is not a resident, that he is employed full time therein or intends to have an office for the practice of law in this state upon being admitted to practice therein;* and

PART V — Topics for Future Study and Review

In addition to the recommendations by the Committee with

respect to the subjects of attachment, replevin and receivership, which as previously mentioned, have been deferred for another year pending clarification of the underlying constitutional problems by the United States Supreme Court, the Committee intends to initiate or to continue study in the following areas:

1. *Study on the Adequacy of Costs in Litigation.* This study was published in the *Sixteenth Annual Report of the Judicial Conference.* p. 246 (1971) and concluded that the present provisions in Articles 81, 82 and 83 are inadequate and that the most reasonable way to restore them to their proper function is to award reasonable attorneys' fees as a percentage of the amount in controversy.

2. Pursuant to a study which appeared in the *Twelfth Annual Report of the Judicial Conference*, p. 128 (1967) an Appendix of Official Forms of the Judicial Conference was promulgated and became effective September 1, 1968. In the meantime, suggestions for adding to and amending this illustrative Appendix have been received. Some of the present forms should be updated. The Committee recommends that a study be commissioned to review the present forms, now more than seven years old, and to review suggestions for new forms, to enable necessary revisions and additions to be promulgated in the near future.

3. The *Study on Exemptions from Execution*, published in the *Twelfth Annual Report*, p. 205 (1967), highlighted possible new solutions to thorny problems of long-standing which the Committee intends to review in the future.

Other studies which the Advisory Committee has placed on its agenda for future action are:

1. Revision of provisions governing compulsory joinder (CPLR 1001 et seq.)
2. Revision of service-of-process procedures to include the possible replacement of personal delivery by mail service (CPLR Article 3).
3. Revision of intervention provisions (CPLR 1012-14) to conform to federal practice.
4. Revision of provisions relating to "poor persons" (CPLR Article 11).

CONCLUSION

The Committee will continue to assist the Judicial Conference in its statutory mandate to report its recommendations as to the statutory provisions of the CPLR and to adopt, amend or rescind the rules of civil practice. In its task, the Committee will continue to examine thoroughly every proposal it receives from practitioners and professors, judges and the general public, in relation to statutes, rules and the Appendix of Official Forms. In this connection, the Committee again solicits comments and suggestions from the profession and the public. All recommendations should be sent to:

Professor Adolf Homburger
Chairman
Committee to Advise and Consult with the Judicial
Conference on the CPLR
c/o The Office of Court Administration
270 Broadway
New York, New York 10007

December 5, 1975

Respectfully submitted,

Adolf Homburger, *Chairman*
John T. Frizzell
Hyman W. Gamso
Raymond W. Hackbarth
John M. Keeler
Harold A. Meriam, Jr.
John A. Murray
Maurice N. Nessen
Herbert Peterfreund
George C. Pratt
G. Robert Witmer, Jr.

1976 Proposal of the Judicial Conference of the State of New York Amendatory of the Civil Practice Law and Rules

The Judicial Conference hereby amends the Rules of the Civil Practice Law and Rules, effective September first, nineteen hundred seventy-six, by the following proposal:

Proposal Number 1.

Section 1. Rule fifty-five hundred twenty-six of the civil practice law and rules, as amended by judicial conference proposal number four of nineteen hundred sixty-eight, is hereby amended to read as follows:

Rule 5526. Content and form of record on appeal. The record on appeal from a final judgment shall consist of the notice of appeal, the judgment-roll, the corrected transcript of the proceedings or a statement pursuant to subdivision (d) of rule 5525 if a trial or hearing was held, any relevant exhibits, or copies of them, in the court of original instance, any other reviewable order, and any opinions in the case. The record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other exhibits upon which the judgment or order was founded and any opinions in the case. All printed or reproduced papers comprising the record on appeal shall be eleven inches by eight and one-half inches. *The subject matter of each page of the record shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated*

at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or recross examination shall be stated at the top of each page.

§ 2. Subdivision (c) of rule fifty-five hundred twenty-nine of such law and rules is hereby amended to read as follows:

(c) Page headings. The subject matter of each page of the appendix shall be stated at the top [including, in] *thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof.* In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross [or] redirect *or recross* examination *shall be stated at the top of each page.*

I, Richard J. Bartlett, State Administrative Judge and Secretary to the Judicial Conference of the State of New York, do hereby certify that the above Proposal was adopted by the Judicial Conference of the State of New York on January 29, 1976, pursuant to the provisions of section 229 of the Judiciary Law as added by Chapter 309 of the Laws of 1962.

Dated: January 30, 1976
New York, New York

RICHARD J. BARTLETT
STATE ADMINISTRATIVE JUDGE AND SECRETARY

FOURTH ANNUAL REPORT
TO THE JUDICIAL CONFERENCE
OF THE STATE OF NEW YORK

By the Advisory Committee on the CPL

January 9, 1975

I. INTRODUCTION

This Committee has considered a number of proposals aimed at improving the administration of criminal justice. We report here on those which we have approved and which, we suggest, should be sponsored by the Judicial Conference. Additionally, we report on a problem which led to a proposed bill which we have disapproved. We report also on the matter of discovery—one which we dealt with in far greater detail in last year's Report.

II. APPROVED BILLS

The bills which we have approved deal not only with the Criminal Procedure Law but with the Penal Law and the Civil Practice Law and Rules.

A. Criminal Procedure Law

1. *Appearance Tickets*

Under present law, a police officer may issue an appearance ticket only when the warrantless arrest has been made by a police officer. When the arrest is made by a private citizen, Criminal Procedure Law §140.40 requires that the arrested person be turned over to a police officer for prompt arraignment; that officer apparently has no authority to resort to the convenience of an appearance ticket in such a case. Moreover, present law does not permit a peace officer who has made a warrantless arrest to issue an appearance ticket.

NOTE: Unlike the report of the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules, this report is not officially transmitted to the legislature, there being no statutory basis for doing so. *Compare*, Jud. L. §229 (2). The Criminal Procedure Law Advisory Committee's report forms the basis for the Judicial Conference's proposals for legislation in the area of criminal law and procedure, but in making its proposals the Conference is free to reject and modify and has rejected and modified some of the recommendations of the Committee contained in its report. This report, therefore, should be considered the Committee's final product, but not the Judicial Conference's.

We have approved a bill which would increase the use of the appearance ticket by authorizing its issuance by a police officer into whose custody has been delivered a person arrested by a private citizen or to whom a request for such issuance has been made by a peace officer who has made a warrantless arrest.

We believe that this bill will increase the use of the appearance ticket—a device which has already proved its utility.

2. *The Defendant's Criminal Record*

We have approved a bill amending Criminal Procedure Law § § 160.40 and 530.20 so as to require the Division of Criminal Justice Services to give copies of a defendant's criminal record to the court, which must then give a copy to defense counsel or, if counsel has been waived, to the defendant himself. Concepts of fairness and of efficiency dictate that the defense have as much access to the defendant's criminal record as has the prosecution. At present, the court will surely make this information available to the defense by virtue of a recently enacted rule of the Administrative Board of the Judicial Conference. The problem, however, is that the court is not always supplied with this record. This bill should end that problem.

3. *Severance*

Under present law, a court which finds a misjoinder with respect to one or more courts of an indictment has only one course of action to take—the dismissal of the offending count or counts. The charges contained in those counts may usually, of course, be resubmitted to the same or another grand jury. If a new indictment is handed down, the result will be that the defendant will face separate trials on the two sets of charges which were originally misjoined.

The Committee is convinced that the remedy of dismissal is too drastic, and causes an unnecessary waste of the time of prosecutors, grand jurors and witnesses. The problem of misjoinder is totally solved by an order requiring the misjoined actions to be tried separately. Consequently, the Committee has approved a bill which would amend Criminal Procedure Law § § 200.20 and 210.25 so as to provide that the sole remedy for a misjoinder is an order granting separate trials.

4. *Discharge of a Grossly Unqualified Juror*

Last year, this Committee recommended and the Judicial Conference sponsored a bill dealing with the problem which arises when, during trial or jury deliberation, the court finds that a juror is, by virtue of facts unknown at the time of his or her selection, grossly unqualified to serve or has engaged in substantial misconduct *not* requiring a mistrial. Criminal Procedure Law § 270.35, to the extent that it permits, without the defendant's consent, the replacement of that juror by an alternate after deliberations have begun, is violative of the New York State Constitution. See *People v. Ryan*, 19 N.Y.2d 100

(1966). Moreover, to the extent that it requires the trial to continue with the offending juror (when no alternate is available), it is unfair.

The bill recommended and sponsored last year was passed by the Legislature, but it was vetoed by the governor because he feared that the deletion of any reference to the discharge of an unqualified juror would be interpreted as a revocation of a judge's power to do.

The bill we are recommending this year avoids the defects which the governor saw in our last proposal. It would comply with *Ryan* by requiring the defendant's consent to the substitution of an alternate juror after deliberations have commenced. It would comply with the concept of fairness by requiring the declaration of a mistrial if there were no alternate available to take the place of the juror whose continued presence on the jury would cast doubt on the fairness of any verdict.

Additionally, it would cure a defect in the present statute. As now worded, section 270.35 states that the defendant's consent to the substitution of an alternate juror is required after the jury has retired to deliberation. The *Ryan* case talks in terms of the commencement of jury deliberations. Since it is possible that the gross disqualification of a juror is discovered after the jury has "retired" to deliberate, but before actual deliberations have commenced, we think it advisable to have this statute track the words of the Court of Appeals rather than make it possible for the statute to apply even though actual deliberations have not yet begun.

5. *Bail Pending Appeal in Class A Felonies*

Under present law, the court lacks power to release upon bail or recognizance any defendant convicted, by plea or verdict, of a Class A felony. No matter how likely a reversal and no matter how compelling is the defendant's argument for continued liberty pending appeal, to jail he must go.

Here, as elsewhere, the Committee deplores a statute which deprives a judge of an opportunity to use his reasoned discretion to assure that justice is done in the particular case before him. Consequently, we have approved a bill which would amend Criminal Procedure Law §§530.40, 530.45 and 530.50 so as to remove the prohibition against the court releasing on bail or recognizance a defendant who has been convicted of a Class A felony. As a safeguard against potential abuse, the statute requires the court to place on the record a recitation of the facts which caused him to find that a "compelling factor" or some "exigent circumstance" justifies the defendant's release.

6. *Pre-Trial Motions: Notice to Defendant*

Last year, after recommendation by this Committee and sponsorship by the Judicial Conference, the Legislature passed and the governor signed an Omnibus Pre-Trial Motion bill which

should effectuate the concept that all pre-trial motions should promptly be made at the same time before the same judge. Present law, however, does not require the prosecutor to notify the defendant of the existence of certain facts which might be made the basis of a pre-trial defense motion. If the People intend to offer against the defendant statements made by him or testimony identifying him as the perpetrator of the crime, or evidence obtained by eavesdrop, they need not so advise him until shortly before trial. Once so advised, the defendant may well wish to move to suppress such evidence, and his lack of prior knowledge of the evidence would justify the making of a motion on the eve of trial. A disruption of the orderly pace of the proceedings may result.

To effectuate the purpose of the Omnibus Pre-Trial Motion law, we have approved a bill which would require the prosecutor to notify the defendant, within fifteen days of arraignment, of his intention to offer such evidence. To assure that the defendant has ample time to respond, the bill provides that the defendant's forty-five day period within which to make motions does not begin to run until he has received that notice. A prosecutor's failure to provide timely notice is excusable only when he can justify that failure to the court.

7. *Scope of Suppression in Identification Cases*

A prosecutor who intends to offer against a defendant evidence identifying him as the perpetrator of the crime charged must so notify the defendant in advance of trial in order to give the defendant an opportunity to move to suppress the evidence. Neither the statute setting forth the procedure for the making of a motion to suppress nor the statute requiring such notice applies where a circumstantial identification is involved—e.g., an identification of the defendant as having previously possessed the instruments of the crime, as having subsequently possessed the fruits, or as being perpetrator of a prior crime evidence of which is admissible under the reasoning of cases such as *People v. Molineux*, 168 N.Y. 264 (1901). Under the Supreme Court cases defining the right to suppress tainted identifications, the defendant would have the constitutional right to seek to suppress all such identification evidence; thus it seems clear to us that he is entitled to notice of the prosecutor's intent to offer evidence of that sort and to employ the suppression procedures provided in Article 710.

B. Penal Law

1. *Bribery and Bribe Receiving*

A careful analysis of a number of sections of the Penal Law dealing with bribery and bribe receiving has revealed unintended technical defects which should be corrected, lest they create problems where none should exist.

a. *Bribery*

A number of sections proscribing bribery of various sorts

(i.e., Penal Law §§200.00, 200.04, 200.45, 215.00 and 215.15) state, as an element of the crime, that the benefit must have been conferred "upon an agreement or understanding" that the recipient would be influenced in some way. No problem exists where both giver and receiver are guilty, since there would then exist an "agreement or understanding." Where the offer of a bribe is rejected, however, there has been no such "agreement or understanding" and the offeror of the bribe could conceivably argue that, in the absence of such "agreement or understanding," he had committed no crime. Surely the Legislature intended no such result.

The bill we have approved would cure this technical defect by amending the sections involved to make it clear that the crime of bribery is committed when the offer is made with the intent to influence the prospective recipient of the benefit, regardless of whether the offer is accepted or rejected.

b. *Bribe Receiving*

A similar defect may be found in the related bribe-receiving statutes (i.e., Penal Law §§180.05, 180.25, 200.10, 200.12, 200.50, 215.05 and 215.20). The Legislature obviously intended to penalize a person who solicited a bribe, even if the solicitation were rebuffed. Yet here, as well, the phrase "upon an agreement or understanding" appears, with the same possibility of creating doubts where none should exist.

The bill would cure this defect by amending the appropriate sections so as to make clear that the crime is committed when he who solicits the bribe does so through a "representation" that he will thereby be influenced, regardless of the outcome of his solicitation.

C. Civil Practice Law and Rules

1. *Habeas Corpus: Place off Hearing*

When an inmate in a state prison petitions a court for a writ of habeas corpus, his claim may very well involve a defect in the proceedings which led up to the judgment of conviction. The court which issues the writ—located in the county of incarceration—may decide that a full hearing is required to resolve the issues. It may be most inconvenient, however, to hold the hearing in a court so far removed from the record of the trial, the witnesses and the prosecutor who best knows the case.

We have approved a bill which would amend Civil Practice Law and Rules §7004 by providing that if the judge who issues the writ in the county of incarceration concludes that the court in which the judgment was rendered is a more convenient forum for a hearing upon the writ, he may direct that the writ be returnable in the court in which judgment was rendered. We believe that this revision will expedite the resolution of the issues raised by the inmate in a far more convenient fashion than the present statute.

III. WITNESSES' COURT APPEARANCES

A serious problem exists in some courts where witnesses whose testimony is required for a hearing must make repeated trips to court only to find, often after waiting long periods of time, that the case must be adjourned. At best, this represents an inconvenience to the witness; at worst, the witness may lose certain wages and may even become so discouraged as to withdraw his complaint or simply fail ever to appear in court again.

The Committee reviewed a proposed bill which would have provided that, under certain circumstances, certain kinds of witnesses need not appear at a hearing and be subject to cross examination. This bill would have solved the problem to which we have just referred.

Because the proposed bill presented serious other problems, however, the Committee declined to approve it. The absence of the right to confront the witness was, the Commitee felt, too drastic a solution to the obvious problem involved.

The Committee believes it essential that some steps be taken to alleviate the problem caused by repeated and unnecessary trips to court by witnesses in criminal cases. The Committee will continue to look into this matter in an effort to alleviate the problem while at the same time protecting the rights of the accused.

IV. THE DISCOVERY BILL

Last year, the Committee's discovery bill was sponsored by the Judicial Conference solely as a Study Bill. We believe that the time is right for the bill to be sponsored in an effort to obtain its enactment. To that end, this Committee will make various of its members available to argue on behalf of the bill before whatever bodies, official or unofficial, are concerned about its merits. It may be that the bill will fail of passage this year, but we believe that it is one that should eventually be adopted and we will take whatever steps may be necessary to accomplish its ultimate enactment.

V. CONCLUSION

The Committee expresses its appreciation to the Judicial Conference for its continued support. As usual, we remain available to receive and consider suggestions as to how the administration of criminal justice in this State may be improved.

Respectfully submitted,

The Advisory Committee on the CPL

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Hon. Richard G. Denzer
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AN ACT

To amend the criminal procedure law, in relation to the issuance of appearance tickets to defendants arrested by persons other than police officers.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 140.27 of the criminal procedure law, as added by chapter nine hundred ninety-seven of the laws of nineteen hundred seventy, is hereby amended by adding thereto a new subdivision, to be subdivision four, to read as follows:

4. If the arrest is for an offense other than a felony, the arrested person need not be brought before a local criminal court as provided in subdivision two, and the procedure may instead be as follows:

(a) The arresting peace officer, where he is specially authorized by law to issue and serve an appearance ticket, may issue and serve an appearance ticket upon the arrested person and release him from custody; or

(b) The arresting peace officer, where he is not specially authorized by law to issue and serve an appearance ticket, may enlist the aid of a police officer and request that such officer issue and serve an appearance ticket upon the arrested person, and upon such issuance and service the latter must be released from custody.

§2. Section 140.40 of such law as last amended by chapter seven hundred sixty-two of the laws of nineteen hundred seventy-one is hereby amended to read as follows:

§140.40 Arrest without a warrant; by person acting other than as a peace officer; procedure after arrest

1. A person making an arrest pursuant to section 140.30 must without unnecessary delay deliver or attempt to deliver the person arrested to the custody of an appropriate police officer, as defined in subdivision [four] *five*. For such purpose, he may solicit the aid of any police officer and the latter, if he is not himself an appropriate police officer, must assist in delivering the arrested person to an appropriate officer. If the arrest is for a felony, the appropriate police officer must, upon receiving custody of the arrested person, perform all recording, fingerprint and other preliminary police duties required in the particular case. In any case, the appropriate police officer, upon receiving custody of the arrested person, except as otherwise provided in [subdivision] *subdivisions* two *and three*, must bring him, on behalf of the arresting person, before an appropriate local criminal court, as defined in subdivision [four] *five*, and the arresting person must without unnecessary delay file an appropriate accusatory instrument with such court.

Matter to be deleted is in [brackets]; matter in *italics* is new.

2. If (a) the arrest is for an offense other than a felony and (b) owing to unavailability of a local criminal court the appropriate police officer having custody of the arrested person is unable to bring him before such a court with reasonable promptness, the arrested person must be dealt with in the manner prescribed in subdivision three of section 140.20, as if he had been arrested by a police officer.

3. *If the arrest is for an offense other than a felony, the arrested person need not be brought before a local criminal court, as provided in subdivision one, and the procedure may instead be as follows:*

(a) An appropriate police officer may issue and serve an appearance ticket upon the arrested person and release him from custody, as prescribed in subdivision two of section 150.20; or

(b) The desk officer in charge at the appropriate police officer's station, county jail or police headquarters, or any of his superior officers, may, in such place, fix prearraignment bail and, upon deposit thereof, issue and serve an appearance ticket upon the arrested person and release him from custody, as prescribed in section 150.30.

4. Notwithstanding any other provision of this section, a police officer is not required to take an arrested person into custody or to take any other action prescribed in this section on behalf of the arresting person if he has reasonable cause to believe that the arrested person did not commit the alleged offense or that the arrest was otherwise unauthorized.

[4.] *5.* As used in this section:

(a) An "appropriate police officer" means one who would himself be authorized to make the arrest in question as a police officer pursuant to section 140.10;

(b) An "appropriate local criminal court" means one with which an accusatory instrument charging the offense in question may properly be filed pursuant to the provisions of section 100.55.

§3. Subdivision two of section 150.20 of such law, as amended by chapter six hundred sixty-one of the laws of nineteen hundred seventy-two, is hereby amended to read as follows:

2. *(a)* Whenever a police officer has arrested a person without a warrant for an offense other than a felony pursuant to section 140.10, [he] *or (b) whenever a peace officer, who is not authorized by law to issue an appearance ticket, has arrested a person for an offense other than a felony pursuant to section 140.25, and has requested a police officer to issue and serve upon such arrested person an appearance ticket pursuant to subdivision four of section 140.27, or (c) whenever a person has been arrested for an offense other than a felony and has been delivered to the custody of an appropriate police officer pursuant to section 140.40, such police officer* may, instead of bringing such person before a local criminal court and promptly filing *or causing the arresting peace officer or arresting person to file* an information, simplified information, or misdemeanor complaint therewith, issue to and serve upon such person an appearance ticket. The issuance and service of an appearance ticket under such circumstances may be conditioned upon a deposit of pre-arraignment bail, as provided in section 150.30.

§4. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

AN ACT

To amend the criminal procedure law, in relation to the transmission of the report of the defendant's criminal record

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Matter to be deleted is in [brackets]; matter in *italics* is new.

Section 1. Section 160.40 of the criminal procedure law, as amended by chapter three hundred ninety-nine of the laws of nineteeen hundred seventy-two, is hereby amended to read as follows:

§160.40 Fingerprinting; transmission [to district attorney] of report received by police.

1. Upon receipt of a report of the division of criminal justice services as provided in section 160.30, the recipient police officer or agency must promptly transmit such report or a copy thereof to the district attorney of the county *and two copies thereof to the court in which the action is pending.*

2. Upon receipt of such report the court shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.

§2. Section 530.20 of the criminal procedure law, as amended by chapter three hundred ninety-nine and chapter six hundred sixty-one of the laws of nineteen hundred seventy-two, is hereby amended to read as follows:

§530.20. Order of recognizance or bail; by local criminal court when action is pending therein.

When a criminal action is pending in a local criminal court, such court, upon application of a defendant, must or may order recognizance or bail as follows:

1. When the defendant is charged by information, simplified information, prosecutor's information or misdemeanor complaint, with an offense or offenses of less than felony grade only, the court must order recognizance or bail.

2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order recognizance or bail except as otherwise provided in this subdivision.

(a) A city court, a town court or a village court may not order recognizance or bail when (i) the defendant is charged with a class A felony, or (ii) it appears that the defendant has two felony convictions;

(b) No local criminal court may order recognizance or bail with respect to a defendant charged with a felony unless and until:

(i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so; and

(ii) The court has been furnished with a report of the division of criminal justice services concerning the defendant's criminal record if any or with a police department record with respect to the defendant's prior arrest record. *When the court has been furnished with such police department report, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.*

§3. This act shall take effect thirty days after it shall have become a law.

AN ACT

To amend the criminal procedure law to require severance of misjoined counts.

Section 1. Subdivision three of section 200.20 of the criminal procedure law is hereby amended to read as follows:

Matter to be deleted is in [brackets]; matter in *italics* is new.

3. [In any case where] *The court may order that one or more counts of an indictment be tried separately from one or more other counts thereof under the following circumstances:*

(a) Where two or more offenses or groups of offenses charged in an indictment are based upon different criminal transactions, and where their joinability rests solely upon the fact that such offenses, or as the case may be at least one offense of each group, are the same or similar in law, as prescribed in paragraph (c) of subdivision two, the court, in the interest of justice and for good cause shown, may, upon application of either a defendant or the people, in its discretion order that any one of such offenses or groups of offenses be tried separately from the other or others, or that two or more thereof be tried together but separately from two or more others thereof.

(b) Where an indictment is defective, within the meaning of subdivision one of section 210.25, by reason of a misjoinder of counts, the court must, upon application of either the defendant or the people, order that any misjoined count or group of counts be tried separately from the other count or counts of the indictment with which it or they are improperly joined.

§2. Section 210.25 of the criminal procedure law is hereby amended to read as follows:

§210.25 Motion to dismiss indictment; as defective

An indictment or a count thereof is defective within the meaning of paragraph (a) of subdivision one of section 210.20 when:

1. It does not substantially conform to the requirements stated in article two hundred; provided that an indictment may not be dismissed as defective [, but must instead be amended] where *(a) the defect consists of a misjoinder of counts pursuant to section 200.20 but in such case, separate trials must be ordered pursuant to paragraph (b) of subdivision 3 of said section 200.20; or*

(b) the defect or irregularity is of a kind that may be cured by amendment, pursuant to section 200.70, and people move to so amend *but in such case, the indictment must be amended instead of dismissed;* or

2. The allegations demonstrate that the court does not have jurisdiction of the offense charged; or

3. The statute defining the offense charged is unconstitutional or otherwise invalid.

§3. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

AN ACT

To amend the criminal procedure law, in relation to discharge and replacement of a trial juror.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 270.35 of the criminal procedure law is hereby amended to read as follows:

§270.35 Trial jury; discharge of juror; replacement by alternate juror

[1.] If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, or for any other reason in unavailable for

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Matter to be deleted is in [brackets]; matter in *italics* is new.

continued service, *or the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial,* the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has [retired to deliberate] *begun its deliberations,* the defendant must consent to such replacement. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court. If no alternate juror is available, the court must declare a mistrial pursuant to subdivision three of section 280.10.

[2. If at any time after the trial jury has been sworn and before its rendition of a verdict the court is satisfied, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case, or that a juror has engaged in misconduct of a substantial nature but not of a kind to require the declaration of a mistrial pursuant to subdivisions one and two of section 280.10, the court may, if an alternate juror or jurors are available for service, discharge such trial juror and order that he be replaced by the alternate juror whose name was first drawn and called. If no alternate juror is available, such trial juror may not be discharged, and the trial must proceed.]

§2. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

AN ACT

To amend the criminal procedure law, in relation to bail or recognizance after conviction of a class A felony.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision three of section 530.40 of the criminal procedure law is hereby amended to read as follows:

3. Notwithstanding the provisions of subdivision two, a superior court may not order recognizance or bail, or permit a defendant to remain at liberty pursuant to an existing order, after he has been convicted of a class A felony [, but must commit or remand the defendant to the custody of the sheriff] *unless the issuance of such order is required by the existence of some compelling factor or exigent circumstance that clearly demonstrates the need for such action and the court sets forth its reasons therefor upon the record.*

§2. Subdivision one of section 530.45 of such law as added by chapter four hundred thirty-five of the laws of nineteen hundred seventy-four is hereby amended to read as follows:

1. When the defendant is at liberty in the course of a criminal action as a result of a prior order of recognizance or bail and the court revokes such order and then either fixes no bail or fixes bail in a greater amount or in a more burdensome form than was previously fixed and remands or commits defendant to the custody of the sheriff, a judge designated in subdivision two, upon application of the defendant following conviction of an offense [other than a class A felony] and before sentencing, may issue a securing order and either release defendant on his own recognizance, or fix bail, or fix bail in a lesser amount or in a less burdensome form than fixed by the court in which the conviction was entered; *provided however that where defendant has been convicted of a class A felony, the judge may take such action only where it is required by the existence of some compelling factor or exigent circumstance that clearly demonstrates the need for such action and the judge sets forth his reasons therefor upon the record.*

§3. Section 530.50 of such law is hereby amended to read as follows:

Matter to be deleted is in [brackets]; matter in *italics* is new.

530.60 Order of recognizance or bail during pendancy of appeal. A judge who is otherwise authorized pursuant to section 460.50 or section 460.60 to issue an order of recognizance or bail pending the determination of an appeal, may do so [unless] *except that where* the defendant received a class A felony sentence *the judge may issue such order only where it is required by the existence of some compelling factor or exigent circumstance that clearly demonstrates the need for such action and the judge sets forth his reasons therefor upon the record.*

§4. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

AN ACT

To amend the criminal procedure law to effect prompt disposition of pre-trial motions to suppress evidence.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision one of section 255.20 of the criminal procedure law as added by chapter seven hundred sixty-three of the laws of nineteen hundred seventy-four is hereby amended to read as follows:

§255.20 Pre-trial motions; procedure

1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be made within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment. *In an action in which an eavesdropping warrant and application have been furnished pursuant to section 700.70 or a notice of intention to introduce evidence has been served pursuant to section 710.30, such period shall be extended until forty-five days after the last date of such service.* If the defendant is not represented by counsel and has requested an adjournment to obtain counsel or to have counsel assigned, such forty-five day period shall commence on the date counsel initially appears on defendant's behalf.

§2. Section 700.70 of such law is hereby amended to read as follows:

Sec. 700.70. Eavesdropping warrants; notice before use of evidence

The contents of any intercepted communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the people, [not less than ten days] *within fifteen days after arraignment and* before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant, and accompanying application, under which interception was authorized or approved. This [ten-day] period may be waived by the trial court if it finds that it was not possible to *so* furnish the defendant with such papers [ten days before the trial] and that the defendant will not be prejudiced by the delay in receiving such papers.

§3. Section 710.30 of the criminal procedure law is hereby amended to read as follows:

§710.30 Motion to suppress evidence; notice to defendant of intention to offer evidence

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressable upon motion pursuant to subdivision three of section 710.20, or (b) testimony identifying a defendant as a person who committed the offense charged, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

Matter to be deleted is in [brackets]; matter in *italics* is new.

2. Such notice must be served *within fifteen days after arraignment and before* trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice [during trial], *thereafter* and in such case it must accord the defendant reasonable opportunity *thereafter* to make a suppression motion [during trial pursuant to subdivision two of section 710.40].

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissable as prescribed in subdivision two of section 710.70.

§4. Subdivision 2 of section 710.40 of said law is hereby amended to read as follows:

2. The motion may be made for the first time [during trial] when, owing to [previous] unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion [before trial] *previously*, or when the evidence which he seeks to suppress is of a kind specified in section 710.30 and he was not served by the people, as provided in said section 710.30, with a pre-trial notice of intention to offer such evidence at the trial.

§5. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

AN ACT

To amend the criminal procedure law with respect to motions to suppress potential testimony identifying the defendant.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 710.20 of the criminal procedure law is hereby amended to read as follows:

§710.20. Motion to suppress evidence; in general; grounds for

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant; or

2. Consists of a record or potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping, obtained under circumstances precluding admissibility thereof in a criminal action against such defendant; or

3. Consists of a record or potential testimony reciting or describing a statement of such defendant involuntarily made, within the meaning of section 60.45, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him; or

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two and three; or

5. Consists of potential testimony [identifying the defendant as a person who committed the offense charged] *regarding an observation of the person claimed by the people to be the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case*, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness.

Matter to be deleted is in [brackets]; matter in *italics* is new.

§2. Section 710.30 of the criminal procedure law is hereby amended to read as follows:

§710.30. Motion to suppress evidence; notice to defendant of intention to offer evidence

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony [identifying a defendant as a person who committed the offense charged] *regarding an observation of the person claimed by the people to be the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case*, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

2. Such notice must be served before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice during trial, and in such case it must accord the defendant reasonable opportunity to make a suppression motion during trial pursuant to subdivision two of section 710.40.

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissable as prescribed in subdivision two of section 710.70.

§3. This act shall take effect immediately.

AN ACT

To amend the penal law with respect to bribery and related offenses.

Section 1. Section 180.05 of the penal law, is hereby amended to read as follows:

§180.05 Commercial bribe receiving

[An employee, agent or fiduciary] *A person* is guilty of commercial bribe receiving when, [without] *being an employee, agent or fiduciary, and not having* the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon [an] *a representation*, agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

Commercial bribe receiving is a class B misdemeanor.

§2. Section 180.25 of said law is hereby amended to read as follows:

§180.25 Bribe receiving by a labor official

A [labor official] *person* is guilty of bribe receiving by a labor official when, *being a labor offical*, he solicits, accepts or agrees to accept any benefit from another person upon [an] *a representation*, agreement or understanding that [such benefit will influence him] *he will or may thereby be influenced* in respect to any of his acts, decisions or duties as such labor official.

Bribe receiving by a labor official is a class D felony.

§3. Section 200.00 of said law as amended by chapter two hundred seventy-six of the laws of nineteen hundred seventy-three, is hereby amended to read as follows:

Matter to be deleted is in [brackets]; matter in *italics* is new.

§200.00 Bribery in the second degree

A person is guilty of bribery in the second degree when, *with intent to influence a public servant with respect to any vote, opinion, judgment, action, decision or exercise of discretion as such public servant,* he confers, or offers or agrees to confer, any benefit upon [a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced] *him.*

Bribery in the second degree is a class D felony.

§4. Section 200.04 of said law as added by chapter two hundred seventy-six of the laws of 1973 is hereby amended to read as follows:

§200.04 Bribery in the first degree

A person is guilty of bribery in the first degree when, *with intent to influence a public servant with respect to any vote, opinion, judgment, action, decision or exercise of discretion as such public servant in the investigation, arrest, detention, prosectuion, or incarceration of any person for the commission or alleged commission of a class A felony defined in article two hundred twenty of the penal law or an attempt to commit any such class A felony,* he confers, or offers or agrees to confer, any benefit upon [a] *such* public servant [upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced in the investigation, arrest, detention, prosecution, or incarceration for the commission or alleged commission of a class A felony defined in article two hundred twenty of the penal law or an attempt to commit any such class A felony].

Bribery in the first degree is a class B felony.

§5. Section 200.10 of said law as amended by chapter two hundred seventy-six of the laws of nineteen seventy-three is hereby amended to read as follows:

§200.10 Bribe receiving in the second degree

A [public servant] *person* is guilty of bribe receiving in the second degree when, *being a public servant,* he solicits, accepts or agrees to accept [any] *a* benefit from another person upon [an] *a representation,* agreement or understanding that [his vote, opinion, judgment, action, decision or exercise of discretion as a public servant] *he* will *or may* thereby be influenced *in respect to any vote, opinion, judgment, act, decision or exercise of discretion as such public servant.*

Bribe receiving in the second degree is a class D felony.

§6. Section 200.12 of said law as amended by chapter two hundred seventy-six of the laws of nineteen seventy-three is hereby amended to read as follows:

§200.12 Bribe receiving in the first degree

A [public servant] *person* is guilty of bribe receiving in the first degree when, *being a public servant,* he solicits, accepts or agrees to accept [any] *a* benefit from another person upon [an] *a representation,* agreement or understanding that [his vote, opinion, judgment, action, decision or exercise of discretion as a public servant] *he* will *or may* thereby be influenced *in respect to any vote, opinion, judgment, action, decision, or exercise of discretion as such public servant* in the investigation, arrest, detention, prosecution or incarceration of any person for the commission or alleged commission of a class A felony defined in article two hundred twenty of the penal law or an attempt to commit any such class A felony.

Bribe receiving in the first degree is a class B felony.

§7. Section 200.45 of said law is hereby amended to read as follows:

Matter to be deleted is in [brackets]; matter in *italics* is new.

§200.45 Bribe giving for public office

A person is guilty of bribe giving for public office when, *with intent to achieve, promote or advance the appointment of a person to public office, or the designation or nomination of a person as a candidate for public office*, he confers, or offers or agrees to confer, any money or other property upon a public servant or a party officer [upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office].

Bribe giving for public office is a class D felony.

§8. Section 200.50 of said law is hereby amended to read as follows:

§200.50 Bribe receiving for public office

A [public servant or a party officer] *person* is guilty of bribe receiving for public office when, *being a public servant or a party officer*, he solicits, accepts or agrees to accept any money or other property from another person upon [an] *a representation*, agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office.

Bribe receiving for public office is a class D felony.

§9. Section 215.00 of said law is hereby amended to read as follows:

§215.00 Bribing a witness

A person is guilty of bribing a witness when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness in any action or proceeding [upon an agreement or understanding] *with intent* that (a) the testimony of such witness or person will thereby be influenced, or (b) such witness *or person* will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

Bribing a witness is a class D felony.

§10. Section 215.05 of said law is hereby amended to read as follows:

§215.05 Bribe receiving by a witness

A [witness or a person about to be called as a witness in any action or proceeding] *person* is guilty of bribe receiving by a witness when, *being a witness or about to be called as a witness in an action or proceeding*, he solicits, accepts or agrees to accept any benefit from another person upon [an] *a representation*, agreement or understanding that (a) his testimony will *or may* thereby be influenced, or (b) he will *or may* absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

Bribe receiving by a witness is a class D felony.

Section 11. Section 215.15 of said law is hereby amended to read as follows:

§215.15 Bribing a juror

A person is guilty of bribing a juror when he confers, or offers or agrees to confer, any benefit upon a juror [upon an agreement or understanding] *with intent* that such juror's vote, opinion, judgment, decision or other action as a juror will thereby be influenced.

Bribing a juror is a class D felony.

§12. Section 215.20 of said law is hereby amended to read as follows:

§215.20 Bribe receiving by a juror

A [juror] *person* is guilty of bribe receiving by a juror when, *being a juror*, he solicits, accepts or agrees to accept a benefit from another person

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Matter to be deleted is in [brackets]; matter in *italics* is new.

upon [an] *a representation,* agreement or understanding that his vote, opinion, judgment, decision or other action as a juror will *or may* thereby be influenced.

Bribe receiving by a juror is a class D felony.

§13. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

AN ACT

To amend the civil practice law and rules with respect to habeas corpus petitions brought to challenge judgments of conviction.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 7004 of the civil practice law and rules, as last amended by chapter three hundred eighty-eight of the laws of nineteen hundred sixty-four, is hereby amended to read as follows:

§7004. Content of writ

(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.

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

(c) Before whom returnable. [A] *Except as hereafter provided, 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 being or residing within the county in which the person is detained; if there is no such judge it shall be made returnable before the nearest accessible supreme court justice or county judge. *If the petition is brought to challenge detention pursuant to a judgment of conviction, and it appears that the court in which the judgment was rendered is a more convenient forum for a hearing upon the writ, the court which issues the writ may direct that it be returnable in the court in which the judgment was rendered.* 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.

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

(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.

§2. This act shall take effect thirty days after it shall have become a law.

AN ACT

To amend the criminal procedure law, in relation to establishing a new discovery procedure.

Section one. Article two hundred forty of the criminal procedure law is hereby REPEALED.

§2. Such law is hereby amended by adding thereto a new article, to be article two hundred forty, to read as follows:

Matter to be deleted is in [brackets]; matter in *italics* is new.

ARTICLE 240
DISCOVERY

§240.10 Discovery; definition of terms.

As used in this article, the following terms have the following meanings:

1. "Demand to produce" means a written demand served on the other party to a criminal action without leave of the court, giving the other party notice of the time at which the demanding party wishes to inspect the property, specified in such demand.

2. "Order of discovery" means an order of a court in which a criminal action is pending, issued upon motion of a party thereto, directing the adverse party to permit such moving party to inspect property, and to copy or photograph or test it or to take the deposition of any person other than the defendant.

3. "Protective order" means an order of a court in which a criminal action is pending, issued upon motion of a party thereto or a witness or on the court's own initiative, denying, limiting, conditioning or regulating discovery proceedings conducted under this article.

4. "Property" means any tangible, personal or real property, such as books, records, reports, memoranda, papers, photographs, tapes or other electronic recordings, articles of clothing, fingerprints, blood samples, fingernail scrapings or handwriting specimens.

5. "Exempt property" means (a) reports, memoranda or other internal documents or work papers made by the prosecutor, police officers or other law enforcement agents or by a defendant or his attorneys or agents, in connection with the preparation of the prosecution or defense of a criminal action; and

(b) documents or reports pertaining to the identity of an informant, whose identity is a prosecution secret, the failure to disclose which will not infringe upon the rights of the defendant.

§240.20 Discovery; by the defendant.

Except as otherwise provided in this article, the prosecutor, upon service of a demand to produce by a defendant against whom an indictment or information is pending, shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property:

1. A record of testimony given by such defendant before the grand jury which filed the indictment or which directed the prosecutor to file an information;

2. A written or recorded statement or a report of an oral statement made by the defendant to a public official engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him, which statement is within the possession, custody or control of the prosecutor, or is known by him to exist or should by the exercise of due diligence on his part be known to him to exist;

3. A record of testimony before the grand jury which filed the indictment or which directed the prosecutor to file an information given by those persons whom the prosecutor intends to call as witnesses at the trial;

4. A record or memorandum containing reports of oral statements made by persons whom the prosecutor intends to call as witnesses at the trial;

5. Any written reports and documents or copies or portions thereof, concerning physical or mental examinations or scientific tests and experiments made in connection with the action which are within the possession, custody or control of the prosecutor, the existence of which is known, or by the exercise of due diligence should be known, to such prosecutor;

6. Any books, papers, documents, photographs or other property which were obtained from or belong to the defendant but which are in the possession, custody or control of the prosecutor;

7. Any electronically recorded conversations or transcripts thereof obtained pursuant to article 700 containing intercepted communications which the prosecutor intends to introduce as evidence at the trial;

8. Any record of prior criminal convictions of persons whom the prosecutor intends to call as witnesses at the trial;

9. Any written reports, official forms, documents or other writings made by any police or other public officer in connection with the official investigation leading to the pending indictment or information provided such is not exempt property as defined in subdivision 5 of section 240.10. The prosecutor shall make diligent good faith efforts to cause such materials to be made available to defense counsel where they are not within the prosecutor's possession or control.

§240.30 Discovery; by prosecutor.

Subject to constitutional limitations and except as otherwise provided in this article, upon service of a demand to produce by the prosecutor, the defendant shall disclose and make available for inspection, copying, photographing or testing by the prosecutor, the following materials within the possession, custody or control of the defendant.

1. Any written reports, photographs, drawings, statements, documents or copies or portions thereof, concerning physical or mental examinations or scientific tests and experiments made in connection with the action, which the defendant intends to introduce as evidence or use for impeachment purposes at the trial;

2. Any written record or statement, affidavit, memorandum or other writing containing reports of oral statements made by those persons, other than the defendant, whom the defendant intends to call as witnesses at the trial;

3. Any books, papers, documents, photographs, writings or other property which the defendant intends to introduce as evidence or use for impeachment purposes at the trial.

§240.40 Discovery; when discretionary.

1. Upon motion of a defendant against whom an indictment or information is pending, the court may issue an order of discovery with respect to any other property designated by the defendant, except exempt property or property required to be disclosed pursuant to the provisions of section 240.20 which is in the possession, custody or control of the prosecutor, and may order the taking of the deposition upon oral questions of witnesses within the state, or upon written questions of witnesses without the state. Such an order may be issued only upon a showing by the defendant that (a) discovery with respect to such property or deposition upon oral or written questions is material to the preparation of the defense, and (b) the request is reasonable;

2. Upon motion of the prosecutor showing that discovery with respect to such property is material to the preparation of his case and that the request is reasonable, and subject to constitutional limitations, the court

may issue an order of discovery with respect to property designated by the prosecutor, except exempt property or material required to be disclosed pursuant to the provisions of section 240.30 of this article, or may require the defendant to:

(a) Appear in a line-up;
(b) Speak for identification by witnesses to an offense;
(c) Be fingerprinted;
(d) Pose for photographs not involving reenactment of an event;
(e) Permit the taking of samples of blood, hair or other materials from his body, provided such does not involve an unreasonable intrusion thereof;
(f) Provide specimens of his handwriting;
g) Submit to a reasonable physical or medical inspection of his body.

§240.50 Discovery; protective orders.

1. The court may at any time on its own initiative, or on motion of either the defendant, the prosecutor or a witness, issue a protective order denying, limiting, conditioning or regulating discovery under this article;

2. Service of a notice of motion for a protective order shall suspend discovery of the particular matter or property in dispute;

3. Upon application of any party, or witness opposing a motion for discovery or seeking a protective order, the court may permit such party or witness to present his argument wholly or partly in the form of a written statement to be inspected by the court in camera. In that case, such statements must be sealed and preserved in the records of the court. Upon an appeal from an ensuing judgment of conviction in the action, such statement constitutes a part of the record to the extent that it must be made available to the appellate court for inspection;

4. The court may deny discovery authorized by this article if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal or unnecessary annoyance or embarrassment which outweighs the usefulness of the discovery to the defendant or the prosecutor;

5. The court may require that any property or copies or photographs thereof furnished to the defendant or the prosecutor pursuant to this article be maintained in the exclusive custody of that party and be used only for the purpose of assisting in the preparation or conduct of the action, and be returned immediately thereafter or be held subject to such other terms and conditions as the court may provide.

§240.60 Discovery; continuing duty to disclose.

If, after complying with the provisions of this article or an order pursuant thereto, a party finds, either before or during trial, additional property which is subject to discovery or covered by such order, he must promptly notify the other party or the court of the existence thereof.

§240.70 Discovery; sanctions.

If, during the course of discovery proceedings, the court finds that a party has failed to comply with any of the provisions of this article, the court may order such party to permit discovery of the property not previously disclosed, grant a continuance, prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action.

§240.80 Discovery; procedure.

1. Except as otherwise provided by this article or by the criminal procedure law, discovery conducted pursuant to this article shall be governed by the civil practice law and rules;

2. An appeal to an intermediate appellate court may be taken by either party to a criminal action, from an order of discovery, a protective order or other order entered by a court pursuant to this article, provided that a certificate granting leave to appeal is obtained pursuant to section 460.15.

§3. This act shall take effect on the first day of September next succeeding the day on which it shall have become a law.

NOTE. Article 240, to be REPEALED by this act, relates to discovery and is superseded by new article 240, to be inserted by this act, which relates to the same subject matter.

Chapter 7

SPECIAL STUDIES

RECOMMENDATIONS RELATING TO SECTION 50-e OF THE GENERAL MUNICIPAL LAW AND RELATED STATUTES*

by

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EDITOR'S NOTE: This study, prepared by Professor Graziano upon commission of the Office of Court Administration on the recommendation of the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules, provided the basis in large part for the statutory recommendations in this area of law submitted by the Judicial Conference to the Legislature in 1976. However, the statutory recommendations of the Judicial Conference and its CPLR Advisory Committee departed in some respects from the recommendations of Professor Graziano contained in this study. This study was submitted by Professor Graziano to the CPLR Advisory Committee on November 29, 1975.

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RECOMMENDATIONS RELATING TO SECTION 50-e OF THE GENERAL MUNICIPAL LAW AND RELATED STATUTES

Paul S. Graziano*

I. INTRODUCTION

In *Bernardine v. City of New York*[1], decided in 1945, the Court of Appeals held that the legal irresponsibility once enjoyed by the civil divisions of government had ended in 1929 with the enactment of section 12-a of the Court of Claims Act, which, in 1939, was renumbered section 8.[2] "On the waiver by the State of its own sovereign dispensation," wrote Judge (later Chief Judge) Loughran, "we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees,—even if no separate statute sanctions that enlarged liability in a given instance."[3]

That pronouncement, though not strictly necessary to the decision,[4] has ever since formed the cornerstone of tort liability of the civil divisions of the State.[5] The just-quoted words, however, were followed immediately by these: "Of course, the plaintiff in such a case must satisfy all applicable general statutory or charter requirements in the way of presentation of claims, notice of injury, notice of intent to sue and the like."[6] Those requirements were many, they were conflicting, and they were difficult to find—and they still are!

In 1943, just two years before *Bernardine*, the Judicial Council of the State of New York published a study in which it recommended the adoption of a section 50-e of the General Municipal Law to effect uniformity throughout the State as to requirements for notices of claim in actions against municipal and district corporations.[7] That recommendation, renewed in 1944,[8] resulted in the adoption of a section 50-e, effective September 1, 1945,[9] which did much to improve the situation theretofore existing but which differed in several important respects from the Judicial Council's original recommendation.[10]

There were two critical differences in the section as adopted from the section as recommended by the Judicial Council. One was that no application for leave to serve a late notice of claim could be granted if the application was made more than one year after the happening of the event upon which the claim was based. The other was that where an application for leave to serve a late notice of claim was based upon infancy or mental or physical incapacity the failure to file a timely notice (then sixty days) had to be "by reason of such disability."

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In 1959 the Law Revision Commission of the State of New York published a study in support of its recommendations to delete the one year bar from section 50-e and to restore to the courts the power they had before the enactment of section 50-e to permit late filing within a reasonable time after a disability ceased.[11] The failure to file, however, still had to be "by reason of such disability." As commendable as the Commission's recommendation appeared to be, it did not consider the impact of the short statutes of limitations governing tort actions against public corporations, statutes that might well have run against some claimants although their time to file a notice of claim had not. The recommendation was not adopted.

In 1954 the Joint Legislative Committee on Municipal Tort Liability was created "with full power to investigate and make a thorough study of municipal liability in the State of New York."[12] That Committee made several major contributions to the law[13] and yet it was frustrated in its efforts to obtain the enactment of a statute defining municipal tort liability and providing for the defense and indemnification of municipal employees.[14] The Committee published its final report in 1964.

The cudgels were picked up by the Joint Legislative Committee on Metropolitan and Regional Areas, which published a four-volume report for 1969-1971, volume four of which was, with accuracy and restraint, entitled "Municipal Tort Liability: Confining Confusion."[15] That Committee, too, attempted to obtain the enactment of a statute defining municipal tort liability and providing for the defense and indemnification of municipal employees.[16] In addition, the Committee recommended the amendment of section 50-e, not to remove the one year bar but to give the court greater discretion to grant leave to file a late notice of claim.[17] None of its recommendations became law.

The one year bar persists. So, too, does the requirement that the failure to file a timely notice (now ninety days) by an infant or a person mentally or physically incapacitated be "by reason of such disability." The courts have, it is true, taken much of the sting out of the latter requirement in the case of infant claimants, but not without much discomfort at the need to disregard plain statutory language.[18]

In the main, the courts have struggled valiantly to do justice under the existing statute, but the inflexibility of some of its major provisions has far too often proved insuperable. It is understandable, then, that the cry for reform is heard from them with increasing frequency and intensity.

II. PURPOSE AND CONSTITUTIONALITY OF NOTICE OF CLAIM PROVISIONS

A. PURPOSE

The primary purpose of notice of claim provisions as conditions precedent to the commencement of actions against public corporations, especially municipal corporations, has been variously stated by our Court of Appeals through the years. In

Curry v. City of Buffalo,[19] an action to recover damages for personal injuries resulting from a fall on a sidewalk, Chief Judge Earl, writing for a unanimous Court, put it this way:

> ". . These actions against cities are numerous, and the legislature seems to have been solicitous to protect them so far as possible against unjust or excessive claims, and also against the improvident or collusive allowance of such claims by municipal officers."[20]

In *Thomann v. City of Rochester*,[21] an action for injunctive and monetary relief, Chief Judge Cardozo stated it yet another way:

> "The requirement is strict, but not so strict as to be arbitrary. A judgment against a municipal corporation must be paid out of the public purse. Raids by the unscrupulous will multiply apace if claims may be postponed till the injury is stale. The law does not condemn as arbitrary a classification of rights and remedies that is thus rooted in the public needs . . . ."[22]

In more recent years the emphasis has been placed upon the need for efficient investigation of the claim. For example, in *Winbush v. City of Mount Vernon*,[23] an action for wrongful death and conscious pain and suffering, Judge (later Chief Judge) Desmond stated, with reference to section 50-e, that its primary purpose "is to give to a municipality prompt notice of such claims, so that investigation may be made before it is too late for investigation to be efficient . . . ."[24]

Many jurisdictions have spoken in like vein,[25] and some have ascribed still other purposes to their notice of claim statutes. For example, one federal court has said that the purpose of the Federal Tort Claims Act is to ease court congestion and avoid unnecessary litigation.[26] The highest court of another state has said that the purpose of its statute is to facilitate the planning of municipal budgets and to enable public officers to remedy defects in far-flung municipal property before other persons are injured.[27]

Whatever the purpose ascribed in the particular jurisdiction, all seem to have but one end: protection of the public purse. Is it, therefore, true that "[t]he problem of municipal tort liability [of which notice of claim statutes are so integral a part] resolves itself finally into a question of dollars and cents?"[28] Dismal though an affirmative answer to that question may be to those who believe, as does the author, that basic to American jurisprudence is the principle that liability follows fault, that does seem to be the answer. How else can one explain the immediate legislative response in so many jurisdictions to decisions abrogating the doctrines of sovereign or governmental immunity?[29] One legislature has said so frankly.[30] Others have said so either by placing dollar limits on the judgments recoverable,[31] or waiving immunity solely to the extent of insurance purchased.[32]

Fortunately, this State is no longer toiling with the problem

of sovereign or governmental immunity. Unfortunately, however, it is still toiling with the problem of notices of claim. Does it resolve itself finally "into a question of dollars and cents?"

B. CONSTITUTIONALITY

When last squarely presented with the question of the constitutionality of section 50-e some twenty years ago, our Court of Appeals in *In re Brown v. Trustees, Hamptonburg School District*,[33] an action by a six-year old who fell on a children's slide on school grounds, unanimously held that the statute was constitutional. The Court reasoned as follows: This suit against the municipal corporation arose out of the exercise of a governmental function. This suit was unknown at common law and was never protected by constitutional provision, but was created by statute. The legislature, having the power to withhold the right, had the power to grant it upon condition.[34]

The New York view represents that of the overwhelming weight of authority in this country.[35] But the undercurrent of dissent grows stronger. Three jurisdictions, Michigan, Nevada and Montana, have taken a different view.

The first blow was struck in 1970 when the Supreme Court of Michigan, in *Grubaugh v. City of St. Johns*,[36] struck down on due process grounds a 60-day notice of claim provision as applied to a 19-year old who was rendered permanently blind in both eyes from an automobile accident allegedly caused by a highway defect. In 1972 the same Court, in *Reich v. State Highway Department*,[37] struck down on equal protection grounds the same provision as applied both to infants and adults who sustained personal injuries from automobile accidents also allegedly caused by a highway defect. The constitutional infirmity, according to *Reich*, is that "the notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence after only 60 days. The victims of private negligence are granted three years in which to bring their actions."[38]

One year after *Reich*, the Supreme Court of Nevada decided *Turner v. Staggs*.[39] That was a wrongful death action based on medical malpractice brought by the minor children of the decedent through their legal guardian. The statute required claims against counties to be presented within 6 months after the cause of action arose. The claim was presented 13 months after the date of death. The Court invalidated the notice of claim provisions on equal protection grounds, expressly refusing to limit its holding to minors. "Within our present scheme of government, claim statutes serve no real beneficial use. . .but they are indeed a trap for the unwary."[40] These provisions, held the Court, "have the effect of arbitrarily dividing all tort-feasors into [two] classes of tort-feasors: (1) private tort-feasors to whom no notice of claim is owed and (2) governmental tort-feasors to whom notice is owed."[41]

In a very recent case, *Noll v. City of Bozeman*,[42] the Supreme Court of Montana held that the 120-day notice of

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claim statute violated that State's unconditional waiver of immunity in its 1972 Constitution, a waiver which was held to supercede a legislative discretion concededly possessed under the prior Constitution. The Court expressed no opinion as to whether the statute violated equal protection guarantees, nor did it determine the impact of a constitutional amendment, effective July 1, 1975, permitting the legislature, by a two-thirds vote, to impose limitations.[43]

Noll obviously turns on its own particular facts. *Grubaugh*, *Reich* and *Turner*, however, are of broader sweep. In none of those cases did the Court discuss in depth the public policy considerations implicit in notice of claim provisions. The full extent of the discussion in *Turner* is set forth above. *Reich* did not discuss them at all, but simply cited *Grubaugh*. In *Grubaugh* the principal opinion[44] devoted one-half page of its five pages to quoting a previously expressed purpose of those provisions (prompt notice to permit effective investigation) and stating that even if the policy considerations were once valid, "today they have lost their validity and ceased to exist due to changed circumstances."[45] The Court referred to the ready availability of insurance investigators, police departments and full-time attorneys, as well as to the statute requiring report of an accident resulting in personal injury.

Those are the only cases so far.[45a] It should not be assumed, however, that the full extent of individual judicial support for holding notice of claim statutes unconstitutional is reflected only in the two Michigan cases.[46]

Nevertheless, the New York Court of Appeals seems unlikely to strike down those statutes on constitutional grounds since, notwithstanding its justifiable discontent with some of the inflexible requirements of section 50-e, the Court has not even intimated at its possible unconstitutionality even as applied to infants. Concededly, the Court does not seem to have been presented with a modern, in depth constitutional attack on notice of claim statutes, as such, or as applied to particular types of public corporations.

Just a few years ago, however, in *Stanton v. Village of Waverly*,[47] a unanimous Court of Appeals turned back a constitutional attack on what the writer believes to be a far more vulnerable statute, section 341-a of the Village Law (now CPLR 9804), and a local law, which require written notice of a street or highway defect to be actually given to the village clerk as a condition precedent to *liability*. That statute and local law, and the many others like them,[48] are in fact conditions precedent to conditions precedent (a notice of claim as a condition precedent to the commencement of an action also being required) and thus permit a municipal corporation to do what no individual or private corporation is permitted to do: inflict at least one injury with impunity. The constitutionality of notice of claim provisions seems far easier to defend.

Though sorely tempted by the unnecessary complexity of the New York provisions relating to conditions precedent to the

commencement of tort actions against public corporations, and by the unfortunate results too often reached under them, to recommend total abolition of those provisions, the writer is deterred from that extreme step for two principal reasons: First, it is extreme and unlikely to be heeded by the Legislature, especially in these fiscally trying times; thus, for the present at least, it seems more realistic to try to correct as many as possible of the major defects in the most pervasive statute, section 50-e of the General Municipal Law. And, second, the writer is not convinced that notice of claim provisions do not, at least where our local and State governments are concerned, rest on a rational basis and serve a useful public purpose. This late in the day perhaps something more than personal dissatisfaction with their operation in particular cases should be required to abolish them.

III. STATUTORY RECOMMENDATIONS

It is proposed to amend section 50-e of the General Municipal Law, to repeal subdivision 2 of section 52 of the County Law, to amend paragraph 7 of section 311 of the Civil Practice Law and Rules, and to repeal subdivision 6 of sections 1276, 1299-p, 1299-rr, 1317 and 1342 of the Public Authorities Law, as follows (matter in brackets [] to be deleted; matter in italics to be added):

A. Section 50-e of the General Municipal Law

§ 50-e. Notice of claim

1. *When service required; time for service; infancy or insanity; upon whom service required; when claim arises.*

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general [corporation] *construction* law, or any officer, appointee or employee thereof, the notice of claim shall [comply] *be made and served in accordance* with the provisions of this section [and it shall be given within ninety days after the claim arises].

(b) The notice of claim shall be served within ninety days after the claim arises, except that if the claimant is under a disability of infancy or insanity the time within which the notice must be served shall be extended by the period of disability; provided, however, that such time shall not be extended by this provision beyond ten years after the claim arises, except, in any action other than for medical malpractice, where the person was under a disability due to infancy.

(c) Service of a notice of claim upon an officer, appointee or employee of a public corporation shall not be required as a condition precedent to the commencement of an action or special proceeding against him. If an action or special proceeding is commenced against the officer, appointee or

employee but not against the public corporation, service of a notice of claim upon the public corporation shall be required only if it is under a statutory duty to indemnify him.

(d) A claim for wrongful death arises upon the appointment of a personal representative. A claim for any other tort arises on the date from which the time limited for commencing an action or special proceeding to enforce the claim would be computed if service of a notice of claim was not required.

2. *Form of notice: contents.* The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

3. *How served; service upon attorney; when service by mail complete; defect in manner of service; return of notice improperly served.*

(a) The notice shall be served on the [party] *public corporation* against [whom] *which* the claim is made by delivering a copy thereof [, in duplicate,] personally, or by registered or *certified* mail, to the person [, officer, agent, clerk or employee] designated by law as [a person] *one* to whom a summons in an action in the supreme court issued against [such party] *the corporation* may be delivered , *or to the attorney for the public corporation* [; provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim].

(b) Service of a notice of claim upon an attorney who represents more than one public corporation shall be effective not only as to the public corporation against which the claim is specifically asserted but also as to any other public corporation that the attorney represents and against which the claim exists if the notice of claim is sufficient reasonably to apprise the attorney of the identity of that public corporation.

(c) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(d) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be deemed valid if the notice is actually received by a proper person and the public corporation against which the claim is made either

demands that the claimant or any other person interested in the claim be examined in regard to it or fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(e) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

4. *Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice.* No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. *Application for leave to serve a late notice; grounds; when application made.*

(a) The court in its discretion may grant leave to serve a notice of claim within a reasonable time after the expiration of the period specified in subdivision one of this section in the following cases: (1) Where the claimant is physically incapacitated [,] and by reason of such [disability] *incapacity* fails to serve a notice of claim within the time specified; (2) where [a] *the* person entitled to make a claim dies before the expiration of the time [limited] *specified* for service of the notice; or (3) [where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier; or] *where the claimant shows that he has a reasonable excuse for his failure to serve a notice of claim within the time specified and that the public corporation against which the claim is made or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified, unless the corporation or carrier shows that it has been substantially prejudiced by the failure to serve the notice within the time specified.*

[Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the proposed notice of claim. The application shall be made returnable at a trial or special term of the supreme court, or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made in the manner specified in subdivision three.]

(b) Where the claimant who failed to serve a notice of claim within the time specified in subdivision one of this section was under a disability of infancy or insanity, application for leave to serve a late notice of claim must be made within one year after the disability ceases, but in no event later than ten years after the claim arises, except, in any action other than for medical malpractice, where the person was under a disability due to infancy. In all other cases, the application must be made within one year after the happening of the event upon which the claim is based.

(c) An application for leave to serve a late notice of claim shall not be denied on the ground that it was made after the commencement of an action to enforce the claim.

6. *Mistake, omission, irregularity or defect. At* [Any] *any* time after the [date of] service of [the] *a* notice of claim and at [or before the trial of an action or the hearing upon a special proceeding] *any stage of an action or special proceeding* to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby. [Application for such relief, if made before trial, shall be by motion, on affidavits; if made before the action is commenced, shall be by motion, on the petition of the claimant, or someone on his behalf. Failure to serve more than one copy may be corrected by such motion.]

7. Applications under this section; where and how made; proof. An application under this section shall be made to the supreme court or to the county court in a county where the action may properly be brought for trial or, if an action to enforce the claim has been commenced, where the action is pending. Before action commenced, the application shall be made by special proceeding; after action commenced, the application shall be made by motion. The application shall be made upon such notice as is provided generally for special proceedings and motions in the civil practice law and rules; shall be supported by affidavit or such other proof as the court may require; and shall, where the application is for leave to serve a

late notice of claim, be accompanied by a copy of the proposed notice.

8. Liberal construction. The provisions of this section shall be liberally construed with a view to substantial justice between the parties.

[7] *9. Inapplicability of section.* This section shall not apply to claims arising under the provisions of the workmen's compensation law, or [,] the volunteer firemen's benefit law, or to claims [of infant wards of] *against* public corporations [where the claim is against such public corporation] by [its] *their* own infant wards.

B. Section 52 of the County Law

§ 52. Presentation of claims for torts; commencement of actions

1. Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section 50-e of the general municipal law. Every action upon such claim shall be pursuant to the provisions of section 50-i of the general municipal law. The place of trial shall be in the county against which the action is brought.

[2. No action shall be maintained against an officer, agent, servant or employee of a county unless the notice of claim for damages was filed in the manner and within the time prescribed in subdivision one and also served personally or by registered mail upon such officer, agent, servant or employee within the same period of time.]

[3] 2. This section shall not apply to claims for compensation for property taken for a public purpose, nor to claims under the workmen's compensation law.

C. Section 311 of the Civil Practice Law and Rules

§ 311. Personal service upon a corporation or governmental subdivision.

Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service;

2. upon the city of New York, to the corporation counsel or to any person designated by him to receive process in a writing filed in the office of the clerk of New York County;

3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;

4. upon a county, to the chairman or clerk of the board of supervisors, clerk, attorney or treasurer;

5. upon a town, to the supervisor or clerk;

6. upon a village, to the mayor, clerk, or any trustee; [and]

7. *Upon a school district, to a school officer, as defined in the education law; and*

[7] *8.* upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

D. Public Authorities Law

§ 1276. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§ 1299-p. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§ 1299-rr. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§ 1317. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock

corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§1342. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

IV. DISCUSSION OF PRESENT AND PROPOSED AMENDED SECTION 50-e OF THE GENERAL MUNICIPAL LAW

A. PRESENT SUBDIVISION 1

1. Its Requirements

Subdivision 1 of Section 50-e of the General Municipal Law presently reads as follows:

> "In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general corporation law, or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises."

That single sentence has a dangerously disarming simplicity about it. It is fraught with traps, for the wary as well as the unwary.

Let us look at subdivision 1 closely. It applies only to tort cases. It does not itself require service of a notice of claim. A notice must be "required by law" as a "condition precedent" to the commencement of an action or special proceeding against a "public corporation, as defined in the general corporation [now general construction] law, or any officer, appointee or employee thereof." Where a notice of claim is so required, and only then, it must comply with the provisions of section 50-e and must be served "within ninety days after the claim arises."

Each one of the quoted expressions merits comment, but first, a word about conditions precedent. There are two critical differences between a limitation of time that is a condition precedent and a limitation of time that is a statute of limitations: First, performance of a statutory condition precedent (or an excuse for its nonperformance) must be pleaded and proved by the plaintiff, its performance is an

essential element of his cause of action,[49] whereas a statute of limitations must be raised affirmatively by the defendant by motion or in his responsive pleading.[50] Second, a condition precedent does not receive the benefit of tolls and extensions,[51] whereas a statute of limitations does.[52]

The doctrines of waiver and estoppel do, it is true, apply both to conditions precedent and statutes of limitations, but they are rarely invoked to excuse nonperformance of a condition precedent against a public corporation.[53]

Two additional points deserve mention. The first is that comparatively few notice of claim statutes expressly use the words "condition precedent."[54] The second point is that notices of claim are not universally held to be conditions precedent rather than statutes of limitations.[55]

2. The Major Problems

a. Service of Notice Must Be Required by Law

Subdivision 1, as it now stands, requires compliance with section 50-e only where a notice of claim is "required by law" as a condition precedent to the commencement of an action or special proceeding against a public corporation or its officer, appointee or employee. The phrase "required by law" is obviously broader than the phrase "required by statute" and may have been deliberately chosen by the Judicial Council to cover situations where a notice of claim is not expressly required by any statute but is required by judicial decision.[56]

Where service of a notice of claim is required by statute (and the word "statute" is used throughout this study to include charter provisions and local laws), the requirement is there to be found, though not always easily. The search, however, as will presently appear,[57] cannot always safely end with the statutes.

Notice of claim provisions are scattered throughout the general, special and local laws,[58] and city charters.[59] They are many, they overlap, they are inconsistent and they are difficult to find. Some of the inconsistency is more apparent than real because as to local laws, whether enacted before or after section 50-e, the latter controls;[60] and general or special statutes enacted before section 50-e were repealed by special provision accompanying the enactment of section 50-e.[61]

There is one statute relating to tort actions against the Port Authority of New York and New Jersey that contains two time periods (one for commencing the action, the other for serving a notice of claim), both referred to as conditions, and both time periods have understandably been held to be conditions precedent.[62] There is another statute relating to contract actions against villages that also contains two time periods (one for commencing the action, the other for serving a notice of claim), and both time periods have been held to be statutes of limitations,[63] although, as to the notice of claim, the language is almost identical to the language in another statute that has been held to be a condition precedent.[64] There are unrepealed statutes that are silent as to claims against the public

corporation concerned,[65] and then there is a statute that not only provides for such claims but splits the jurisdiction to hear them between the Court of Claims and other courts.[66]

The aberrations noted in the preceding paragraph are rare, but they exist and little can be done about them. The first example is the result of interstate compact.[67] The second is the result of decisions in the Appellate Division, Second Department, that seem questionable.[68] The third is caused by the continued existence of the Court of Claims whose specialized jurisdiction raises many other problems.[69]

Until we have a truly unified court system in this State and a separate chapter in the consolidated laws covering the entire area of tort claims against the State and public corporations, uniformity and simple accessibility of the relevant statutes will not be achieved.[70]

b. Reference to Public Corporations

Subdivision 1 of section 50-e speaks of a "public corporation, as defined in the general corporation law." That definition, unchanged, is now in the General Construction Law. A "public corporation," as defined in that Law, "includes a municipal corporation, a district corporation, or a public benefit corporation."[71] These three types of corporations are in turn defined.[72]

Of the three corporations, the public benefit corporation is the biggest troublespot. There is no telling how many public benefit corporations there are in this State.[73] Statutes creating them are to be found, among many places, in the General Municipal Law,[74] the Public Authorities Law,[75] the Public Housing Law,[76] and the Unconsolidated Laws.[77]

At last count, there were, in the Public Authorities Law alone, 84 unrepealed titles in eight chapters.[78] All but 14 of those 84 titles contain notice of claim provisions,[79] and those that do are neither consistent in incorporating the provisions of section 50-e,[80] nor are they consistent within each article of that very Law.[81]

In any event, from the seemingly plain language of subdivision 1 of section 50-e, one might well conclude that where a notice of claim is required as a condition precedent to the commencement of a tort action against *any* public corporation, the notice must be given "within ninety days after the claim arises." That conclusion would, by pure accident, be half right. If an inconsistent statute was enacted before section 50-e, the latter would control,[82] but if the inconsistent statute was enacted after section 50-e, the later statute would control.[83]

On the plus side of all this is the fact that the author has found only one later inconsistent statute that provides for a basic period of less than 90 days,[84] and in many statutes the basic period is six months.[85]

The statutory recommendations made in this study are not intended to affect any of those provisions for several reasons: for one, the State is not a public coporation[86] and section 10 of the Court of Claims Act, whose provisions are jurisdiction-

al,[87] has caused little major difficulty.[88] For another, the author is of no mind to require service of a notice of claim where none is presently required nor to shorten any period for serving a notice where one is presently required.[89]

c. When Public Corporation Must Be Served

(1) In General

As already noted, subdivision 1 of section 50-e does not itself require service of a notice of claim. The provisions of that section come into play only where "a notice of claim is required by law as a condition precedent to the commencement of an action *against a public corporation. . .or any officer, appointee or employee thereof.*"

Some statutes so require in almost the very language as that emphasized above, that is, as a condition precedent to the commencement of an action against the corporation "or" its employee.[90] Most of them do not, contenting themselves to requiring service of a notice as a condition precedent to the commencement of an action against the corporation.[91]

Under either of those statutes, service of a notice of claim upon the corporation is, of course, required as a condition precedent to the commencement of an action against the corporation, whether alone or against the employee as well. Under neither statute, however, is service of a notice upon the employee required as a condition precedent to the commencement of an action against him, whether alone or against the corporation as well. Service of a notice upon the employee need only be made when the statute explicitly so requires, and the author recommends the repeal of what appears to be the only such statute presently in effect.[92]

Sandak v. Tuxedo Union School District No. 3,[93] decided by the Court of Appeals in 1954, is the leading case. Plaintiff commenced a negligence action against a school district and two teachers, but had served a notice of claim upon the school district only. Subdivision 2 of section 3813 of the Education Law provided (and provides), in pertinent part, that no tort action "shall be prosecuted or maintained against any of the parties named in this section or against any teacher. . .unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law." Section 3023 of the Education Law required (and requires) the school district to save its teachers harmless from all financial loss resulting from their alleged negligence in the discharge of their duties within the scope of their employment.

Special Term dismissed the complaint against the teachers and the Appellate Division affirmed without opinion. The Court of Appeals reversed.

Judge Froessel, writing for a unanimous Court, carefully reviewed the history and purpose of notice of claim requirements, specifically noted that "[h]istorically, the notice of claim concept has always applied only to public corporations," and concluded on the basis of language in

subdivision 3 of section 50-e that the Legislature intended to require no more than service of the notice of claim on the school district. "When the Legislature has desired to require that the notice of claim be served on both the public corporation *and* its negligent employee or appointee," noted Judge Froessel, "it has clearly and explicitly so stated. . . ."[94]

(2) In Indemnity and Contribution Situations

The more difficult question is this: When must a notice of claim be served upon the public corporation as a condition precedent to the commencement of an action against its employee alone?

Derlicka v. Leo,[95] decided by the Court of Appeals in 1939, is a leading case. There, plaintiffs brought a malpractice action against doctors who had rendered gratuitous surgical services to the plaintiff in a hospital operated by the City of New York. The City was not sued. A notice of intention to commence the action was not served on either the City or the defendants.

Section 394-a 1-0 of the City's Administrative Code required service of a notice upon the City as a condition precedent to the commencement of a personal injury action *against it*. Under section 50-d of the General Municipal Law, as it then read, every municipal corporation was liable for damages resulting from the malpractice of its physicians and dentists, and was required to save them harmless. The second paragraph of that section provided that "No action shall be maintained under this section against such municipal corporation, physician or dentist unless the applicable provisions of law pertaining to the commencement of action and the filing of notice of intention to commence action against such municipal corporation shall be strictly complied with."

Special Term granted defendant Leo's motion to dismiss the complaint. The Appellate Division reversed, holding that section 50-d applied only to actions under that section and that plaintiffs were entitled to maintain their common law action against the doctors. The Court of Appeals disagreed, reversing on a certified question, and stating in part as follows:

> ". . .For the wrong done to the patient by the physician the statute creates a new remedy against the city in favor of the injured person. The liability which existed at common law may still be enforced by action against the physician, but the physician would have a right to insist that in accordance with the statute he be saved harmless by the municipal corporation. The effect of any action, whether brought against the municipality or against the physician or dentist, is determined by the provisions of the statute and by the express terms of the statute, may be maintained only if 'the applicable provisions of law pertaining to the commencement of action and the filing of notice of intention to commence action against such municipal corporation shall be strictly complied with'."[96]

Cases involving the indemnity problem seem to arise with

some frequency,[97] but, except for three statutes,[98] the rule is difficult to glean from the statutory language alone. If it is sound, it should be expressly codified. The writer believes that it is.

Basically, the theory behind the rule is that a public corporation that is under a statutory duty to indemnify its employee is the real party in interest.[99] In effect, by statute, a vicariously liable public corporation is required to indemnify a primary wrongdoer, its employee, whereas the converse is usually true.[100] If the employee alone is sued and no notice of claim is required to be served upon the public corporation, it might well have no knowledge of the claim until commencement of the action against its employee and commencement of the action would only be subject to the statute of limitations.[101] To permit this result would be effectively to repeal many notice of claim provisions in a day of expanding tort liability and of an increasing tendency to compel all public corporations to indemnify their employees.[102]

But, as indicated above, the writer has found only a few notice of claim provisions that reflect the rule with reasonable clarity.[103] The purpose of the last sentence of proposed amended subdivision 1 of section 50-e is to state the rule expressly and thus help to eliminate one of the pitfalls that attorneys face in this area and to reduce the frequency of court consideration of the problem.

The rule, however, is different as to both indemnity and contribution claims sought to be asserted against a public corporation by a stranger against whom a tort action has been commenced. In *In re Valstrey Service Corp. v. Board of Elections, Nassau County*,[104] a prospective voter was injured when she stepped into a hole while she was about to enter an election booth. She sued *Valstrey* more than 90 days after the claim arose. *Valstrey*, wishing to assert a claim over against the Board of Elections and the Sanitation and Water Supply Division of Nassau County, applied for leave to serve a late notice of claim. This application was denied on the ground that section 50-e did not permit an extension of time under these circumstances. The Appellate Division affirmed, suggesting, however, that perhaps no notice was required under these circumstances. The Court of Appeals affirmed, holding that no notice was required. The Court's reasoning seems faultless. An indemnity claim does not arise until a judgment against the indemnitee has been paid.[105] Impleader is an exception to the general rule that one may not sue until a cause of action has accrued. The exception is designed to avoid circuity of action. Notice of claim statutes were not designed to render the impleader statute inoperative.[106]

Valstrey has been followed in the contribution area, which was revolutionized in 1972 by the holding of the Court of Appeals in *Dole v. Dow Chemical Co.*[107] The result of *Dole* and its progeny[108] is that the procedural devices for pursuing claims based on indemnity may now be used for pursuing claims for contribution. The Civil Practice Law and Rules[109] and the General Obligations Law[110] now reflect modern thought.

The rationale behind *Valstrey* supports the same result in the *Dole* area since a claim for contribution, too, does not arise until a tortfeasor has paid more than his share of the judgment.[111] This will, of course, increase the situations in which a public corporation may be sued without having been served with a notice of claim, and the statute of limitations for both indemnity and contribution claims is six years.[112]

There might seem to be less justification for the result in the *Dole* area because presumably the active tortfeasor would know both of his susceptibility to suit and of the active tortious participation of the public corporation. But if the tortfeasor had no individual claim of his own against the public corporation, would he be required to serve a notice setting forth a hypothetical claim?[113]

The sailing would be comparatively smooth if it were not for one case, a very troublesome case, *Siegel v. Epstein.*[114] So far as here pertinent, the facts are these: On August 10, 1961, plaintiff sued the marshal of the City of Long Beach for a wrongful eviction and conversion on April 10, 1961. Plaintiff did not sue the city, and plaintiff did not serve a notice of claim on either the marshal or the city. The statute involved was section 257 of the charter of the City of Long Beach, which read as follows: "In any case founded upon tort a notice of claim is hereby required as a condition precedent to the commencement of an action or special proceeding against the city of Long Beach, or any officer, appointee or employee thereof." The city, while perhaps liable on the theory of respondeat superior, was under no duty to indemnify its employee. The marshal's motion to dismiss the complaint for failure to state a cause of action (failure to serve a notice of claim on the City of Long Beach) was granted at Special Term. The Appellate Division affirmed in a memorandum opinion, and the Court of Appeals affirmed unanimously, without opinion.

The Appellate Division cited two cases (preceded by the symbol "cf.") and stated the ground upon which it distinguished a third. The two cases compared were *Derlicka v. Leo*, discussed above,[115] and *Feisthamel v. Roczen.*[116] Present in both cases, however, was one critical fact absent in *Siegel*, to wit: the public corporation was under a duty to indemnify its employee. And present in *Feisthamel* was this further important fact: the statute there involved was section 50-c of the General Municipal Law, which, as it then read,[117] not only required the public corporation to indemnify its employee but specifically required the service of a notice of claim upon both the public corporation *and* its employee.

The Appellate Division in *Siegel* distinguished *O'Hara v. Sears Roebuck & Co.*[118] on the ground that there "a notice of claim was *not* required by any law as a condition precedent to the commencement of an action against an officer, appointee or employee of the municipality."[119]

The result reached in *Siegel* is, of course, reachable by a literal reading of the statute involved. Also reachable under that

statute and the others like them, however, is the result that a notice of claim must be served upon the employee as a condition precedent to the commencement of an action against him, whether alone or against the public corporation as well.[120] But the latter result is foreclosed by *Sandak*.[121] Concededly, *Sandak* is distinguishable from *Siegel* in that in *Sandak* the public corporation was made a party and was served with a notice of claim, but the inference that the author draws from language in that opinion, dictum to be sure, is that if the action had been brought against the teachers alone and the school district had been under no duty to indemnify them, no notice of claim need have been served on anyone.

In *Sandak*, Judge Froessel noted that before 1950 plaintiff would have had a common law right to sue the teachers and that, under Section 3813 of the Education Law before its amendment to include actions against any teacher, no notice of claim would have had to be served on the school district even though, prior to the amendment, it was under a duty to indemnify its teachers.[122] It was the 1950 amendment to section 3813 which made it necessary to serve the public corporation in the indemnity situation even if a teacher alone was sued. The language of the opinion does not say so expressly,[123] but so it appears to the author.

While the ground upon which *O'Hara* was distinguished by the Appellate Division in *Siegel* was certainly valid, the Court in *O'Hara* seemed to stress the no indemnity feature in that case. Otherwise, according to *Sandak*, no notice of claim would have to be served upon the public corporation, indemnity or no, since the statute in question required service of a notice of claim only as a condition precedent to the commencement of an action against the public corporation.

The author does not believe that the result reached in *Siegel* furthers the basic purpose of notice of claim statutes.[124] Nor, as stated in another context, does it further the public policy of this State that "one injured by the negligent act of another engaged in a public service should be permitted to recover the damages suffered as a result of such misconduct."[125]

The author believes that the result in *Siegel* should not be perpetuated. The proposed amendment to subdivision 1 of section 50-e (proposed new paragraph (c)) is intended to overrule it. No recommendation is made to delete the language "or any officer, appointee or employee thereof," or similar language, from the statutes presently including it lest it then be held that even in indemnity cases no notice of claim need be served upon the public corporation if its employee alone is sued.

d. When Does A Claim Arise?

The last sentence of subdivision 1 of present section 50-e requires notice of a claim to be given within 90 days after the claim "arises". When does a claim "arise"?

In the leading case of *Borgia v. City of New York*,[126] a child was admitted to a city hospital on October 10, 1956. Separate

acts of malpractice were committed on the child on October 11, 1956 and on April 22, May 5, and November 25, 1957. He was discharged from the hospital on February 14, 1958. A notice of claim was served on April 18, 1958. The city argued that the notice of claim was timely only as to injuries inflicted within 90 days before its filing. The Appellate Division agreed with the city. The Court of Appeals did not.

The question, said Judge (later Chief Judge) Desmond, writing for a majority of the Court, is the same in a 50-e case as it is in a true statute of limitations problem, viz: "[W]hen did the claim or cause of action 'accrue'?" The answer was that the cause of action "accrued," as to all of the injuries sustained by the infant, on February 14, 1958, the day of his discharge from the hospital and the end of the continuous treatment.

That one word, "accrued," has caused many problems. Its precise meaning is as elusive as mercury. A cause of action does, ordinarily, accrue when one first has the right to sue and one first has the right to sue when all of the essential elements of his cause of action exist.[127] The statute of limitations does, ordinarily, start to run from the point at which one has the right to sue.[128] Ordinarily, when a condition precedent is not in the picture, the statute of limitations may begin to run *after* there is a right to sue.[129] And when a condition precedent is in the picture, the statute of limitations may begin to run *before* there is a right to sue, that is, before the condition precedent has been complied with but *after* the wrong has been done.

Borgia is one authority for the last statement.[130] The Court of Appeals held, as stated above, that the question is the same in a section 50-e case as it is in a statute of limitations case, viz: "[W]hen did the claim or cause of action 'accrue'?" The Court did not hold that the statute of limitations on an action to enforce the claim would not begin to run until the notice of claim had been served because until that point there would be no right to sue. To have so held would have been to hold that the time within which to serve a notice of claim would not begin to run until after a notice of claim had been served. Fanciful? That was precisely the argument made in *Christian v. Village of Herkimer.*[131]

In *Christian*, section 341 of the Village Law (now CPLR 9802) provided that "no other [than a contract] action shall be maintained against the village unless the same shall be commenced within one year after the cause of action therefor shall have *accrued*, nor unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law." The action was commenced within one year after service of the notice of claim but more than one year and six months after plaintiff was injured. The Village pleaded the statute of limitations as an affirmative defense and moved for summary judgment.

Special Term denied the motion on the ground that the word "accrued" referred to the date upon which the notice of claim was filed. The Appellate Division reversed by a divided Court, observing that "[i]f plaintiff's interpretation were applied. . .an

anomalous situation would exist since the plaintiff is specifically given 30 days from the time of accrual to file his notice."[132] The Presiding Justice, dissenting, observed that "[o]bviously, it is not possible for one to have a cause of action and at the same time not to have the right to sue."[133] Perhaps, but the flaw in that observation is that the statute of limitations may begin to run before one has a "cause of action." Indeed, until very recently in this State, it has been possible for the statute of limitations to begin to run on a cause of action to recover damages for personal injuries based on breach of warranty even before any personal injuries were sustained.[134]

A misunderstanding of the use of the word "accrued" in *Borgia* almost defeated a claim in *Boland v. State of New York*,[135] decided under Section 10 of the Court of Claims Act. Claimant was involuntarily committed to a state mental institution in November, 1965. She was conditionally released on convalescent status in June, 1966 and finally discharged in June, 1967.

In May, 1969 she moved for permission to file a late claim under subdivision 5 of section 10 of the Court of Claims Act, which provides, in pertinent part, that a claimant who has failed to file a claim or a notice of intention to file a claim within 90 days after the claim accrues "may. . .in the discretion of the court, be permitted to file such claim at any time within two years after the accrual thereof" upon a showing of reasonable excuse for failure to file on time and of the State's actual knowledge within the 90-day period of the essential facts constituting the claim, if the state was not substantially prejudiced by the failure to file. The subdivision concludes with these words: "But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed."[136]

The Court of Claims granted claimant's motion. The Appellate Division reversed unanimously on the grounds that she did not have a reasonable excuse and that she was not under disability when the claim "accrued." As to the latter ground, the Appellate Division reasoned, via *Borgia* (among other cases involving claims against the State), that her claim was not complete and thus did not accrue until she was finally discharged and upon her discharge she was not under disability so she was not entitled to file a claim as a matter of right.[137]

The Court of Appeals reversed, two judges dissenting.[138] The question was: When did the claim accure? Judge (now Chief Judge) Breitel, writing for the majority, hit the heart of the distinction noted above when he said: "The fact that for Statute of Limitations purposes a continuing wrong does not start the running of the statute until the wrong is 'complete' does not mean that before 'completeness' there is no claim. Of course there is. On common principles the wrong against claimant, if there has been a wrong, was initiated at the inception of the detention."[139]

In conclusion, the word "arises" in section 50-e and the word "accrues" in other notice of claim statutes mean the same thing

for the purpose of fixing the point from which the time specified for serving a notice of claim should be computed, to wit: except for claims for wrongful death, that point from which the time limited for commencing an action to enforce the claim would be computed if service of a notice of claim was not required. A cause of action for wrongful death, however, accrues upon the appointment of a personal representative,[140] although the time limited for commencing an action for wrongful death is computed from the date of death.[141] A claim for wrongful death also "arises" or "accrues" upon the appointment of a personal representative, and the time limited for commencing an action to enforce that claim is, of course, also computed from the date of death.[142]

To avoid possible future misunderstanding, the author has recommended a new paragraph (d) in subdivision 1 of section 50-e to reflect the law as stated above.

e. No Exceptions to Time for Service

(1) In General

Present subdivision 1 of section 50-e requires that a notice of a claim be given within 90 days after a claim arises. It makes no exception for infant claimants. It makes no exception for mentally or physically incapacitated claimants. Relief for them must, as will be discussed in greater detail below, be sought under subdivision 5 of section 50-e.[143]

As to all claimants unable to bring themselves within the provisions of subdivision 5, service must be made within the 90-day period. Absent waiver or estoppel,[144] one day late is too late.[145] Ignorance of the law is no excuse.[146] Inability to speak English is no excuse.[147] That the 90th day falls on a sabbath is no excuse.[148] The incapacity of claimant's lawyer is no excuse;[149] indeed, his death is no excuse.[150] The lesson is clear. Absent relief under subdivision 5, or waiver or estoppel, claimants must comply with the 90-day requirement.

The special problems existing with respect to infant claimants and claimants under mental or physical incapacity are discussed now rather than deferred for the discussion under subdivision 5 because a major amendment affecting them is proposed to be made to subdivision 1 of section 50-e.

(2) Infancy

Under present subdivision 5 of section 50-e, a court may grant to an infant leave to serve a notice of claim "within a reasonable time after the expiration of the time specified in subdivision one" where the infant fails to serve a notice within that period "by reason of such disability." Furthermore, the application must, in any event, be made "within the period of one year after the happening of the event upon which the claim is based. . . ."[151]

If no attorney had been retained to represent the infant within the 90-day period, the courts have had little difficulty in granting the infant's application for leave to serve a late notice of claim since nothing in section 50-e or in any other notice of

claim provision requires that someone else shall act for the infant within the one-year period.[152]

If, however, an attorney has been retained for the infant within the 90-day period, some courts have had considerable difficulty in finding that the failure to serve the notice of claim within that period was "by reason of such disability."[153]

The ultimate discretion is vested in the Appellate Divisions[154] and for some time conflicting decisions among Departments,[155] as well as within a particular Department,[156] were the rule rather than the exception. As time went on, however, the strictest interpretation of the statute consistently prevailed in the Appellate Division, First Department.[157]

In *In re Murray v. City of New York*,[158] the Court of Appeals focused the spotlight on the problem and that Court's role in resolving it. There, Special Term had granted to a 19-year old infant, as he then was,[159] permission to file a late notice of claim upon application made some six months after the expiration of the 90-day period although the infant had retained counsel while 57 of the 90-day period remained. The Appellate Division, Second Department, affirmed. So, too, did the Court of Appeals.

The result was not easy to reach as a matter of statutory construction and the fact is that it was not reached via that route by the Court of Appeals. Judge Scileppi collated the cases; noted the divergence then existing, principally between the Appellate Division, First Department, and the Appellate Divisions of the remaining Departments, and the affirmance by the Court of Appeals of the divergent results, and then wrote: "The thread of consistency binding these cases construing section 50-e together, resides, ultimately, in the fact that a determination as to the cognizable relation between infancy and the delay is a matter committed to the sound discretion of the court, to be exercised in light of all the facts and relevant circumstances in a given case."[160] Invitation for a liberal exercise of that discretion, however, was not lacking as Judge Scileppi later noted that "[t]he impediment may reasonably be presumed to attend infancy; there is no requirement that it be factually demonstrated. . . ."[161]

The Appellate Division, First Department, took the cue in three later cases—not, however, without continuing strenuous resistance from some members of the Court.[162] But lest all believe that the rule in all Departments now is that infancy alone will satisfy the statute, attention is called to the Third Department's post-*Murray* denial of leave to file a late notice of claim to a "near adult" (then—an adult now) in *Stowe v. City of Elmira*, a denial affirmed by the Court of Appeals.[163]

The cases just discussed were concerned only with the causal relationship between the failure to serve the notice and the disability of infancy. Justice was eventually done, although not without strenuous judicial gymnastics. But the inflexible one-year bar, not avoidable by any judicial effort, has produced its own shocking results. That bar has resulted in the forfeiture of the rights of infants of tender years because of the inaction

of their parents or others responsible for their welfare,[164] as well as of helpless adults.[165]

This was not always so. Before the enactment of section 50-e, courts, in their discretion, permitted the service of a notice of claim within a reasonable time after the expiration of the time specified when the failure to serve the notice could reasonably be said to be attributable to the disability.[166] The Judicial Council's original recommendation was intended to codify that law,[167] and the Law Revision Commission's to restore it.[168] The author's recommendation would not only restore that humanitarian discretion in behalf of those who have always been considered wards of the court, but would go a step further.[169]

(3) Mental or Physical Incapacity

The requirements of subdivisions 1 and 5 of section 50-e are equally strict as to claimants who are mentally or physically incapacitated. Although courts have for the most part been liberal when applications for leave to serve a late notice have been made within the one-year period,[170] they have been as helpless here as in the infancy cases when applications have not been so made.[171] It is, of course, possible for the mental or physical incapacity to continue for longer than one year.[172]

The inflexible one-year bar, computed as it is from the happening of the event upon which the claim is based, is as unjust here as it is for infants. And here, too, it was not so before the enactment of section 50-e.[173]

The rights of those who are mentally or physically incapacitated should not be forfeited because others failed to do for them what they were unable to do for themselves. As to claimants under a disability of insanity, the author's recommendation would return to pre-section 50-e law, and go one step beyond.[174] The reason for the recommended change in language from mental incapacity to insanity will presently appear, as will the reason for not recommending any change in present law for physically incapacitated claimants.

The recommendations follow.

B. Proposed Amended Subdivision 1

1. When service required; time for service; infancy or insanity; upon whom service required; when claim arises.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general [corporation] *construction* law, or any officer, appointee or employee thereof, the notice of claim shall [comply] *be made and served in accordance* with the provisions of this section [and it shall be given within ninety days after the claim arises].

(b) The notice of claim shall be served within ninety days after the claim arises, except that if the claimant is under a disability of infancy or insanity the time within which the

notice must be served shall be extended by the period of disability; provided, however, that such time shall not be extended by this provision beyond ten years after the claim arises, except, in any action other than for medical malpractice, where the person was under a disability due to infancy.

(c) Service of a notice of claim upon an officer, appointee or employee of a public corporation shall not be required as a condition precedent to the commencement of an action or special proceeding against him. If an action or special proceeding is commenced against the officer, appointee or employee but not against the public corporation, service of a notice of claim upon the public corporation shall be required only if it is under a statutory duty to indemnify him.

(d) A claim for wrongful death arises upon the appointment of a personal representative. A claim for any other tort arises on the date from which the time limited for commencing an action or special proceeding to enforce the claim would be computed if service of a notice of claim was not required.

Comment on Proposed Amendments to Subdivision 1 of Section 50-e

The amendments to this and to every other subdivision of section 50-e include a caption for ease of reference. Perhaps, too, when the intended meaning of the statutory language is not clear, the caption may be helpful.[175]

Subdivision 1 has been divided into four paragraphs to facilitate treatment of the subject matter.

Paragraph (a)

Two of the proposed amendments to subdivision 1, as reflected in new paragraph (a), are purely formal. One concerns the place where the definition of a "public corporation" is to be found. It was formerly in section 3 of the General Corporation Law, which was repealed effective September 1, 1974. The definition, unchanged, is now in section 66 of the General Construction Law.[176] The other purely formal amendment is the substitution of the word "served" for the word "given" since service of the notice is the act otherwise consistently referred to in the rest of section 50-e.

The remaining amendments to subdivision 1 are substantive.

Paragraph (b)

First, a brief word about the 90 days as the time within which a notice of claim must be served. As indicated above,[177] the time for serving a notice of claim is not uniform throughout the State of New York. Nor is there any semblance of uniformity throughout the other jurisdictions.[178] Legislative judgments understandably differ as to how prompt notice must be in order to serve its avowed purpose. Toying with the 90-day period did not strike the author as the preferable way of dealing

with the problems. The 90-day period is not unreasonably short, and it is well known to the Bench and Bar. To increase it by a very short period would probably be of little help. To increase it by a substantial period would, in the opinion of the author, be to repeal the statute by amendment since the time limited for commencing an action to enforce a claim is itself short.[179]

One major amendment to subdivision 1, indeed a major amendment to the entire section, is contained in proposed new paragraph (b). The amendment relates to claimants who are infants (remembering that the age of majority is, in this area, now 18) and those who are insane.

If the claimant is an infant, the 90-day period will not begin to run until he reaches his majority, with one exception: where his claim is for medical malpractice. As to that claim, the time for serving the notice may not be extended beyond ten years after the claim arises, out of deference to section 208 of the Civil Practice Law and Rules,[180] to avoid the anomalous result of having a notice of claim timely served although an action to enforce the claim would be barred by the statute of limitations, a result which persists in wrongful death cases.[181]

The failure of an infant to serve a notice of claim within 90 days after his claim arises need not be due to his infancy. Infancy, as such, will suffice whatever the infant's age when his claim arose and whether he or someone on his behalf retained an attorney within the basic 90-day period. If, however, the infant needs more time after his disability ceases and the maximum 10-year period, in the single instance applicable, has not expired, he may seek leave to serve a late notice pursuant to proposed amended subdivision 5.[182]

If the claimant is a person under the disability of insanity, he, too, may serve a notice of claim within 90 days after his disability ceases, but, as to him, the time for serving a notice as to any tort may not be extended beyond ten years after the claim arises, again out of deference to section 208 of the Civil Practice Law and Rules.[183] If he needs more time after his disability ceases and the maximum ten-year period has not expired, he, too, may seek leave to serve a late notice pursuant to proposed amended subdivision 5.

No change is recommended in present law as to claimants who are physically incapacitated because no extension of the time limited for commencing an action to enforce the claim is available to them.

As indicated above, the ten-year limit in the instances specified (claim of infant for medical malpractice and any claim of insane person) was mandated by section 208 of the Civil Practice Law and Rules. As recently amended,[184] that section affords an infant a maximum ten-year period from the time his cause of action accrues within which to commence an action for medical malpractice; and, even before that amendment, that section restricted insane persons to the same ten-year period as to any cause of action. Section 208 provides no extension for physical incapacity, as such. It seemed illogical (indeed,

misleading), therefore, to extend the time for serving a notice of claim when no extension was available for commencing an action to enforce the claim, or beyond the time of an available extension.

The word "insane" was substituted for the traditional words "mental incapacity" to assure an extension of the time limited for commencing an action to enforce the claim as well as the time for serving a notice of claim. But the substitution was made with the specific intent to adopt the liberal construction given by the Appellate Division, Fourth Department, to the words "insane person" as used in section 208 of the Civil Practice Law and Rules in a notice of claim setting.[185]

The language of proposed new subdivision (b) of subdivision 1 follows quite closely the language of section 208 of the Civil Practice Law and Rules. Subdivision (b) does not simply incorporate section 208 by reference because the author is convinced that to do so would be to mix apples and oranges. To assure the mesh with section 208, but in a condition precedent setting, it was deemed wiser to set forth the pertinent language of section 208, although simplicity is not its hallmark either. The intent is to avoid being word wise and volume foolish.

The basic reason for the writer's recommendation to extend the period for serving a notice of claim during infancy and insanity—a reason that, concededly, would support a like extension for physical incapacity—was well stated by the Law Revision Commission sixteen years ago:

> ". . .[T]he one year limitation has no relation at all to the disability that prevented compliance with the statute. It is, rather, an arbitrary rule sacrificing the substantive claim of the disabled party to the convenience of the defendant public corporation or its officer, employee or appointee. It overrides the principle that a right of action will not be forfeited without fault of the person to whom the right belongs and the principle, applied before section 50-e was enacted, that the law does not compel a man to do that which he cannot possibly do. Where a physical disability [citing case] is itself a result of the injury on which the claim is founded, the one year limitation produces the anomalous result that the defendant benefits by the severity of the injury caused by the accident for which liability is asserted."[186]

The one flaw in the Commission's recommendation to remove the one-year bar was the failure to consider the impact of the short statutes of limitation, usually one year, and the absence of any extension of those statutes for physical incapacity.

The author realizes that his recommendation undercuts, in the infancy and insanity cases, the basic purpose of notice of claim provisions, which is to give to a public corporation prompt notice to permit effective investigation. A simpler solution would have been to keep the one-year bar as to both infants and insane persons, but to delete the "by reason of such disability" requirement. But, as to these claimants, the simpler solution is not, it is submitted, the just solution and, public

corporation or no, the scales weigh heavily in favor of the just solution. Support for the recommendation is to be found in our own State[187] and in several other jurisdictions.[188]

Looking at the matter in a practical way, the author does not believe that the extended time within which to serve a notice will be abused so far as infants are concerned. Under *Murray*,[189] infants do in fact now have one year within which to serve a notice.[190] Furthermore, the passage of time is a two-edged sword: it may make defending an action to enforce the claim more difficult, but it makes proving the claim correspondingly so.[191] Not to be ignored, too, is the incentive to prompt filing by a competent adult parent who wishes to save his derivative claim.[192]

Paragraph (c)

The basic purpose of this proposed new paragraph is to state in one conspicuous place that in no case shall service of a notice upon an officer, appointee or employee of a public corporation be required as a condition precedent to the commencement of an action against him, and that if an action is commenced against an officer, appointee or employee but not against the public corporation, a notice of claim need not be served upon the corporation unless it is under a statutory duty to indemnify him. Ancillary to proposed paragraph (c) is the proposed repeal of subdivision 2 of section 52 of the County Law.[193]

It is intended by proposed new paragraph (c) to codify the holdings of *Sandak v. Tuxedo Union School District No. 3*[194] and *Derlicka v. Leo*[195] and to overrule the holding in *Siegel v. Epstein.*[196] All three cases are discussed in detail above.[197] The author believes that *Sandak* and *Derlicka* further the basic purpose of notice of claim statutes, but that *Siegel* does not. The statutes, however, with three exceptions,[198] do not expressly reflect the holdings in *Sandak* and *Derlicka.* New paragraph (c) of subdivision 1 of section 50-e would do so.

No recommendation is made to codify the holding in *In re Valstrey Service Corp. v. Board of Elections, Nassau County*,[199] *i.e.*, that a notice of claim is not a condition precedent to a common law claim for indemnity against a public corporation, or what appears to be the holding under *Dole v. Dow Chemical Co.*,[200] *i.e.*, that the same rule applies to a claim for contribution, both also discussed above,[201] because the failure to serve a notice of claim when none is required, can hardly be cause for concern; the converse, however, can have serious consequences for the claimant and his attorney.

Paragraph (d)

The uncertainty attending the word "arises" in determining the point from which the time specified for serving a notice of claim is to be computed has been discussed above.[202]

The sole purpose of proposed new paragraph (d) is to help dispel that uncertainty by codifying the law as the author has gleaned it from the cases.[203]

C. Proposed Amended Subdivision 2

2. *Form of notice; contents.* The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

Comment on Proposed Amendment

Aside from the addition of a caption, no amendment to this subdivision is recommended. Its requirements are reasonable and have been liberally interpreted by the courts.[204]

Consideration was given to eliminating the requirement of verification, as it was by the Judicial Council some thirty years ago,[205] but perhaps an oath has some effect. In any event, a good faith failure to meet this requirement should never be fatal. The public corporation that objects to a notice of claim because of defective or no verification should be required to do no less as to it than the corporation would be required to do as to a pleading. And the claimant should be given a reasonable time to correct the defect without penalty for the time elapsing between service of the defective and corrected notice.[206]

D. Present Subdivision 3

Subdivision 3 of section 50-e of the General Municipal Law presently reads as follows:

> "The notice shall be served on the party against whom the claim is made by delivering a copy thereof, in duplicate, personally, or by registered mail, to the person, officer, agent, clerk or employee, designated by law as a person to whom a summons in an action in the supreme court issued against such party may be delivered; provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard thereto."

1. Its Requirements

This subdivision requires service of a notice of claim (solely upon the public corporation[207]), in duplicate, by personal delivery or registered mail, upon one to whom a summons may be delivered in a supreme court action. The public corporation is not required to return a notice of claim that has been served in an unauthorized manner,[208] and timely but improper service is expressly saved in only one instance: where the notice of claim is actually received by a proper person and the public

corporation causes the claimant or other person interested in the claim to be examined. The failure to serve a duplicate notice is expressly curable under present subdivision 6 of section 50-e.

2. The Major Problems

a. How Service Must Be Made

Service of a notice of claim in the manner required by subdivision 3 is not required as to every public corporation. To the extent that a later statute provides for a different method of service, it prevails. Different methods are to be found, for example, in many of the statutes governing public benefit corporations, statutes which usually require that service be made by filing the notice in the principal office of the corporation.[209]

All defects in the manner of service are not necessarily fatal although the statutory language, literally read, seems to brook no exception save the one expressly stated (actual receipt plus examination). If the improper service relates to the person served, only satisfaction of the stated exception will save the service. The proper person must either be served within the original period or leave obtained to serve a late notice of claim.[210]

If, however, service is timely made upon a proper person but in an unauthorized manner, for example, by certified mail instead of by registered mail, an attack upon the service will probably prove unsuccessful. In almost every modern case upholding that service, however, the public corporation caused the claimant to be examined, thereby invoking the doctrines of waiver or estoppel before subdivision 3 was amended in 1951 to include the stated exception,[211] or, thereafter, falling squarely within that exception.[212]

In *Perl v. New York City Housing Authority*,[213] however, no examination of the claimant was held until after an action to enforce the claim had been commenced, yet service by certified mail was upheld. The late Justice Matthew M. Levy noted that certified mail was in use but a few years and that the "purpose of the requirement of registered mail is that there be governmental—as distinguished from personal—proof of mailing and of delivery and thereby proof of receipt."[214]

Perl was cited with approval by the Appellate Division, Second Department, in *Montana v. Village of Lynbrook*,[215] in which it does not appear that any examination was held.

If, however, service is made by certified mail, service is effective upon receipt not upon mailing, as would be the case if service was duly made by registered mail.[216]

Absent compliance with the exception stated in subdivision 3, service by ordinary mail has not received a sympathetic reception.[217] Relief cannot be sought under subdivision 6 of section 50-e because defects in "the manner or time of service" of a notice of claim are expressly excluded.

b. Upon Whom Service Must Be Made

Subdivision 3 of section 50-e requires that service of a notice

of claim be made upon a person to whom a summons may be delivered in a supreme court action. The Civil Practice Law and Rules identifies him.[218]

But before ascertaining the identity of that person, it is of paramount importance to ascertain the identity of the public corporation against which the claim exists. No small number of the cases involving applications for leave to serve a late notice of claim have dealt with an initial timely service upon a wrong public corporation,[219] if there can be such a service. From this mistake there is ordinarily no relief for a competent adult.[220]

Occasionally, service is made upon the wrong corporation by serving one who is the attorney for both the wrong and right corporations, and who is, as to the wrong but not the right corporation, designated by law as one to whom a summons may be delivered. *In re Economou v. New York City Health & Hospitals Corporation*[221] illustrates the problem well. Petitioners' claim existed against the Health & Hospitals Corporation. The claim was asserted against the City of New York by serving a notice on the corporation counsel. The claim arose on April 5, 1972. Pursuant to the City's demand, petitioners were examined on September 12, 1972. A summons and complaint was served on October 30, 1972 and, after several extensions of time, an answer was served on January 15, 1973. The answer admitted ownership of Bellevue Hospital by the City but denied operation and control. Alerted by that answer, petitioners' attorney investigated and learned that operation and control had been turned over to the Health and Hospitals Corporation on or about July 1, 1970.[222]

Petitioners applied for leave to serve a notice of claim on the Health and Hospitals Corporation *nunc pro tunc*. Special Term granted the application and the Appellate Division, First Department, affirmed, one justice dissenting. The majority estopped the Health & Hospitals Corporation on the grounds that the statute did not disclose the new operator of the hospital and that the Corporation had done nothing to reveal its identity to those doing business with it. The dissenting justice stated that he saw no legal basis for awarding such relief and that "Certainly the fact that both entities are represented by the Corporation Counsel can have no legal significance."[223]

From a strictly technical standpoint, the position taken by the dissenting justice may be correct, but the result reached by the court seems just. A proposed amendment to subdivision 3 would obviate the need to resort to the doctrine of estoppel to reach the result in *Economou*, and would go a step further.[224]

Less frequent, perhaps, but by no means uncommon, are the instances where the notice of claim, or equivalent correspondence, was directed to the right public corporation but was served upon the wrong person. Many cases in this group have involved claims against school districts. *Bayer v. Board of Education*[225] highlights the problem. There, the infant plaintiff had a personal injury claim against the defendant. Within 90 days after that claim arose "a letter stating the claim was addressed by the adult plaintiff to the Superintendent of

Schools, was acknowledged by the Superintendent in a letter in which he stated that the matter was being referred to the school insurance agency for action, and that a written statement was thereafter taken by an investigator from the infant plaintiff . . . ."[226] There was no proof, however, that the letter was "actually received" by a person upon whom a summons could be delivered, the Superintendent not being one of those identified in subdivision 6 of section 228 of the Civil Practice Act, now subdivision 7 of section 311 of the Civil Practice Law and Rules. The complaint was dismissed.

Justice Bernard S. Meyer decried the creation of a system "so inflexible that honest claims may still be defeated on a technicality rather than on the merits,"[227] and offered several constructive alternatives for increasing the system's flexibility.[228] The simplest, and the one that the writer has adopted, is to permit service of a summons upon any "school officer," as that term is defined in the Education Law.[229]

As disturbing as they are, the problems discussed above pale beside one later to be discussed.[230]

E. Proposed Amended Subdivision 3

3. *How served; service upon attorney; when service by mail complete; defect in manner of service; return of notice improperly served.*

(a) The notice shall be served on the [party] *public corporation* against [whom] *which* the claim is made by delivering a copy thereof [, in duplicate,] personally, or by registered *or certified* mail, to the person [, officer, agent, clerk or employee] designated by law as [a person] *one* to whom a summons in an action in the supreme court issued against [such party] *the corporation* may be delivered, *or to the attorney for the public corporation* [; provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim].

(b) Service of a notice of claim upon an attorney who represents more than one public corporation shall be effective not only as to the public corporation against which the claim is specifically asserted but also as to any other public corporation that the attorney represents and against which the claim exists if the notice of claim is sufficient reasonably to apprise the attorney of the identity of that public corporation.

(c) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(d) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be deemed valid if the notice is actually received by a proper person and the public corporation against which the claim is made either demands that the claimant or any other person interested in the claim be examined in regard to it or fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(e) If the notice if served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

Comment on Proposed Amendments to Subdivision 3

A caption is added and the subdivision is divided into five lettered paragraphs.

Paragraphs (a) and (b)

Several obvious changes in language are made with no intended change in substance. The words "public corporation" and "corporation" are substituted for the word "party" to emphasize that the corporation is the only party upon whom service need be made. The reference to "officer, agent, clerk or employee" is deleted because the author believes that the word "person" is sufficient.

Service of only one copy of a notice of claim is required. Present subdivision 3 requires service "in duplicate," but failure to serve more than one copy may be corrected by motion under present subdivision 6. In this day of quick, convenient and inexpensive duplicating processes, the public corporation should easily be able to make as many copies of a notice of claim as it needs.

Service by certified mail is expressly approved.[231] It has sometimes been accepted under present subdivision 3, although it specifically authorizes only service by registered mail.[232] But, under present law, service by registered mail is complete upon mailing, service by certified mail is complete upon receipt.[233] A day or two can make a big difference.[234] Service in either fashion should be complete upon mailing, and it is so provided in paragraph (c).

Service by ordinary mail, however, with its propensity for raising triable issues, is not authorized. If actually received within the time specified, permission to serve a late notice in a proper manner will, if necessary, be readily obtainable under the proposed amendment to subdivision 5.

Service of the notice of claim upon the attorney for a public corporation is expressly sanctioned. It is presently sanctioned as

to some, but not all, public corporations.[235] Notice to the attorney impresses the author as notice to a person best equipped to initiate the procedures necessary to determine promptly whether a claim has merit, the avowed purpose of a notice of claim.

Proposed new paragraph (b) goes a step further and provides that service of a notice of claim upon an attorney for more than one public corporation (for example, the Corporation Counsel of the City of New York) shall be effective service upon all public corporations that the attorney represents if the notice is sufficient reasonably to apprise him of the identity of the public corporation against which the claim exists. The intended effect of this recommendation is to codify the excellent result reached in *In re Economou v. New York City Health & Hospitals Corporation*,[236] discussed above, without resorting to the doctrine of estoppel.

The words "notice of claim," as used in paragraph (b), should be liberally construed. Thus, if the information identifying the public corporation against which the claim exists is contained in a letter accompanying the notice of claim, the two should be read together. Actual knowledge, acquired via written communication, should be the test.

The provision following the semi-colon in present subdivision 3 has been moved to proposed new paragraph (d) and amended.

Paragraphs (c), (d) and (e)

Proposed paragraph (c) provides that service by registered or certified mail is complete upon mailing. Proposed paragraph (d) requires a public corporation that has been served in an unauthorized manner to decide with reasonable promptness (30 days after receipt) whether to return the notice or to waive the defect. Under present subdivision 3, the unauthorized service is deemed valid only if the public corporation causes the claimant or another person interested in the claim to be examined. There is no present requirement that the public corporation return the notice. The writer believes that a demand for such examination should suffice to validate the service and that, absent such demand, a failure to return the notice within thirty days after it is received, specifying the defect in the manner of service, should also validate the service. Actual receipt of a timely notice—not the "ritual of service"[237]—should control.

If a notice is duly returned, proposed paragraph (e) allows a claimant ten days after receipt of the returned notice within which properly to serve another notice and this service will relate back to the time of service of the original notice.

Hopefully, the provisions of paragraphs (c), (d) and (e) will encourage public corporations to ignore defects in the manner of service of a timely notice and to proceed to a prompt investigation of the merits of the claim.

F. Proposed Amended Subdivision 4

4. *Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice.* No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

Comment on Proposed Amendment

The only amendment proposed as to this subdivision is the addition of a caption, yet the exception expressly provided for conditions precedent to *liability* for "the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon," sanctions the commission of greater injustices than were ever wrought by notice of claim provisions.

These provisions exist in the consolidated laws, in city charters and in local laws. As to the consolidated laws, the provision governing villages is to be found, of all places, in the Civil Practice Law and Rules;[238] that governing towns, in the Town Law;[239] and that governing second class cities, in the Second Class Cities Law.[240] The provisions governing almost all of the other cities are to be found in the city charters or local laws.[241] There is none in the County Law and there is none for the City of New York, although a bill to cover the City of New York was introduced in the 1974 legislature.[242] There are, however, provisions in the local laws covering towns[243] and villages.[244]

Typically, but not uniformly, the so-called prior notice of defect provisions require, as a condition precedent to liability, that "written notice" of the defect be "actually given" to a designated municipal employee and that the municipality have a reasonable time or a specified number of hours or days within which to correct the defect.[245]

Section 65-a of the Town Law is one of the more unique provisions. The notice required as to a defect in a "highway, bridge or culvert" is "written notice" or constructive notice, but for snow or ice on a "highway, bridge or culvert", only "written notice" will suffice. As to a defect in a "sidewalk," or snow or ice thereon, only "written notice" will satisfy the statute and only if "such sidewalks have been constructed or are

maintained by the town or the superintendent of highways of the town pursuant to statute," a story unto itself.[246] Query: As to a defect in a highway, bridge or culvert, will actual but unwritten notice suffice? What about defects in a street or crosswalk?

The stated justification for these provisions, aside from the historical liability of towns,[247] is that a large judgment might ruin a small municipality.[248] The effect of these provisions is that a municipality may by law injure at least one person with impunity. *Damnum absque injuria* has been the fate of many.[249]

The underlying policy question in this area is so controversial that the writer has refrained from making a specific recommendation at this time lest concern with it postpone receptive consideration of the proposed amendments to the notice of claim provisions of section 50-e of the General Municipal Law.

G. Present Subdivision 5

5. The court, in its discretion, may grant leave to serve a notice of claim within a reasonable time after the expiration of the time specified in subdivision one of this section in the following cases: (1) Where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the notice of claim. The application shall be made returnable at a trial or special term of the supreme court, or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made, in the manner specified in subdivision three.

1. Its Requirements

Application for leave to serve a late notice of claim must be made, in the manner prescribed, within a reasonable time after the expiration of the time specified in subdivision 1; leave may be granted only in the three cases specified in subdivision 5, must be made within one year after the happening of the event upon which the claim is based, and the application must be made before the commencement of an action to enforce the claim.

Thus, it can be seen that section 50-e has three time periods: the 90-day period specified in subdivision 1; the "within a reasonable time" period specified in subdivision 5; and the one-year period also specified in subdivision 5 — with the caveat that the application for leave to serve a late notice must be made before the commencement of an action. A failure to comply with the 90-day period, even by one day, is usually fatal;[250] a failure to comply with the remaining periods is always fatal.[251] Claimants do, however, have the full one-year period within which to make their applications since the time during which the application is sub judice is not part of the time within which an action to enforce the claim must be commenced.[252]

The public corporation, however, is under no duty to return an untimely notice.[253]

2. The Major Problems

a. Grounds Upon Which Application to Serve Late Notice May Be Made

Subdivision 5 of section 50-e lists the following three cases in which leave to serve a late notice of claim may be granted after expiration of the time specified in present subdivision 1: "(1) Where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier."

Each will be discussed in turn.

(1) Infancy or Mental or Physical Incapacity

In all of the three cases set forth in subdivision 5, the application for leave to serve a late notice of claim must be made within one year after the happening of the event upon which the claim is based. "That requirement is absolute, and neither infancy, insanity nor physical or mental injuries sustained in the accident can eliminate that barrier."[254]

The hardship that has been caused by that one-year bar and the courts' struggle to avoid the "by reason of such disability" requirement as applied to infants, has been discussed in detail above.[255]

(2) Death of Person Entitled to Make Claim

The difficulties under case (2) of present subdivision 5 have been caused principally by the substantive rule in this State that a claim (as well as a cause of action) for wrongful death accrues to the personal representative of the decedent's estate upon his appointment.[256] It is he, therefore, the personal representative, who is the claimant as to that claim. His failure to serve a notice

of claim within 90 days after his appointment is excusable under subdivision 5 only if he fits within one of the three cases set forth therein.

As to the claim for conscious pain and suffering, however, the person who sustained the injuries is the claimant. The time within which to serve a notice of claim for personal injury is ordinarily computed from the date the injury was incurred;[257] in medical malpractice cases, from the end of continuous treatment[258] or the actual or imputed discovery of a foreign object.[259] To obtain leave to serve a notice of claim after the expiration of the basic 90-day period, he, the person injured, must satisfy the requirements of subdivision 5. He may be an infant or a person under mental or physical incapacity. Whether he is or not, if he dies within the 90-day period, that fact alone permits the court to grant leave to serve a notice of claim within a reasonable time after the expiration of that period.

The interaction of case (1) and case (2) of subdivision 5 may be illustrated by *Baker v. New York City Health & Hospitals Corporation.*[260] The facts, as they appear in the opinion at the Appellate Division,[261] are these: Mrs. Baker was admitted into Queens General Hospital on July 31, 1972, treated with medication and released on the same day. Immediately thereafter, her husband took her to Hillcrest General Hospital, where she was admitted in a coma and died from a cerebral hemorrhage on August 5, 1972. Limited letters of administration were issued to her husband on September 13, 1972. On September 14th, a notice of claim for conscious pain and suffering and wrongful death was served on the City of New York (the wrong party). On January 5, 1973, a "motion" for leave to serve a late notice was served on the New York City Health & Hospitals Corporation.

Trial Term denied the application as to both claims. The Appellate Division affirmed as to the claim for wrongful death but reversed as to the claim for conscious pain and suffering. As to the claim for wrongful death, the time within which to serve a notice of claim started to run on September 13, 1972. The 90 days expired on December 12. The claimant, the personal representative, could not bring himself within any of the saving provisions of subdivision 5; hence, the court was without discretion to grant him leave to serve a late notice. As to the claim for conscious pain and suffering, however, this claim accrued to Mrs. Baker in her lifetime. She died within the 90-day period. As to that claim, therefore, the court did have discretion to grant leave to serve a late notice. The Appellate Division concluded that the application had been made within a reasonable time.

The Court of Appeals affirmed, emphasizing that "there is no requirement to establish a nexus between the excuse [the death] and the untimeliness."[262] The Court concluded that the Appellate Division did not abuse its discretion in concluding that the trial court had abused its discretion.

It is apparent, therefore, that the distinction between the claimant as to a claim for wrongful death and the claimant as to

a claim for conscious pain and suffering may produce a variety of results. Occasionally, a notice of claim is timely served as to a claim for wrongful death, but an application for leave to serve a late notice as to the claim for conscious pain and suffering is denied.[263] Or leave is granted to serve a late notice as to a claim for conscious pain and suffering but is denied as to a claim for wrongful death.[264] Or leave is denied as to both claims.[265] If a *timely* notice is served as to a claim for conscious pain and suffering, no notice at all need be served as to a claim for wrongful death.[266]

(3) Justifiable Reliance Upon Written Settlement Representations

Case (3) of subdivision 5 has been strictly construed. Oral representations will not do.[267] Written representations made after an application for leave to serve a late notice was made will not do.[268] Representations made by one not authorized to act, did not appear to be authorized to act and did not purport to act for the public corporation will not do.[269] And, finally, representations, whenever, however, and by whomever made, will not do if they are not relied upon.[270]

Pugh v. Board of Education Central District No. 1[271] illustrates the unpalatable results possible under present section 50-e. Mrs. Pugh was injured on March 10, 1970 when an automobile owned and operated by her collided with a school bus owned by the defendant Board and operated by one Frederick Gregg, Jr. A notice of claim on behalf of herself and her husband was served on the Board on June 9, 1970, the 91st day after the accident.

An action was commenced by Mr. and Mrs. Pugh against the Board and its driver. The Board's answer pleaded the untimely service of the notice of claim as an affirmative defense, the driver merely denied the allegation that a notice had been timely served. Thereafter, defendants moved for summary judgment. Plaintiffs cross-moved to dismiss the affirmative defense of untimely service and the driver sought leave to plead the untimely service as an affirmative defense.

The papers before the court disclosed that Mrs. Pugh had promptly filed a report of the accident with her insurance company and that it had replied by letter dated March 25, 1970, acknowledging receipt of her report and advising her how to protect her interests. This letter was forwarded to her attorney, who advised the insurance company that he represented her. The defendant Board was insured by the same company. By order dated July 6, 1971, Special Term denied defendants' motion for summary judgment. The court invoked the doctrine of estoppel and found that defendants had not been prejudiced. The Appellate Division, Third Department, reversed unanimously. Absent waiver or estoppel, or some statutory basis for permitting late service, one day late was too late. There was here no basis for a waiver or estoppel. Defendants did nothing upon which plaintiffs relied. That defendants were insured by the same company as plaintiffs was

of no consequence. Neither was the absence of prejudice. The third exception in subdivision 5 of present section 50-e was clearly inapplicable. There were no written representations by defendants upon which plaintiffs could have relied and in any event no application for leave to serve a late notice was made within one year.

The Court of Appeals affirmed unanimously without opinion. The result is unpalatable, but is it correctible without major surgery on section 50-e?

b. When Application May Be Made

The writer believes that the time requirements of present section 50-e have been sufficiently discussed above. A word, however, may be in order as to the requirement in present subdivision 5 that application for leave to file a late notice must be made prior to the commencement of an action to enforce the claim. This requirement is frequently adverted to by the courts,[272] but it is not always enforced.[273] It can lead to unfair results. Assume that timely service of a notice of claim under section 50-e is a condition precedent to the commencement of an action to enforce the claim and that plaintiff has commenced an action but served an untimely or no notice. Dismissal of that action upon motion of the defendant seems to afford a sufficient remedy for the noncompliance. If, however, plaintiff realizes his mistake, why should he not be permitted immediately to apply for leave to serve a late notice if a basis for so doing is available? Compelling him to discontinue the pending action, with the attending delay, can only exacerbate an already precarious situation.[274]

Proposed new paragraph (c) of subdivision 5 expressly provides that an application for leave to serve a late notice of claim shall not be denied on the ground that it was made after commencement of an action to enforce the claim.

H. Proposed Amended Subdivision 5

5. *Application for leave to serve a late notice; grounds; when application made.*

(a) The court in its discretion may grant leave to serve a notice of claim within a reasonable time after the expiration of the period specified in subdivision one of this section in the following cases: (1) Where the claimant is physically incapacitated [,] and by reason of such [disability] *incapacity* fails to serve a notice of claim within the time specified; (2) where [a] *the* person entitled to make a claim dies before the expiration of the time [limited] *specified* for service of the notice; or (3) [where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier; or] *where the claimant shows that he has a reasonable excuse for his failure to serve a notice of claim within the time specified and*

that the public corporation against which the claim is made or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified, unless the corporation or carrier shows that it has been substantially prejudiced by the failure to serve the notice within the time specified.

[Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the proposed notice of claim. The application shall be made returnable at a trial or special term of the supreme court, or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made in the manner specified in subdivision three].

(b) Where the claimant who failed to serve a notice of claim within the time specified in subdivision one of this section was under a disability of infancy or insanity, application for leave to serve a late notice of claim must be made within one year after the disability ceases, but in no event later than ten years after the claim arises, except, in any action other than for medical malpractice, where the person was under a disability due to infancy. In all other cases, the application must be made within one year after the happening of the event upon which the claim is based.

(c) An application for leave to serve a late notice of claim shall not be denied on the ground that it was made after the commencement of an action to enforce the claim.

Comments on Proposed Amendments to Subdivision 5

1. Paragraph (a)

Slight changes in language are made with no intended change in meaning: The word "the" is substituted for the word "a" and the word "specified" is substituted for the word "limited."

Present case (1) is proposed to be amended because of proposed new paragraph (b) of subdivision 1.[275]

Present case (2) remains as it is.

Present case (3) is proposed to be deleted because proposed new case (3) is intended to include it, and more.

The major amendment to subdivision 5, indeed one of the major amendments to the entire section, is new case (3), providing that an application for leave to serve a late notice may be granted "where the claimant shows that he has a reasonable excuse for his failure to serve a notice of claim within the time specified and that the public corporation against which the claim is made or its insurance carrier had actual knowledge within the time specified of the essential facts constituting the claim, unless the corporation or carrier shows that it has been

substantially prejudiced by the failure to serve the notice within the time specified."

That recommendation is modeled after the provision in, coincidentally, subdivision 5 of section 10 of the Court of Claims Act,[276] with two exceptions. First, the Court of Claims Act does not clearly indicate who has the burden of showing substantial prejudice.[277] The proposed amendment to subdivision 5 of section 50-e expressly places the burden on the public corporation or its carrier, which is presumably in the best position to show that it has been substantially prejudiced.[278] Secondly, actual knowledge in the insurance carrier, the real party in interest,[279] will be just as effective as actual knowledge in the public corporation itself.

2. Paragraph (b)

The first sentence of this section conforms the outside time limit in subdivision 5 to proposed new paragraph (b) of subdivision 1 as to persons who were under a disability of infancy or insanity when their claims arose.

3. Paragraph (c)

The purpose of this proposed new paragraph is to give a claimant the opportunity immediately to correct his nonperformance of the condition precedent if he possibly can. Nonperformance may result in dismissal of the pending action, but its pendency will not be a ground for denying an application for leave to serve a late notice.

I. Proposed Amended Subdivision 6

6. *Mistake, omission, irregularity or defect. At* [Any] *any* time after the [date of] service of [the] *a* notice of claim and at [or before the trial of an action or the hearing upon a special proceeding] *any stage of an action or special proceeding* to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby. [Application for such relief, if made before trial, shall be by motion, on affidavits; if made before the action is commenced, shall be by motion, on the petition of the claimant, or someone on his behalf. Failure to serve more than one copy may be corrected by such motion.]

Comment on Proposed Amendment

The proposed amendments to subdivision 6 consist of adding a caption and permitting a good faith, nonprejudicial mistake, omission, irregularity or defect in a notice of claim "not pertaining to the manner or time of service thereof," to be corrected, supplied or disregarded at *any* stage of an action or special proceeding, even an appeal, thus incorporating into

section 50-e the liberal, discretionary power vested in the court under section 2001 of the Civil Practice Law and Rules.

The present provision for correcting the failure to serve more than one copy of a notice of claim becomes unnecessary by the proposed elimination from present subdivision 3 of the requirement to serve more than one copy.

Serious consideration was given to deleting from present subdivision 6 the words "not pertaining to the time or manner of service thereof." For all practical purposes, so much of the quoted language as pertains to the manner of service has in effect been deleted by the proposed amendments to subdivision 3. But not so much of that language as pertains to the time of service. To delete it would, in the opinion of the author, seriously undercut the very heart of notice of claim provisions, the time requirements. Greater flexibility has been provided by the proposed amendments to subdivisions 1 and 5, but the door is not wide open.

The procedure governing all applications under section 50-e is to be found in proposed new subdivision 7.

J. Proposed New Subdivision 7

7. Applications under this section; where and how made; proof. An application under this section shall be made to the supreme court or to the county court in a county where the action may properly be brought for trial or, if an action to enforce the claim has been commenced, where the action is pending. Before action commenced, the application shall be made by special proceeding; after action commenced, the application shall be made by motion. The application shall be made upon such notice as is provided generally for special proceedings and motions in the civil practice law and rules; shall be supported by affidavit or such other proof as the court may require; and shall, where the application is for leave to serve a late notice of claim, be accompanied by a copy of the proposed notice.

Comment on Proposed New Subdivision

No substantive change in present procedure, as provided in parts of subdivisions 5 and 6, is intended by proposed new subdivision 7. Its sole purpose is to put in one place all of the provisions covering all applications under section 50-e. Before an action is commenced, the application should be made by special proceeding; after an action is commenced, the application should be made by motion. When made by special proceeding or pre-trial motion, the application must, of course, be supported by affidavit. If the application is for leave to serve a late notice of claim, a copy of the proposed notice must accompany the application. During or after trial, however, proof in support of the application should be submitted in such form as the trial or appellate court may require.

The procedural interstices are filled in by the Civil Practice Law and Rules.[280]

Defects in the form of the application should be disregarded if no substantial right is prejudiced.[281]

K. Proposed New Subdivision 8

8. Liberal construction. This section shall be liberally construed with a view to substantial justice between the parties.

Comment on Proposed New Subdivision

An identical recommendation was made by the Judicial Council thirty-two years ago. The Judicial Council deemed it desirable that the substance of the liberal construction provisions of the then Civil Practice Act be incorporated into the proposed new section.[282] Today, it is necessary.

The thrust of the statutory recommendations now made is in keeping with the admonition of the Court of Appeals in *Camarella v. East Irondequoit Central School Board*,[283] to wit, to reconsider the "harsher aspects of section 50-e . . . in order that a more equitable balance may be achieved between a public corporation's reasonable need for prompt notification of claims against it and an injured party's interest in just compensation."[284] The key words are "equitable balance"; they should be the guide by which the provisions of the section are construed.

L. Proposed Amended Subdivision 9

[7] *9. Inapplicability of section.* This section shall not apply to claims arising under the provisions of the workmen's compensation law, or [,] the volunteer firemen's benefit law, or to claims [of infant wards of] *against* public corporations [where the claim is against such public corporation] by [its] *their* own infant wards.

Comment on Proposed Amendment

Aside from the addition of a caption, the only changes intended to be made to present subdivision 7 are to renumber it and to make slight grammatical changes.

V. DISCUSSION OF PRESENT AND PROPOSED REPEAL OF SUBDIVISION 2 OF SECTION 52 OF THE COUNTY LAW

Section 52 of the County Law

§ 52. Presentation of claims for torts; commencement of actions.

1. Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the

county, its officers, agents, servants or employees, must be made and served in compliance with section 50-e of the general municipal law. Every action upon such claim shall be pursuant to the provisions of section 50-i of the general municipal law. The place of trial shall be in the county against which the action is brought.

[2. No action shall be maintained against an officer, agent, servant or employee of a county unless the notice of claim for damages was filed in the manner and within the time prescribed in subdivision one and also served personally or by registered mail upon such officer, agent, servant or employee within the same period of time.]

[3] 2. This section shall not apply to claims for compensation for property taken for a public purpose, nor to claims under the workmen's compensation law.

Comment on Proposed Repeal

The purpose of the proposed repeal of subdivision 2 of Section 52 of the County Law is to remove from the books the only statute in this State[285] that expressly requires service of a notice of claim upon the employee of a public corporation as a condition precedent to the commencement of an action against him. This recommendation, when read with the first sentence of proposed new paragraph (c) of subdivision 1, will make clear that in no case will such service be required.[286]

It is difficult to ascertain why the provision exists. The County Law, as we know it, was enacted in 1950.[287] As to section 52, the note of the commission states simply that subdivisions 1 and 3 were derived from former section 6-a and that subdivision 2 "is new."[288]

Subdivision 2 has caused some problems. For example, in *Stephens v. Department of Health of Orange County*,[289] plaintiffs brought a malpractice action against, among others, the county and one of its doctors. A notice of claim was served upon the county alone. The doctor moved to dismiss the complaint on the ground that a notice of claim had not been served upon him.

The court denied the motion, describing subdivision 2 of section 52 of the County Law as "an anachronism which is in direct conflict with the legislative intent found in the provisions of section 50-e by the Court of Appeals in the *Sandak* case,"[290] and holding that since section 50-d of the General Municipal Law (which specifically covers malpractice actions against municipal corporations and their doctors) was passed sometime after section 52 of the County Law, as indeed it was,[291] the Legislature must have intended section 50-d to control.

The same result was reached in *De Angelo v. Lattimer*[292] where only the truck driver employed by the Oswego County Highway Department was sued and only the county was served with a notice of claim. The applicable specific statute in that case was section 50-b of the General Municipal Law, but it was

enacted fourteen years before section 52 of the County Law,[293] as was section 50-c of the General Municipal Law,[294] which, as amended five years before section 52,[295] required service of a notice of claim in compliance with section 50-e of that Law. The court in *De Angelo* did not refer to the relative priority in enactment of the statutes involved, but simply cited *Sandak* in holding that service of a notice of claim upon the employee was not required.

Examples could be multiplied to no useful end. There is a patent inconsistency between subdivision 2 of section 52 of the County Law and other statutes covering specific types of actions against counties and other public corporations, and subdivision 2 seems not to further the basic purpose of notice of claim statutes.

Unless immunized by statute, an employee of a public corporation is liable for his own tort.[296] What legitimate public purpose is served by requiring the service of a notice of claim upon him? He knows or should know of his own tort. His employer, the public corporation, may not. If it is under a duty to indemnify its employee, a notice of claim must be served upon it. This seems ample protection for the public purse. The private purse is entitled to no such protection.

VI. DISCUSSION OF PROPOSED AMENDED SECTION 311 OF THE CIVIL PRACTICE LAW AND RULES

Section 311 of the Civil Practice Law and Rules

§ 311. Personal service upon a corporation or governmental subdivision.

Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service;

2. upon the city of New York, to the corporation counsel or to any person designated by him to receive process in a writing filed in the office of the clerk of New York County;

3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;

4. upon a county, to the chairman or clerk of the board of supervisors, clerk, attorney or treasurer;

5. upon a town, to the supervisor or clerk;

6. upon a village, to the mayor, clerk, or any trustee; [and]

7. upon a school district, to a school officer, as defined in the education law; and

[7] *8.* upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

Comment on Proposed Amendment

The sole purpose of the proposed amendment to this section is to broaden the category of persons designated by law as persons to whom a summons (and thus a notice of claim) in a supreme court action against a school district may be delivered to include those identified in section 2 of the Education Law. By so doing, notice to school officers to whom parents are most likely to give notice will be effective notice, thus avoiding results like that Justice Bernard S. Meyer felt compelled to reach in *Bayer v. Board of Education*, discussed above.[297]

VII. DISCUSSION OF PRESENT AND PROPOSED REPEAL OF SUBDIVISION 6 OF SECTIONS 1276, 1299-p, 1299-rr, 1317 AND 1342 OF THE PUBLIC AUTHORITIES LAW

Public Authorities Law

§ 1276. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§ 1299-p. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§ 1299-rr. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§ 1317. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary

corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

§ 1342. Actions against the authority

[6. Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority.]

Comment on Proposed Repeal

Until nine years ago, the perplexing problem at times confronting a lawyer was whether he had to serve a notice of claim upon the public corporation, or its employee, or both.[298] Whether he had to serve a notice of claim upon a private stock corporation was never of any concern, that is, until there crept into this already troublesome area of the law the anonymous subsidiary.

The first statute was enacted in 1966.[299] There then followed: one in 1967;[300] one in 1969;[301] and two in 1970.[302]

The pattern is the same. Let us take the first, relating to the Metropolitan Transportation Authority. The pertinent sections are 1266 and 1276 of the Public Authorities Law. Subdivision 5 of section 1266 is set forth in a footnote.[303] Subdivision 6 of section 1276 reads as follows:

> "Each subsidiary corporation of the authority shall be subject to the provisions of this section as if such subsidiary corporation were separately named herein, provided, however, that a subsidiary corporation of the authority which is a stock corporation shall not be subject to the provisions of this section except with respect to those causes of action arising on and after the first day of the twelfth calendar month following that calendar month in which such stock corporation becomes a subsidiary corporation of the authority."

Initially, claimants had three narrow escapes. In one, the Court held that the above-quoted provision was too vague to be enforceable and estopped the defendant from relying on it.[304] In another, a summons and a complaint satisfying the requirements of a notice of claim were served within 90 days after the accident.[305] And in the third, service on the parent corporation was deemed sufficient and timely made as to the subsidiary.[306]

The remaining cases have gone against claimants.[307]

The existing situation is intolerable. It is often difficult enough to decide which of two identified public corporations is the public corporation against which the claim exists. To have to determine at the peril of the 90-day bar whether a notice of claim must be served upon what purports to be a private stock corporation is a burden no lawyer and, more importantly, no injured person should have to bear. The solution is simple. If it be deemed essential that a notice of claim be a condition precedent to the commencement of a tort action against a subsidiary of a public corporation let a separate title be enacted as to each as has been done for so many public corporations in this State.

VIII. SUMMARY OF STATUTORY RECOMMENDATIONS

The basic purpose of the statutory recommendations is to follow the suggestion of the Court of Appeals in *Camarella v. East Irondequoit School Board*,[308] to wit: to reconsider the harsher aspects of section 50-e of the General Municipal Law "in order that a more equitable balance may be achieved between a public corporation's reasonable need for prompt notification of claims against it and an injured party's interest in just compensation."[309]

A more equitable balance has been sought to be achieved by (1) breathing greater flexibility into section 50-e without defeating its basic purpose, (2) codifying and clarifying existing law on troublesome questions that have required far more time and energy than they should to resolve via case law, (3) overruling existing law and repealing or amending existing statutes that do not serve the basic purpose of notice of claim statutes or that have led to unjust results, and (4) expressly providing that this remedial legislation be liberally construed to do substantial justice.

It is not intended by these statutory recommendations to repeal expressly or by implication existing statutes that are in certain respects more liberal than section 50-e, for example, in the basic time period within which a notice of claim must be served.[310]

Some of the statutory recommendations are purely formal, for example, the addition of captions to each subdivision of section 50-e, the slight changes in terminology or grammar, and the placing of the provisions governing the procedure on all applications under section 50-e in a new subdivision 7.

Several major amendments to section 50-e, however, are recommended. A summary of those recommendations follows.

Section 50-e of the General Municipal Law

Subdivision 1

A major change to section 50-e is contained in new paragraph (b) of subdivision 1.[311] Although the basic 90-day period for

service of a notice of claim is retained, that period is extended for claimants under a disability of infancy or insanity, but not for those who are physically incapacitated.

Where the claimant is an infant, a notice of claim may be served within 90 days after his disability ceases, except that as to a claim for medical malpractice, the notice must be served within ten years after the claim arises even though the disability has not ceased. Where the claimant is an insane person, a notice of claim may be served within 90 days after his disability ceases, but must, as to any tort, be served within ten years after the claim arises even though the disability has not ceased.

The ten-year outside limits, and the change in terminology from mental incapacity to insanity, are recommended to mesh the provisions of section 50-e with those of section 208 of the Civil Practice Law and Rules, as amended in 1975, which extend the statute of limitations for infants and insane persons. Since section 208 provides no extension of the statute of limitations for physical incapacity, as such, no extension of the basic 90-day period for serving a notice of claim on that ground is recommended. To do otherwise might result in granting a greater time for serving a notice of claim than would exist for commencing an action to enforce it.

Proposed new paragraph (c) of subdivision 1 provides that service of a notice of claim upon an officer, appointee or employee of a public corporation shall not be required as a condition precedent to the commencement of an action or special proceeding against him, and that if the officer, appointee or employee alone is sued, service of a notice of claim upon the public corporation shall be required only if it is under a statutory duty to indemnify him. This paragraph in effect codifies the holdings in *Sandak v. Tuxedo Union School District No. 3*[312] and *Derlicka v. Leo*[313] and overrules the holding in *Siegel v. Epstein.*[314] Ancillary to the provision in paragraph (c) that a notice of claim need not be served upon an officer, appointee or employee, is the recommended repeal of subdivision 2 of section 52 of the County Law, the only provision in this State that expressly requires such service.

Paragraph (d), which states when a claim "arises," is intended to codify existing law in an unnecessarily troublesome area.

Subdivision 3

Subdivision 3 of section 50-e is proposed to be amended in several important respects.

Only one copy of a notice of claim need be served. Service by certified mail is expressly authorized and it, too, will be effective upon mailing. Defects in the manner of service should no longer prove fatal. Service is permitted upon the attorney for a public corporation although he may not, as to certain public corporations, be one designated by law as one to whom a summons in a supreme court action may be delivered. More importantly, however, service upon the attorney will be effective not only as to the corporation against which the claim

is specifically asserted, but also against a corporation against which the claim exists if the attorney represents both corporations and the information received by him is sufficient reasonably to apprise him of the identity of the corporation against which the claim exists. The purpose of this proposed amendment is to codify *In re Economou v. New York City Health & Hospitals Corporation.*[315] If, of course, the claim exists against both corporations, service upon their attorney will be effective against both.

Subdivision 5

Subdivision 5 of section 50-e is also proposed to be amended in several important respects.

Paragraph (a) gives the court greater discretion to permit service of a notice of claim after the expiration of the basic 90-day period. Presently, the court may do so in only three cases: (1) where the claimant was an infant or physically or mentally incapacitated and failed to file by reason of such disability; (2) where the claimant died within the 90-day period; and (3) where the claimant failed to file in justifiable reliance upon written settlement representations by the public corporation or its carrier.

Part of case (1) has been deleted because of the proposed amendment to subdivision 1 as to infants and insane persons. Case (2) has been retained. Present case (3) has been replaced by a broader new case (3). New case (3) gives the court discretion to permit service of a notice of claim within a reasonable time after the expiration of the basic 90-day period where the claimant has a reasonable excuse for failure to serve a notice within that period and the public corporation or its insurance carrier acquires within that period actual knowledge of the essential facts constituting the claim unless the corporation or carrier shows that it has been substantially prejudiced by the failure to serve the notice within the basic 90-day period.

Under paragraph (b), applications under subdivision 5 of section 50-e must still be made within one year after the happening of the event upon which the claim is based except as to infants and insane persons, whose time to apply for leave to serve a late notice of claim is adjusted to accommodate proposed new paragraph (b) of subdivision 1, extending for infants and insane persons the basic 90-day period for serving a notice of claim.

Proposed new paragraph (c) changes the present rule that an application for leave to serve a late notice of claim must be made before commencement of the action to enforce the claim by proscribing denial of an application on the ground that it was made after commencement of the action. This will remove an unnecessary procedural roadblock to prompt recourse to the ameliorative provisions of subdivision 5.

Subdivision 6

The proposed amendment to subdivision 6 of section 50-e reflects the liberal policy expressed in section 2001 of the Civil Practice Law and Rules. Nonprejudicial mistakes will be correctable at any stage of an action or special proceeding, even on appeal, and not only, as now, at or before the trial.

Subdivision 8

What may well be the most important proposed amendment of all is contained in new subdivision 8, which states that "This section shall be liberally construed to do substantial justice between the parties." Hopefully, the courts will capture the spirit of this subdivision in achieving "a more equitable balance . . . between a public corporation's reasonable need for prompt notification of claims against it and an injured party's interest in just compensation."[3 1 6]

Section 311 of the Civil Practice Law and Rules

The sole purpose of the proposed amendment to this section is to broaden the category of persons designated by law to whom a summons in a supreme court action (and thus a notice of claim) may be delivered in an action against a school district. The category, as broadened, will include all who come within the definition of "School officer" in section 2 of the Education Law, and will thus include persons, such as a school superintendent, to whom a parent is most likely to give notice of a claim.

Section 52 of the County Law

The sole purpose of the proposed repeal of subdivision 2 of section 52 of the County Law is to remove from our books the only provision that explicitly requires service of a notice of claim on an employee of a public corporation as a condition precedent to the commencement of an action against him.

Sections 1276, 1299-p, 1299-rr, 1317 and 1342 of the Public Authorities Law

Subdivision 6 of each of those sections requires service of a notice of claim upon a subsidiary of a public authority "as if such subsidiary corporation were separately named herein." Notice of claim requirements pertaining to identified public authorities have frequently proved to be onerous enough without also requiring attorneys to wonder whether what appears to be a private stock corporation—or even a public corporation not identified in any notice of claim statute—is in fact a subsidiary of a public authority as to which a notice of claim is required.

IX. CONCLUSION

What is proposed now is a first step, but, it is submitted, an important one. Section 50-e of the General Municipal Law is the most pervasive section in the State. If amended as proposed, it will not only bring immediate relief where it is most urgently needed, but it may well serve as a basic section of a much to be desired separate chapter of the consolidated laws. It seemed inappropriate at this time to recommend a new chapter consisting solely of notice of claim provisions. If the Legislature adopts the substance of the statutory recommendations made herein, the way should be eased for a new chapter in the near future.

That new chapter could be entitled the Tort Claims Act if it were applicable to all public entities—the State as well as public corporations—and if both substantive and procedural provisions applicable to all public entities were included. So comprehensive a chapter should perhaps await the merger of the Court of Claims into the Supreme Court. In its stead there could be enacted a Public Corporations Tort Claims Procedure Law, which would apply to all public corporations (not the State) and which would not include substantive law provisions.

Either chapter, however, should include at least provisions governing notices of claim, prior notice of defects (if those provisions are to be perpetuated), statutes of limitations, and the indemnification of public employees for specified misconduct.

Implementation of either of those alternatives would require further serious study and the repeal of many provisions in the consolidated and unconsolidated laws, city charters and local laws. An adequately staffed and funded full-time staff would, in the opinion of the author, be desirable, if not necessary.

It is doubtful, however, that major, lasting progress in the area of tort claims against the State and public corporations will be made until the Court of Claims is merged into the Supreme Court and all of the provisions relating to such claims are placed in one chapter of the consolidated laws. Then alone will uniformity, consistency and simple accessibility be reasonably assured.

APPENDIX "A"

Present Section 50-e of the General Municipal Law

§ 50-e. Notice of Claim

1. In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general corporation law, or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises.

2. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

3. The notice shall be served on the party against whom the claim is made by delivering a copy thereof, in duplicate, personally, or by registered mail, to the person, officer, agent, clerk or employee, designated by law as a person to whom a summons in an action in the supreme court issued against such party may be delivered; provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard thereto.

4. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. The court, in its discretion, may grant leave to serve a notice of claim within a reasonable time after the expiration of the time specified in subdivision one of this section in the following cases: (1) where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the proposed notice of claim. The application shall be made returnable at a trial or special term of the supreme court or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made, in the manner specified in subdivision three.

6. Any time after the date of service of the notice of claim and at or before the trial of an action or the hearing upon a special proceeding to

which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court provided it shall appear that the other party was not prejudiced thereby. Application for such relief, if made before trial, shall be by motion, on the petition of the claimant, or someone on his behalf. Failure to serve more than one copy may be corrected by such motion.

7. This section shall not apply to claims arising under the provisions of the workmen's compensation law or, the volunteer firemen's benefit law or to claims of infant wards of public corporations where the claim is against such public corporation by its own infant ward.

APPENDIX "B"

Proposed Section 50-e of the General Municipal Law

§ 50-e. Notice of claim

1. *When service required; time for service; infancy or insanity; upon whom service required; when claim arises.*

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general [corporation] *construction* law, or any officer, appointee or employee thereof, the notice of claim shall [comply] *be made and served in accordance* with the provisions of this section [and it shall be given within ninety days after the claim arises].

(b) The notice of claim shall be served within ninety days after the claim arises, except that if the claimant is under a disability of infancy or insanity the time within which the notice must be served shall be extended by the period of disability; provided, however, that such time shall not be extended by this provision beyond ten years after the claim arises, except, in any action other than for medical malpractice, where the person was under a disability due to infancy.

(c) Service of a notice of claim upon an officer, appointee or employee of a public corporation shall not be required as a condition precedent to the commencement of an action or special proceeding against him. If an action or special proceeding is commenced against the officer, appointee or employee but not against the public corporation, service of a notice of claim upon the public corporation shall be required only if it is under a statutory duty to indemnify him.

(d) A claim for wrongful death arises upon the appointment of a personal representative. A claim for any other tort arises on the date from which the time limited for commencing an action or special proceeding to enforce the claim would be computed if service of a notice of claim was not required.

2. *Form of notice; contents.* The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

3. *How served; service upon attorney; when service by mail complete; defect in manner of service; return of notice improperly served.*

(a) The notice shall be served on the [party] *public corporation* against [whom] *which* the claim is made by delivering a copy thereof [, in duplicate,] personally, or by registered or *certified* mail, to the person [, officer, agent, clerk or employee] designated by law as [a person] *one* to whom a summons in an action in the supreme court issued against [such party] *the corporation* may be delivered, *or to the attorney for the public corporation* [; provided that if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim].

(b) Service of a notice of claim upon an attorney who represents more than one public corporation shall be effective not only as to the public corporation against which the claim is specifically asserted but also as to any other public corporation that the attorney represents and against which the claim exists if the notice of claim is sufficient reasonably to apprise the attorney of the identity of that public corporation.

(c) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state.

(d) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be deemed valid if the notice is actually received by a proper person and the public corporation against which the claim is made either demands that the claimant or any other person interested in the claim be examined in regard to it or fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(e) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

4. *Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice.* No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. *Application for leave to serve a late notice; grounds; when application made.*

(a) The court in its discretion may grant leave to serve a notice of claim within a reasonable time after the expiration of the period specified in subdivision one of this section in the following cases: (1) where the claimant is physically incapacitated [,] and by reason of such [disability] *incapacity* fails to serve a notice of claim within the time specified; (2) where [a] *the* person entitled to make a claim dies before the expiration of the time [limited] *specified* for service of the notice; or (3) [where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier; or] *where the claimant shows that he has a reasonable excuse for his failure to serve a notice of claim within the time specified and that the public corporation against which the claim is made or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified, unless the corporation or carrier shows that it has been substantially prejudiced by the failure to serve the notice within the time specified.*

[Application for such leave must be made within the period of one year after the happening of the event upon which the claim is based, and shall be made prior to the commencement of an action to enforce the claim, upon affidavit showing the particular facts which caused the delay, accompanied by a copy of the proposed notice of claim. The application shall be made returnable at a trial or special term of the supreme court, or of the county court, in the county where an action on the claim could properly be brought for trial, and due notice thereof shall be served upon the person or party against whom the claim is made in the manner specified in subdivision three.]

(b) Where the claimant who failed to serve a notice of claim within the time specified in subdivision one of this section was under a disability of infancy or insanity, application for leave to serve a late notice of claim must be made within one year after the disability ceases, but in no event later than ten years after the claim arises, except, in any action other than for medical malpractice, where the person was under a disability due to infancy. In all other cases, the application must be made within one year after the happening of the event upon which the claim is based.

(c) An application for leave to serve a late notice of claim shall not be denied on the ground that it was made after the commencement of an action to enforce the claim.

6. *Mistake, omission, irregularity or defect. At* [Any] *any* time after the [date of] service of [the] *a* notice of claim and at [or before the trial of an action or the hearing upon a special proceeding] *any stage of an action or special proceeding* to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby. [Application for such relief, if made before trial, shall be by motion, on affidavits; if made before the action is commenced, shall be by motion, on the petition of the claimant, or someone on his behalf. Failure to serve more than one copy may be corrected by such motion.]

7. Applications under this section; where and how made; proof. An application under this section shall be made to the supreme court or to the county court in a county where the action may properly be brought for trial or, if an action to enforce the claim has been commenced, where the action is pending. Before action commenced, the application shall be made by special proceeding; after action commenced, the application shall be made by motion. The application shall be made upon such notice as is provided generally for special proceedings and motions in the civil practice law and rules; shall be supported by affidavit or such other proof as the court may require; and shall, where the application is for leave to serve a late notice of claim, be accompanied by a copy of the proposed notice.

8. Liberal construction. The provisions of this section shall be liberally construed with a view to substantial justice between the parties.

[7] *9. Inapplicability of section.* This section shall not apply to claims arising under the provisions of the workmen's compensation law, or [,] the volunteer firemen's benefit law, or to claims [of infant wards of] *against* public corporations [where the claim is against such public corporation] by [its] *their* own infant wards.

APPENDIX "C"

Provisions in the Consolidated and Unconsolidated Laws of the State of New York Relating to Notices of Tort Claim Against the State and Public Corporations.

N.Y. Const. art. 3, § 19; art. 9, § 2(c) (1938)
Ct. Cl. Act § § 8, 10 (McKinney 1963)
CPLR 9802 (McKinney Supp. 1975)
County Law § 52 (McKinney 1972)
Educ. Law § § 376-a, 467, 491, 3813, 6210, 6280, 6308 (McKinney 1972, except § 491 (McKinney Supp. 1975))
Exec. Law § 625 (McKinney 1972 & Supp. 1975)
Gen. Constr. Law § § 65, subd. b; 66, subds. 1, 2, 3, 4 (McKinney Supp. 1975)
Gen. Munic. Law
§ 50-c (McKinney 1965)
§ 50-d (McKinney 1965)
§ 50-e (McKinney 1965 & Supp. 1975)
§ 50-f (McKinney 1965)
§ 50-h (McKinney 1965)
§ 50-i (McKinney 1965)
§ 50-j (McKinney Supp. 1975)
§ 880 (McKinney 1974)
H'way Law § 139 (McKinney 1962)
Mental Hygiene Law § 11.29 (McKinney Supp. 1975)
Priv. Hous. Fin. Law § § 667, 717 (McKinney Supp. 1975)
Pub. Auth. Law
art. 2, tit. 3, § 163-a (McKinney 1970)
art. 2, tit. 4, § 212-a (McKinney 1970)
art. 2, tit. 9, § 361-b (McKinney 1970)
art. 2, tit. 11, § § 469, 469-a (McKinney 1970)
art. 3, tit. 3, § 569-a (McKinney 1970)
art. 4, tit. 4, § 889 (McKinney 1970)
art. 5, tit. 3, § 1067 (McKinney 1970)
art. 5, tit. 4, § 1089 (McKinney 1970)
art. 5, tit. 5, § 1109 (McKinney 1970)
art. 5, tit. 7, § 1169 (McKinney 1970)
art. 5, tit. 9, § 1212 (McKinney 1970)
art. 5, tit. 9-A, § 1225-m (McKinney Supp. 1975)
art. 5, tit. [10] 7-A, § 1248 (McKinney 1970)
art. 5, tit. 11, § 1276 (McKinney 1970)
art. 5, tit. 12, § 1297 (McKinney Supp. 1975)
art. 5, tit. [13] 11-A, § 1299-p (McKinney 1970)
art. 5, tit. [14] 11-B, § 1299-rr (McKinney 1970)
art. 5, tit. [15] 11-C, § 1317 (McKinney Supp. 1975)
art. 5, tit. [16] 11-D, § 1342 (McKinney Supp. 1975)
art. 6, tit. 1-A, § 1349-w (McKinney 1970)
art. 6, tit. 2, § 1372 (McKinney 1970)
art. 6, tit. 3, § 1397 (McKinney 1970)
art. 7, tit. 1, § 1416 (McKinney 1970)
art. 7, tit. 1-A, § 1420-r (McKinney Supp. 1975)
art. 7, tit. 2, § 1440 (McKinney 1970)
art. 7, tit. 2-A, § 1425-q (McKinney Supp. 1975)
art. 7, tit. 3, § 1466 (McKinney 1970)
art. 7, tit. 3-A, § 1470-p (McKinney 1970)
art. 7, tit. 4, § 1490 (McKinney 1970)
art. 7, tit. 4-A, § 1493-q (McKinney Supp. 1975)
art. 7, tit. 5, § 1516 (McKinney 1970)
art. 7, tit. 6, § 1541 (McKinney 1970)
art. 7, tit. 7, § 1561 (McKinney 1970)
art. 7, tit. 7 [sic], § 1566 (McKinney 1970)
art. 7, tit. 8, § 1569-q (McKinney 1970)
art. 7, tit. 9, § 1585-q (McKinney 1970)

art. 7, tit. 9-A, § 1590-q (McKinney Supp. 1975)
art. 7, tit. 10, § 1595-q (McKinney 1970)
art. 7, tit. 11, § 1596-p (McKinney 1970)
art. 7, tit. 12, § 1597-p (McKinney 1970)
art. 7, tit. 13, § 1598-p (McKinney 1970)
art. 7, tit. 14, § 1599-q (McKinney 1970)
art. 7, tit. 14 [sic], § 1599-q (McKinney 1970)
art. 7, tit. 14 [sic], § 1599-p (McKinney 1970)
art. 7, tit. 14 [sic], § 1599-p (McKinney 1970)
art. 7, tit. 14 [sic], § 1599-p (McKinney 1970)
art. 7, tit. 15, § 1599-p (McKinney Supp. 1975)
art. 7, tit. 15 [sic], § 1599-qq (McKinney Supp. 1975)
art. 7, tit. 16, § 1599-qqq (McKinney Supp. 1975)
art. 7, tit. 16 [sic], § 1599-qqq (McKinney Supp. 1975)
art. 7, tit. 17, § 1599-qqqq (McKinney Supp. 1975)
art. 7, tit. 18, § 1600-p (McKinney Supp. 1975)
art. 7, tit. 18 [sic], § 1600-q (McKinney Supp. 1975)
art. 8, tit. 1, § 1607 (McKinney 1970)
art. 8, tit. 4, § 1691 (McKinney 1970)
art. 8, tit. 5, § 1718 (McKinney Supp. 1975)
art. 8, tit. 6, § 1740 (McKinney 1970)
art. 8, tit. 7, § 1777 (McKinney 1970)
art. 8, tit. 10, § 1918 (McKinney 1970)
art. 8, tit. 11, § 1966 (McKinney 1970)
art. 8, tit. 12, § 1984 (McKinney 1970)
art. 8, tit. 13, § 2032 (McKinney 1970)
art. 8, tit. 14, § 2067 (McKinney 1970)
art. 8, tit. 14-A, § 2087 (McKinney Supp. 1975)
art. 8, tit. 15, § 2332 (McKinney 1970)
art. 8, tit. 17, § 2416 (McKinney Supp. 1975)
art. 8, tit. 18, § 2447 (McKinney Supp. 1975)
art. 8, tit. 19, § 2481 (McKinney Supp. 1975)
art. 8, tit. 25, § 2520 (McKinney Supp. 1975)
art. 8, tit. 26, § 2547 (McKinney Supp. 1975)
Pub. Hous. Law § 157 (McKinney 1970 and Supp. 1975)
Second Class Cities Law § 244 (McKinney Supp. 1975)
Town Law § 67 (McKinney 1965)
Unconsol. Laws §§ 4412, 7107, 7108, 7401, 8099, 8125 (McKinney Supp. 1975 except §§ 7107, 8125 (McKinney 1961))

APPENDIX "D"

Cities in the State of New York with Notice of Claim Laws*

Albany	Local Laws, 1953, No. 1, p. 3
Amsterdam	Local Laws, 1954, No. 1, p. 5
Auburn	Ch. 438, § 157, [1920] N.Y. Laws 1167
Batavia	Local Laws, 1957, No. 5, § 16.1, p. 47
Beacon	Local Laws, 1944, No. 1, p. 17
Binghamton	Local Laws, 1958, No. 3, p. 21
Buffalo	Local Laws, 1958, No. 1, p. 22
Canandaigua	Local Laws, 1967, No. 3, 1966,** p. 75
Cohoes	Local Laws, 1960, No. 1, p. 48
Corning	Ch. 710, § 160, [1943] N.Y. Laws 1787
Cortland	Local Laws, 1956, No. 3, p. 54
Dunkirk	Local Laws, 1947, No. 6, p. 71
Elmira	Local Laws, 1967, No. 1, p. 113
Fulton	Local Laws, 1953, No. 1, p. 32
Geneva	None found
Glen Cove	Ch. 787, § 64, [1917] N.Y. Laws 2548
Glens Falls	Local Laws, 1963, No. 1, § 10.14, p. 117
Gloversville	Local Laws, 1949, No. 3, p.66
Hornell	Ch. 710, § 320, [1943] N.Y. Laws 1862
Hudson	Ch. 669, § 325, [1921] N.Y. Laws 2135
Ithaca	Ch. 503, § 221, [1908] N.Y. Laws 1859
Jamestown	Local Laws, 1958, No. 2, p. 95
Johnstown	Local Laws, 1948, No. 2, p. 190
Kingston	Local Laws, 1951, No. 1, p. 141
Lackawanna	Local Laws, 1972, No. 1, p. 92
Little Falls	Local Laws, 1957, No. 3, p. 125
Lockport	Local Laws, 1937, No. 6, p. 156
Long Beach	Local Laws, 1946, No. 6, p. 143
Mechanicville	Local Laws, 1955, No. 3, p. 120
Middletown	Local Laws, 1952, No. 3, p. 174
Mount Vernon	Local Laws, 1955, No. 2, p. 125
Newburgh	Local Laws, 1952, No. 5, p. 185
New Rochelle	Local Laws, 1964, No. 4, § 127, p. 225
New York	Administrative Code, Ch. 16, § 394-a-1.0, p. 626
Niagara Falls	Local Laws, 1928, No. 4, p. 92
North Tonawanda	Local Laws, 1964, No. 1, p. 472
Norwich	Local Laws, 1955, No. 4, p. 333
Ogdensburg	Local Laws, 1968, No. 3, § 18.02, p. 1472
Olean	Ch. 535, § 76, [1915] N.Y. Laws 1632
Oneida	Local Laws, 1954, No. 3, p. 398
Oneonta	Local Laws, 1964, No. 1, § 5-1, p. 514
Oswego	Local Laws, 1955, No. 1, p. 346
Peekskill	Local Laws, 1953, No. 2, p. 276
Plattsburgh	Local Laws, 1960, No. 1, p. 280
Port Jervis	Local Laws, 1940, No. 2, p. 528
Poughkeepsie	City Charter § 197
Rensselaer	Local Laws, 1953, No. 1, p. 300
Rochester	Local Laws, 1969, No. 10, 1968**, p. 535
Rome	Local Laws, 1957, No. 6, § 176(2), p. 664
Rye	None found
Salamanca	Ch. 507, § 168, [1913] N.Y. Laws 1294
Saratoga Springs	Ch. 229, § 55, [1916] N.Y. Laws 594
Schenectady	Local Laws, 1935, No. 1, p. 228
Sherrill	Local Laws, 1958, No. 1, p. 358
Syracuse	Local Laws, 1960, No. 13, § 8-115, p. 402
Tonawanda	Local Laws, 1953, No. 1, p. 314
Troy	Local Laws, 1962, No. 2, p. 792
Utica	Local Laws, 1955, No. 1, p. 433
Watertown	Local Laws, 1954, No. 1, p. 498

Watervliet	Local Laws, 1954, No. 1, p. 500
White Plains	Local Laws, 1968, No. 4, § 227, p. 1689
Yonkers	Local Laws, 1961, No. 20, Art. 5, § 3, p. 576

* These laws must be negotiated with care. Many specifically refer to section 50-e of the General Municipal Law; many, for obvious reasons (prior enactment), do not. Where the local law is inconsistent with section 50-e—and, in many instances, it is—section 50-e controls whether the local law was enacted before or after section 50-e. All of the local laws retain vitality so far as they require service of a notice of claim since such service must be "required by law" to trigger the provisions of section 50-e. The local laws vary in scope; some, for example, are limited to street or highway defects. These must be read with the prior notice of defect local laws cited in Appendix "E", which, frequently, were subsequently enacted.

** Second year indicates delay between enactment and filing with the Secretary of State.

APPENDIX "E"

Cities in the State of New York with Prior Notice of Defect Laws

Albany	Local Laws, 1953, No. 1, p. 3
Amsterdam	Local Laws, 1954, No. 1, p. 5
Auburn	Local Laws, 1957, No. 2, p. 13
Batavia	Local Laws, 1957, No. 5, § 16.2, p. 47
Beacon	Local Laws, 1944, No. 1, p. 17
Binghamton	Local Laws, 1958, No. 3, p. 21
Buffalo	Local Laws, 1958, No. 1, p. 22
Canandaigua	Local Laws, 1967, No. 3, 1966*, p. 75
Cohoes	Local Laws, 1960, No. 1, p. 48
Corning	Local Laws, 1959, No. 4, p. 43
Cortland	Local Laws, 1956, No. 3, p. 54
Dunkirk	Local Laws, 1962, No. 1, p. 68
Elmira	Local Laws, 1967, No. 1, p. 113
Fulton	Local Laws, 1953, No. 1, p. 32
Geneva	Local Laws, 1962, No. 1, p. 110
Glen Cove	Ch. 787, § 64 [1917] N.Y. Laws 2548
Glens Falls	Local Laws, 1963, No. 1, § 10.14, p. 117
Gloversville	Local Laws, 1949, No. 3, p. 66
Hornell	Ch. 710, § 320 [1943] N.Y. Laws 1862
Hudson	Local Laws, 1954, No. 1, p. 139
Ithaca	Local Laws, 1971, No. 2, p. 115
Jamestown	Local Laws, 1958, No. 2, p. 95
Johnstown	Local Laws, 1940, No. 2, p. 162, *amended*, Local Laws, 1948, No. 2, p. 190
Kingston	Local Laws, 1951, No. 1, p. 141, *amended*, Local Laws, 1960, No. 2, p. 108
Lackawanna	Local Laws, 1972, No. 1, p. 92
Little Falls	Local Laws, 1957, No. 3, p. 125
Lockport	Local Laws, 1955, No. 1, p. 102
Long Beach	Local Laws, 1971, No. 5, p. 156
Mechanicville	Local Laws, 1955, No. 3, p. 120
Middletown	Local Laws, 1952, No. 3, p. 174
Mount Vernon	Local Laws, 1955, No. 2, p. 125
Newburgh	Local Laws, 1952, No. 5, p. 185
New Rochelle	City Charter § 127(a)
New York	None
Niagara Falls	Local Laws, 1963, No. 10, p. 418
North Tonawanda	Local Laws, 1964, No. 1, p. 472
Norwich	Local Laws, 1955, No. 4, p. 333
Ogdensburg	Local Laws, 1968, No. 3, § 18.02, p. 1472
Olean	Ch. 535, § 76, [1915] N.Y. Laws 1632
Oneida	Local Laws, 1954, No. 3, p. 398
Oneonta	Local Laws, 1964, No. 1, § 5-1, p. 514
Oswego	Local Laws, 1955, No. 1, p. 346
Peekskill	Local Laws, 1953, No. 2, p. 276
Plattsburgh	Local Laws, 1960, No. 1, p. 280
Port Jervis	Local Laws, 1940, No. 2, p. 528
Poughkeepsie	Local Laws, 1967, No. 3, p. 732
Rensselaer	Local Laws, 1953, No. 1, p. 300
Rochester	Local Laws, 1955, No. 1, p. 393
Rome	Local Laws, 1957, No. 6, § 176(1), p. 664
Rye	Local Laws, 1971, No. 4, p. 423
Salamanca	Ch. 507, § 168, [1913] N.Y. Laws 1294
Saratoga Springs	Ch. 229, § 55, [1916] N.Y. Laws 594
Schenectady	Local Laws, 1935, No. 1, p. 228
Sherrill	Local Laws, 1958, No. 1, p. 358
Syracuse	Local Laws, 1960, No. 13, § 8-115, p. 402
Tonawanda	Local Laws, 1953, No. 1, p. 314
Troy	Local Laws, 1962, No. 2, p. 792

Utica	Local Laws, 1955, No. 1, p. 433
Watertown	Local Laws, 1954, No. 1, p. 498
Watervliet	Local Laws, 1954, No. 1, p. 500
White Plains	Local Laws, 1968, No. 4, § 277, p. 1689
Yonkers**	

* Second year indicates delay between enactment and filing with the Secretary of State.
** Covered by Second Class Cities Law, § 244 (McKinney Supp. 1974).

APPENDIX "F"

Towns in the State of New York with Prior Notice of Defect Laws

Fallsburgh	Local Laws, 1966, No. 1, p. 938
Hector	Local Laws, 1970, No. 1, p. 165
Perinton	Local Laws, 1968, No. 7, p. 2751
Pittsford	Local Laws, 1969, No. 1, p. 1943
Saugerties	Local Laws, 1970, No. 7, p. 2667

APPENDIX "G"

Villages in the State of New York with Prior Notice of Defect Laws

Amityville	Local Laws, 1954, No. 1, p. 586
Ballston Spa	Local Laws, 1970, No. 1, p. 3051
Bronxville	Local Laws, 1959, No. 5, p. 491
Catskill	Local Laws, 1954, No. 1, p. 587
Cedarhurst	Local Laws, 1953, No. 1, p. 373
Dansville	Local Laws, 1953, No. 2, p. 374
Dobbs Ferry	Local Laws, 1953, No. 4, p. 379
East Aurora	Local Laws, 1953, No. 2, p. 385
East Rochester	Local Laws, 1954, No. 1, p. 597
East Rockaway	Local Laws, 1955, No. 2, p. 503
Ellenville	Local Laws, 1958, No. 1, p. 479
Elmira Heights	Local Laws, 1954, No. 2, p. 601
Fairport	Local Laws, 1953, No. 1, p. 387
Floral Park	Local Laws, 1953, No. 3, p. 394
Fredonia	Local Laws, 1953, No. 1, p. 396
Freeport	Local Laws, 1953, No. 1, p. 397
Garden City	Local Laws, 1954, No. 1, p. 605
Great Neck	Local Laws, 1954, No. 1, p. 607
Hamburg	Local Laws, 1953, No. 1, p. 405
Hastings-on-Hudson	Local Laws, 1953, No. 1, p. 406
Haverstraw	Local Laws, 1953, No. 4, p. 414
Hempstead	Local Laws, 1953, No. 1, p. 415
Highland Falls	Local Laws, 1971, No. 3, p. 4183
Kenmore	Local Laws, 1955, No. 2, p. 514
Lancaster	Local Laws, 1955, No. 1, p. 516
Larchmont	Local Laws, 1954, No. 1, p. 613
Lawrence	Local Laws, 1959, No. 1, p. 509
Lindenhurst	Local Laws, 1953, No. 1, p. 419
Malone	Local Laws, 1953, No. 1, p. 420
Malverne	Local Laws, 1953, No. 1, p. 421
Mamaroneck	Local Laws, 1956, No. 1, p. 676
Massena	Local Laws, 1954, No. 6, p. 635
Medina	Local Laws, 1953, No. 1, p. 422
Mineola	Local Laws, 1955, No. 1, p. 521
Mount Kisco	Local Laws, 1953, No. 2, p. 430
New Hyde Park	Local Laws, 1955, No. 1, p. 525
North Pelham	Local Laws, 1953, No. 1, p. 432
North Tarrytown	Local Laws, 1956, No. 1, p. 680
Nyack	Local Laws, 1953, No. 1, p. 433
Ossining	Local Laws, 1953, No. 1, p. 434
Patchogue	Local Laws, 1953, No. 1, p. 435
Pelham Manor	Local Laws, 1953, No. 5, p. 441
Penn Yan	Local Laws, 1956, No. 1, p. 681
Port Chester	Local Laws, 1953, No. 1, p. 443
Potsdam	Local Laws, 1955, No. 1, p. 537
Rockville Centre	Local Laws, 1953, No. 1, p. 444
Rouses Point	Local Laws, 1958, No. 1, p. 533
Saranac Lake	Local Laws, 1953, No. 2, p. 445
Scarsdale	Local Laws, 1955, No. 1, p. 541
Scotia	Local Laws, 1953, No. 1, p. 449
Sea Cliff	Local Laws, 1961, No. 3, p. 960
Solvay	Local Laws, 1953, No. 1, p. 450
Tarrytown	Local Laws, 1953, No. 1, p. 451
Tuckahoe	Local Laws, 1953, No. 2, p. 452
Valley Stream	Local Laws, 1953, No. 1, p. 453
Waverly	Local Laws, 1954, No. 1, p. 659
Wellsville	Local Laws, 1955, No. 1, p. 549
Westbury	Local Laws, 1955, No. 1, p. 550

FOOTNOTES

[1] 294 N.Y. 361, 62 N.E.2d 604 (1945).
[2] Ch. 860, [1939] N.Y. Laws 2181. Section 12-a was more than merely renumbered. For the more-recent evolution of present § 8, see ch. 467, § 1, [1929] N.Y. Laws 994, *as amended*, ch. 775, § 2, [1936] N.Y. Laws 1653.
[3] 294 N.Y. at 365, 62 N.E.2d at 605.
[4] The Court could have based its decision solely on its conclusion that a horse was a "facility of transportation" within the meaning of § 50-b of the General Municipal Law.
[5] Sixteen years after *Bernardine*, Judge Van Voorhis said of § 8 of the Court of Claims Act: "This section is held to constitute a waiver of the governmental immunity of all of the civil divisions of the State-counties, cities, towns, villages, and by the same token, public authorities . . ." Benz v. New York State Thruway Auth., 9 N.Y.2d 486, 491, 174 N.E.2d 727, 729, 215 N.Y.S.2d 47, 49-50 (1961)(dissenting opinion), *motion to amend remittitur granted*, 10 N.Y.2d 806, 178 N.E.2d 224, 221 N.Y.S.2d 506 (1961), *petition for cert. dismissed*, 369 U.S. 147 (1962).
[6] 294 N.Y. at 365-66, 62 N.E.2d at 605.
[7] 9th Annual Report of the Judicial Council of the State of New York 50, 225 (1943) [hereinafter cited as N.Y. Judicial Council Rep.]. This study was an abbreviated and slightly modified version of a study made for the Judicial Council in 1942 by Professor Prashker of St. John's University School of Law. *See* L. Prashker, New York Practice 117 n.17(a) (4th ed. L. Prashker & R. Trapani 1959). Seventeen pages of this meticulous textbook are devoted to notices of claim against public corporations. The footnote material, featuring many case digests, is especially valuable.
[8] 10 N.Y. Judicial Council Rep. 44, 263 (1944).
[9] Ch. 694, § 1, [1945] N.Y. Laws 1486.
[10] Section 50-e, *as recommended by the Judicial Council:* (1) was not restricted to tort actions; (2) applied only to municipal and district corporations, as defined in the general corporation law; (3) fixed the original period for serving a notice of claim at 90 days; (4) permitted an "immature" infant or a claimant under physical or mental disability to serve a notice of claim within a reasonable time after the disability ceased; (5) permitted the court, in its discretion, to grant leave to all other claimants to serve a notice within a reasonable time after the expiration of the original period-with no outside time limit-upon a showing of reasonable excuse, actual knowledge in the other party of the essential facts constituting the claim within the original period, and the absence of substantial prejudice by the failure to serve a notice within the original period; (6) declared that no notice was to be deemed invalid for defects in the notice or in the manner of its service if there was no intention to mislead the other party and he was not misled; and (7) provided that the section was to be liberally construed.

Section 50-e, *as enacted:* (1) was restricted to tort actions; (2) applied to public corporations, as defined in the general corporation law; (3) fixed the original period at 60 days; (4) permitted late filing, in the discretion of the court, within a reasonable time after the expiration of the original period but not later than one year after the happening of the event upon which the claim was based, where the claimant died before the expiration of the original period; and (5) specifically excepted the time or manner of service from the defects that could be cured or disregarded.
[11] Report of the Law Revision Commission of the State of New York 573 (1959) [hereinafter N.Y. Law Revision Comm'n Rep.]. This recommendation went a step further than the Judicial Council's in that it applied to "infants," not only to "immature" infants. *Id.* at 575.
[12] First Interim Report of the Joint Legislative Committee on Municipal Tort Liability, Leg. Doc. (1955), No. 42, p. 9 [hereinafter cited as N.Y. Joint Leg. Comm. Rep. followed by the year in which submitted]. The Committee submitted nine additional annual reports,

as follows: Second Report, Leg. Doc. (1956), No. 41; Third Report, Leg. Doc. (1957), No. 23; Fourth Report, Leg. Doc. (1958), No. 42; Fifth Report, Leg. Doc. (1959), No. 36; Sixth Report, Leg. Doc. (1960), No. 14; Seventh Report, Leg. Doc. (1961), No. 37; Eighth Report, Leg. Doc. (1962), No. 13; [Ninth] Report, Leg. Doc. (1963), No. 12; [Tenth] Report, Leg. Doc. (1964), No. 13.

[13] For a detailed summary of the Committee's recommendations that became law, see N.Y. Joint Leg. Comm. Rep. at 12-16 (1964).

[14] See the Committee's "Conclusions and Recommendations" in N.Y. Joint Leg. Comm. Rep. at 20-23 (1964).

[15] 4 Joint Legislative Committee on Metropolitan and Regional Areas Study Report, Leg. Doc. (1971), No. 21 [hereinafter cited as 4 Joint Leg. Comm. Rep. (1971)]. The report of this Committee was in four volumes published from 1969 through 1971. The only volume pertinent to this study is volume 4 *supra*.

[16] *Id.* at 28, 37-42.

[17] *Id.* at 43.

[18] For the most recent examples of judicial discontent, *see* Judge Gabrielli's dissent in Sherman v. Metropolitan Transit Auth., 36 N.Y.2d 776, 778, 329 N.E.2d 673, 674, 368 N.Y.S.2d 842, 843 (1975), and Justice Moule's dissent in *In re* Crume v. Clarence Cent. School Dist. No. 1, 43 App. Div. 2d 492, 498, 353 N.Y.S.2d 579, 585 (4th Dep't 1974).

[19] 135 N.Y. 366, 32 N.E. 80 (1892).

[20] *Id.* at 370, 32 N.E. at 81-82.

[21] 256 N.Y. 165, 176 N.E. 129 (1931).

[22] *Id.* at 170, 176 N.E. at 130.

[23] 306 N.Y. 327, 118 N.E.2d 459 (1954).

[24] *Id.* at 333, 118 N.E.2d at 462.

[25] *E.g.*, Murray v. City of Milford, Conn., 380 F.2d 468, 473 (2d Cir. 1967) (applying Conn. law); Newlan v. State, 96 Idaho 711, 535 P.2d 1348, 1351 (1975); King v. Johnson, 47 Ill. 2d 247, 250-51, 265 N.E.2d 874, 876 (1970); Jenkins v. Board of Educ., 228 N.W.2d 265, 269 (Minn. 1975); Higgenbotham v. City of Charleston, 204 S.E.2d 1, 5 (W. Va. 1974).

[26] Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 515 (6th Cir. 1974).

[27] Lunday v. Vogelmann, 213 N.W.2d 904, 907-08 (Iowa 1973).

[28] N.Y. Joint Leg. Comm. Rep. at 14 (1958). The theme, in one form or another, is repeated throughout the tenure of this Committee. *E.g.*, N.Y. Joint Leg. Comm. Rep. at 35 (1959); N.Y. Joint Leg. Comm. Rep. at 20 (1964).

[29] See the recent compilation in Restatement (Second) of Torts § 895-A (Tent. Draft No. 19, 1973) at 12-19.

Among the many excellent recent judicial discussions of the problem that was spawned many years ago by Russell v. Men of Devon, 100 Eng. Rep. 359 (1788), and that continues to bedevil many American jurisdictions, see O'Dell v. School Dist. of Independence, 521 S.W.2d 403 (Mo. 1975) (governmental immunity retained, 4-3, over a great dissenting opinion by Judge Finch); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed for want of a substantial federal question*, 409 U.S. 1052 (1972) (state constitutional provision establishing governmental immunity held not to violate the equal protection clause of the Federal Constitution); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) (governmental immunity abolished). *Compare* Merrill v. City of Manchester, 332 A.2d 378 (N.H. 1974) (abolished immunity of cities and towns), *with* Sousa v. State, 341 A.2d 282 (N.H. 1975) (refused to abolish immunity of the state).

[30] The note following Ark. Stat. Ann. § 12-2903 (Supp. 1973) is captioned "Emergency" and reads as follows: "Section 4 of Acts 1969, No. 165, read: 'It is hereby found and determined by the General Assembly that because of the decision of the Arkansas Supreme Court in Parish v. Pitts, 244 Ark. 1239, [429 S.W.2d 45 (1968)] municipalities and all units of local government are in imminent danger of bankruptcy because of tort lawsuits and vital

public services are in danger of being discontinued. Therefore, an emergency is hereby declared to exist and this act being immediately necessary to protect the public peace, health and safety, shall take effect immediately on its passage and approval.' Law without signature of governor. Noted in governor's office March 5, 1969."

[31] *E.g.*, Colo. Rev. Stat. Ann. § 24-10-114 (1973); Ind. Ann. Stat. § 34-4-16.5-4 (Supp. 1974); Me. Rev. Stat. Ann. tit. 23, § 3655 (1965); N.C. Gen. Stat. § § 143-291, 143-300.6 (Supp. 1974); Okla. Stat. tit. 11, § 1755 (Supp. 1974); R.I. Gen. Laws Ann. § § 9-31-1 to 9-31-4 (Supp. 1974).

[32] *E.g.*, Del. Code Ann. tit. 18, § 6511 (1974); Kan. Stat. Ann. § § 74-4708, 74-4716 (1972); Me. Rev. Stat. Ann. tit. 14, § 157 (Supp. 1974). *But compare*, as to the effect of failure to purchase insurance, Sturdivant v. City of Farmington, 255 Ark. 415, 500 S.W.2d 769 (1973) (city liable to extent of required policy limits although no insurance purchased), *with* Pipkin v. State Dep't of H'ways & Transp., 316 A.2d 236 (Del. Super. Ct. 1974) (state not liable if no insurance purchased).

[33] 303 N.Y. 484, 104 N.E.2d 866 (1952).

[34] It would be unwise to infer from the Court's reasoning that it would be unconstitutional to burden with conditions a right to sue that did exist at common law. *See* Reining v. City of Buffalo, 102 N.Y. 308, 311, 6 N.E. 792, 793 (1886). Witness, for example, the prior notice of defect provisions, which just a few years ago were again held constitutional by the Court of Appeals in *Stanton v. Village of Waverly* (note 47 *infra* and accompanying text) although the suit was known at common law and was not burdened with conditions. *See* Conrad v. Trustees of the Village of Ithaca, 16 N.Y. 158, 32 Barb. 637 (1857).

[35] *E.g.*, Murray v. City of Milford, Conn., 380 F.2d 468 (2d Cir. 1967); Tammen v. County of San Diego, 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1967); Newlan v. State, 96 Idaho 711, 535 P.2d 1348 (1975); King v. Johnson, 47 Ill. 2d 247, 265 N.E.2d 874 (1970); Lunday v. Vogelmann, 213 N.W.2d 904 (Iowa 1973); Hazard v. South Carolina State H'way Dep't, 215 S.E.2d 438 (S.C. 1975); Cook v. State, 83 Wash. 2d 599, 521 P.2d 725 (1974); Awe v. University of Wyo., 534 P.2d 97 (Wyo. 1975).

[36] 384 Mich. 165, 180 N.W.2d 778 (1970).

[37] 386 Mich. 617, 194 N.W.2d 700 (1972).

[38] *Id.* at 623, 194 N.W.2d at 702.

[39] 89 Nev. 230, 510 P.2d 879, *cert. denied*, 414 U.S. 1079 (1973); Annot., 59 A.L.R.3d 93 (1974).

[40] *Id.* at 234, 510 P.2d at 882.

[41] *Id.* at 235, 510 P.2d at 882.

[42] 534 P.2d 880 (Mont. 1975).

[43] *Id.* at 882-83.

[44] *See* note 36 *supra*.

[45] 384 Mich. at 176, 180 N.W.2d at 784.

[45a] After this study was prepared for printing, the Supreme Court of the State of Washington struck down its "nonclaim" statutes on equal protection grounds. Hunter v. North Mason High School, 539 P.2d 845 (1975). The court refused to follow the more moderate course it had taken seventeen months earlier in *Cook v. State*, cited in note 35 *supra*, in which it had saved the constitutionality of a nonclaim statute by extending the time for filing for a seriously disabled infant although the statute did not expressly authorize any extension.

In *Hunter*, a 16-year old student suffered a knee injury in a rugby game held as part of a physical education class. Within 50 days thereafter, the father notified the school principal of the essential facts constituting the claim. The principal, in turn, conveyed the information he received to the school's insurance carrier and the school district. But no notice of claim was filed within the required 120-day period. The trial court dismissed the complaint. The court of appeals reversed, extending *Cook* to all minors, not only seriously disabled minors. The supreme court affirmed, but did so on broad constitutional grounds, refusing "to avoid the constitutional problems inherent in this type of statute by continuing to fashion judicial exceptions to their plain language . . . ." 539 P.2d at 847.

Justice Utter, writing for the majority, relied heavily upon the dissenting opinion of Justice Reynoldson in *Lunday v. Vogelmann*, cited in note 35 *supra*, and carefully considered and rejected the major reasons that have been advanced to justify non-claim statutes. Justice Utter faced the dollar and cents issue squarely when he wrote: ". . . [W]e cannot uphold nonclaim statutes simply because they serve to protect the public treasury. . . ." 539 P.2d at 850.

The *Hunter* court was not unanimous (as it was not in *Cook*). Two justices concurred in the result, agreeing with the court of appeals that an extension should be available for all minors. Chief Justice Stafford dissented, stating that the majority here (as in *Cook*) had ignored the constitutional mandate that it was for the legislature to decide in what manner and in what courts the state might be sued.

The Washington Supreme Court has come full circle by striking down on equal protection grounds the 3-month *statute of limitations* governing tort actions against counties since the statute of limitations as to all other government entities, including the state, is three years. Jenkins v. State, 540 P.2d 1463 (1975).

[46] *See, e.g.*, the dissenting opinions in *Newlan v. State* and *Lunday v. Vogelmann*, and the concurring opinion in *Cook v. State*, all cited at note 35 *supra*. The one modern dissenting note in a New York court of original jurisdiction was sounded in Zipser v. Pound, 69 Misc. 2d 152, 329 N.Y.S.2d 494 (City Ct.), but it was quickly stilled on appeal, 75 Misc. 2d 489, 348 N.Y.S.2d 18 (App. Term 2d Dep't 1972). *See*, in an appellate court, the dissenting opinion in Montez v. Metropolitan Transp. Auth., 43 App. Div. 2d 224, 227, 350 N.Y.S.2d 665, 668 (1st Dep't 1974) (Nunez, J.P.), in the context of the anonymous subsidiary, discussed in text accompanying notes 298-307 *infra*. Literature on the constitutional question has begun to appear. *See* Note, 60 Cornell L. Rev. 417 (1975).

[47] 29 N.Y.2d 719, 275 N.E.2d 337, 325 N.Y.S.2d 755 (1971), citing Fullerton v. City of Schenectady, 285 App. Div. 545, 138 N.Y.S.2d 916 (3d Dep't), *aff'd without opinion*, 309 N.Y. 701, 128 N.E.2d 413, *motion for leave to reargue denied*, 309 N.Y. 855, 130 N.E.2d 909 (1955), *appeal dismissed for want of a substantial federal question*, 350 U.S. 980 (1956).

[48] *See* Apps. "E," "F" and "G" at pp. 424, 426, and 427, respectively.

Disenchantment with the results reached under § 50-e set in early. Professors Thornton and McNiece, in expressing their dissatisfaction with the prior notice of defect laws, wrote as follows: " . . . A state statute [§ 50-e] already permits municipalities to escape a considerable portion of their liability by requiring notice of any claim to be served within a very brief period after an accident. The wisdom of that law is itself highly debatable. If, on top of that, are to be added a host of local laws which grant substantive immunity in sidewalk cases under the guise of procedural regulation, we are indeed starting to turn back the clock to the days when the king could do no wrong." Thornton & McNiece, *Torts & Workmen's Compensation, 1955 Survey of N.Y. Law*, 30 N.Y.U.L. Rev. 1621, 1632 (1955).

Professor McLaughlin has manifested his discontent in the following language:

"There are almost a hundred pages of annotations to Section 50-e of McKinney's General Municipal Law, bristling with decisions which rob plaintiffs of their causes of action because they did not see their lawyers within ninety days after an accident. The purpose of the notice requirement is to discourage fraudulent claims against municipalities by requiring notice while the claim is still fresh enough for the defendant to investigate it. Granted that this is a legitimate concern, the question simply becomes whether the game is worth the candle, whether the good to be achieved by the statute is outweighted by the harm it does to honest claimants. This writer remains unconvinced that the legislature has made the right judgment." McLaughlin, *Civil Practice, 1968 Survey of N.Y. Law*, 20 Syracuse L. Rev. 449, 454 (1968).

[49] Winter v. City of Niagara Falls, 190 N.Y. 198, 203, 204, 82 N.E. 1101, 1102, 1103 (1907); Reining v. City of Buffalo, 102 N.Y. 308, 310-11,

6 N.E. 792, 793 (1886); *see* Arnold v. Village of N. Tarrytown, 137 App. Div. 68, 122 N.Y.S. 92 (2d Dep't 1910), *aff'd on opinion below*, 203 N.Y. 536, 96 N.E. 1109 (1911). However, a failure to plead compliance is correctable by amendment. Andre Saint-Ile v. New York City Transit Auth., 42 App. Div. 2d 789, 346 N.Y.S.2d 461 (2d Dep't 1973) (mem.)

[50] Burns v. City of Binghamton, 39 App. Div. 2d 1009, 333 N.Y.S.2d 879 (3d Dep't 1972) (mem.), *aff'd without opinion*, 33 N.Y.2d 555, 301 N.E.2d 426, 347 N.Y.S.2d 440 (1973); Arnold v. Village of N. Tarrytown, note 49 *supra*.

[51] *See* Winter v. City of Niagara Falls, note 49 *supra*.

[52] Barchet v. New York City Transit Auth., 20 N.Y.2d 1, 228 N.E.2d 361, 281 N.Y.S.2d 289 (1967); Bellows v. County of Montgomery, 42 App. Div. 2d 1020, 348 N.Y.S.2d 248 (3d Dep't 1973) (mem.); Abbatemarco v. Town of Brookhaven, 26 App. Div. 2d 664, 272 N.Y.S.2d 450 (2d Dep't 1966) (mem.).

[53] There does, however, seem to be an increasing judicial disposition to invoke the doctrine of estoppel. *See, e.g.*, Roa v. Westchester County Playland Comm'n, 34 App. Div. 2d 818, 311 N.Y.S.2d 527 (2d Dep't 1970) (mem.), *aff'd without opinion*, 28 N.Y.2d 873, 271 N.E.2d 235, 322 N.Y.S.2d 259 (1971); Teresta v. City of N.Y., 304 N.Y. 440, 108 N.E.2d 397 (1952); *In re* Economou v. New York City Health & Hosps. Corp., 47 App. Div. 2d 877, 366 N.Y.S.2d 644 (1st Dep't 1975) (per curiam); Handera v. Jamesville-DeWitt Cent. Schools, 82 Misc. 2d 516, 369 N.Y.S.2d 920 (Sup. Ct. 1975).

There also seems to be an increasing tendency to treat a public corporation the same as a private litigant. For example, in *In re* Engle v. County of Westchester, 38 App. Div. 2d 601, 328 N.Y.S.2d 601 (2d Dep't 1971) (mem.), the court dismissed an appeal from an order granting leave to serve a late notice of claim on the default of a public authority and affirmed an order denying it leave to open its default, while at the same time reversing an order granting leave to serve a late notice on the county, which had not defaulted. And in Martin v. City of Cohoes, 37 N.Y.2d 162, 332 N.E.2d 867, 371 N.Y.S.2d 687 (1975), where the city pleaded and defended on the basis of plaintiff's failure to meet a prior "actual" notice charter provision although it had in fact been amended to require prior "written" notice, the Court of Appeals unanimously reversed the Appellate Division's dismissal of the complaint although the precise ground for the reversal is difficult to pinpoint. *See* note 245 *infra*.

[54] Twenty-one of the 116 statutes cited in App. "C" at p. 420 do so. *E.g.*, N.Y. Gen. Munic. Law § 880 (McKinney 1974); N.Y. Priv. Hous. Fin. Law § § 667, 717 (McKinney Supp. 1975); N.Y. Pub. Auth. Law § § 469, 889 (McKinney 1970).

[55] *E.g.*, F.W. Woolworth Co. v. Stoddard, 156 A.2d 229 (D.C. Mun. App. 1959); Helle v. Brush, 53 Ill. 2d 405, 292 N.E.2d 372 (1973); Thompson v. City of Aurora, 325 N.E.2d 839 (Ind. 1975); Garber v. Wilkins Constr. Co., 121 Pa. L.J. 39 (1972). *Compare* Hamilton v. City of Anniston, 268 Ala. 559, 109 So. 2d 728 (1959), *with* Dixon v. City of Mobile, 280 Ala. 419, 194 So. 2d 825 (1967).

[56] *See* 9 N.Y. Jud. Council Rep. 225, 230 (1943) (*semble*). But in other settings, *compare* Brinckerhoff v. Bostwick, 99 N.Y. 185, 190-91, 1 N.E. 663, 665-66 (1885), *with* Board of Educ. v. Town of Greenburgh, 277 N.Y. 193, 195, 13 N.E.2d 768, 770 (1938), and *In re* Hecht v. Monaghan, 307 N.Y. 461, 468, 121 N.E.2d 421, 424 (1954).

[57] *See* text accompanying notes 95-125 *infra*.

[58] *See* Apps. "E," "F" and "G" at pp. 424, 426, and 427, respectively.

[59] The author has been unable to ascertain precisely which of the local laws have found their way into city charters. Many, perhaps most, have. *See., e.g.*, N.Y. Local Laws, 1962, No. 1, p. 68 (city of Dunkirk); Muszynski v. City of Buffalo, 29 N.Y.2d 810, 277 N.E.2d 414, 327 N.Y.S.2d 368 (1971); Siegel v. Epstein, 21 App. Div. 2d 821, 251 N.Y.S.2d 538 (2d Dep't 1964) (mem.), *aff'd without opinion*, 17 N.Y.2d 639, 216 N.E.2d 341, 269 N.Y.S.2d 138 (1966) (city of Long Beach). The citations to the local laws and, with rare exception, to city

charter or administrative code are set forth in App. "D" at p. 422.

[60] *Siegel v. Epstein* is discussed in text accompanying notes 114-25 *infra*.

[61] *See* N.Y. Const. art. IX, § 2, subd. (c)(1938).

[62] Ch. 694, § 13, [1945], N.Y. Laws 1494.

[63] N.Y. Unconsol. Laws § 7108 (McKinney Supp. 1975), (Port Authority of New York and New Jersey); Balzano v. Port of N.Y. Auth., 232 N.Y.S.2d 776 (Sup. Ct. 1962), *aff'd mem.*, 23 App. Div. 2d 573, 256 N.Y.S.2d 495 (2d Dep't), *motion for leave to appeal granted*, 16 N.Y.2d 481, 261 N.Y.S.2d 1025 (1965); *see* McLaughlin, *Civil Practice, 1963 Survey of N.Y. Law*, 15 Syracuse L. Rev. 382, 393 (1963).

[64] New York Civil Practice Law and Rules § 9802 (McKinney Supp. 1975)(formerly section 341-b of the Village Law)[hereinafter cited as N.Y. C.P.L.R.].

[65] N.Y. Town Law § 65, subd. 3 (McKinney 1965); *cf. In re* Town of Islip v. Stoye, 29 N.Y. 2d 524, 272 N.E.2d 573, 324 N.Y.S.2d 79 (1971), *rev'g mem.* 35 App. Div. 2d 834, 317 N.Y.S.2d 230 (2d Dep't 1970)(mem.); *see In re* Board of Educ. v. Wager Constr. Corp., 37 N.Y.2d 283, 333 N.E.2d 353, 372 N.Y.S.2d 45 (1975)(construing § 3813, subdivision 1, of the Education Law).

[66] *E.g.*, N.Y. Pub. Auth. Law art. 1, tit. 1; art. 3, tits. 2, 4, 7, 8, 9 (McKinney 1970).

[67] N.Y. Pub. Auth. Law § § 469, 469-a (McKinney 1970).

[68] N.Y. Const. art. X, § 5 (1938); N.Y. Unconsol. Laws § § 7111, 7112 (McKinney 1961); Balzano v. Port of N.Y. Auth., note 62 *supra*.

[69] Caruso v. Village of Sloatsburg, 35 App. Div. 2d 988, 317 N.Y.S.2d 959 (2d Dep't 1970)(mem.). *But cf.* Stage v. Village of Owego, 48 App. Div. 2d 985, 369 N.Y.S.2d 883 (3d Dep't 1975) (mem.). In *Caruso*, the court cited O'Connell Elec. Co. v. Village of Macedon, 197 Misc. 22, 93 N.Y.S.2d 901 (Sup. Ct. 1949), which in turn cited Arnold v. Village of North Tarrytown, 137 App. Div. 68, 122 N.Y.S. 92 (2d Dep't 1910), *aff'd on opinion below*, 203 N.Y. 536, 96 N.E. 1109 (1911), but *Arnold* was construing the then § 322 of the Village Law, requiring the commencement of a personal injury action within one year after the cause of action accrued. Section 322 did not require the filing of a notice of claim. It is doubtful that *Caruso* can survive the Court of Appeals cases cited in note 64 *supra*.

[70] N.Y. Const. art. VI, § 9 (1938). For a sample of the problems caused by the court's limited jurisdiction, *see* DeVivo v. Grosjean, 48 App. Div. 2d 158, 368 N.Y.S.2d 315 (3d Dep't 1975) (plaintiff may sue a State employee in the Supreme Court although the State is under a duty to indemnify him); McCorkle v. Degl, 74 Misc. 2d 611, 344 N.Y.S.2d 802 (Sup. Ct. 1973) (indemnity claim against State hospital must be brought in the Court of Claims although principal action properly in the Supreme Court); *see also* cases cited in note 105 *infra*.

[71] *See* N.Y. Joint Leg. Comm. Rep. at 23 (1964). *But cf.* 4 N.Y. Joint Leg. Comm. Rep. at 28 (1971). Citations to the relevant statutes and local laws are contained, respectively, in App. "C" at p. 159 and Apps. "D," "E," "F" and "G" at pp. 422, 424, 426, 427.

[72] N.Y. Gen. Constr. Law § 66, subd. 1 (McKinney Supp. 1975).

[73] *Id.*,subds. 2-4 (McKinney Supp. 1975):

"2. A 'municipal corporation' includes a county, city, town, village and school district.

"3. A 'district corporation' includes any territorial division of the state, other than a municipal corporation, heretofore or hereafter established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the creation of such territorial divison.

"4. A 'public benefit corporation' is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof."

Public authorities are the most prominent example. *See* the citations to sections of the Public Authorities Law in App. "C" at p. 420, see,

generally, Quirk v. Wein, *A Short Constitutional History of Entities Commonly Known as Public Authorities*, 56 Cornell L. Rev. 521 (1971).

[74] *See, e.g.*, N.Y. Gen. Munic. Law § § 522, 553, subd. 1(b) 2, 554(1), and art. 15-B; § § 856, subd. 2; 880; and title 2 of art. 18-A (McKinney 1974).

[75] *See* App. "C" at p. 420.

[76] *See, e.g.*, N.Y. Pub. Hous. Law § 2, last paragraph (McKinney 1955); § 157 (McKinney 1955 & Supp. 1975); art. 13 (McKinney Supp. 1975).

[77] *See, e.g.*, N.Y. Unconsol. Laws § § 4404, 4412, 7384, 7401 (McKinney Supp. 1975).

[78] The number of public authorities actually in existence may be more modest. *See* 1974 New York State Statistical Yearbook 180. Most public authorities are of limited duration. It is, therefore, probable that some, perhaps many, are no longer functioning although the statutes creating them have not been repealed.

[79] *See* App. "C" at p. 420.

[80] *E.g.*, for the parking authorities covered in article 7 of the Public Authorities Law a notice of intention to commence an action must be filed within six months after the cause of action accrues. As for the authorities covered in article 3, § 569-a requires that a notice of intention to commence an action be filed within six months after the cause of action accrues, whereas § 734, by tortuous reference to § 1397, requires compliance with § 50-e of the General Municipal Law.

[81] In article 7, for example, *compare* N.Y. Pub. Auth. Law § § 1416, 1516 (McKinney 1970) (90-day stay), *with* § § 1440, 1490 (McKinney 1970) (30-day stay).

[82] For the incredible situation existing before the amendment to § 157 of the Public Housing Law in 1971, see Hlanko v. New York City Housing Auth., 19 N.Y.2d 937, 228 N.E.2d 399, 281 N.Y.S.2d 343 (1967), *aff'g mem.* 23 App. Div. 2d 840, 259 N.Y.S.2d 661 (1st Dep't 1965) (mem.), holding that § 50-e of the General Municipal Law superseded the previously enacted provisions of § 157 of the Public Housing Law so far as the time for serving a notice of claim was concerned, but that § 157 and not § 50-i of the General Municipal Law applied so far as the time limited for commencing an action to enforce the claim was concerned because § 50-i did not apply to public authorities, as indeed it did (and does) not.

[83] Reinhart v. Troy Parking Auth., 36 App. Div. 2d 654, 318 N.Y.S.2d 852 (3d Dep't 1971) (mem.).

[84] N.Y. Unconsol. Laws § 7107 (McKinney 1961) (60 days), but § 7108 permits a court to grant leave to serve a late notice of claim and commence an action within *three years* after the cause of action accrues.

[85] *See* note 80 *supra*. But these seemingly more liberal statutes give rise to their own problems since they contain no provision for leave to serve a late notice of claim. Since the courts are not bound by § 50-e, they might well apply pre-§ 50-e law. *See* notes 166-68 and 173 *infra* and accompanying text.

[86] Tice v. Atlantic Constr. Co., 52 App. Div. 284, 287, 65 N.Y.S. 79, 81 (1st Dep't 1900).

[87] *See*, among many cases, DeMarco v. State, 43 app. Div. 2d 786, 350 N.Y.S.2d 230 (4th Dep't 1973), *aff'd on mem. below*, 37 N.Y.2d 735, 337 N.E.2d 131, 374 N.Y.S.2d 619 (1975); Kurtz v. State, 40 App. Div. 2d 917, 338 N.Y.S.2d 345 (3d Dep't 1972) (mem.), *aff'd on opinion below*, 33 N.Y.2d 828, 307 N.E.2d 46, 351 N.Y.S.2d 973 (1973); *see also* McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 St. John's L. Rev. 1 (1965).

For another statute containing "jurisdictional requirements," *see* N.Y. Exec. Law § 625, subd. 3 (McKinney 1972), a statute that has, in other respects, received unusual construction. *In re* Johnsen v. Nissman, 39 App. Div. 2d 578, 331 N.Y.S.2d 796 (2d Dep't 1972) (mem.).

[88] Perhaps the words should be "has drawn little criticism" for some of

the results reached under § 10 of the Court of Claims Act have been no more liberal than those reached under § 50-e of the General Municipal Law. *See, e.g.*, as to § 10, Cantor v. State, 43 App. Div. 2d 872, 351 N.Y.S.2d 197 (3d Dep't 1974) (mem.) (proper service upon the State is not proper service upon the New York State Thruway Authority although the State Attorney General, one of the persons served, also represents the Authority in legal matters); Dependable Trucking Co. v. New York State Thruway Auth., 41 App. Div. 2d 985, 343 N.Y.S.2d 615 (3d Dep't 1973) (mem.) (claim mailed on 90th day but received on 91st, untimely); Modern Transfers Co. v. State, 37 App. Div. 2d 756, 322 N.Y.S.2d 948 (4th Dep't 1971) (mem.) (ignorance of filing requirement is no excuse). And *compare* Lewis v. State, 25 N.Y.2d 881, 250 N.E.2d 880, 303 N.Y.S.2d 890 (1969), *aff'g without opinion* 26 App. Div. 2d 878, 274 N.Y.S.2d 255 (3d Dep't 1966) (mem.) (filing of claim for wrongful death by administratrix 87 days after her husband's death but two months before her appointment, not timely), *with* Winbush v. City of Mt. Vernon, 306 N.Y. 327, 118 N.E.2d 459 (1954) (serving of notice of claim under § 50-e by next of kin before appointment as administratrix, which had occurred within the 90-day period, timely).

Probably the saving feature of § 10 of the Court of Claims Act is contained in the last sentence of its subdivision 5: "But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed." *See* note 276 *infra*. *See also* N.Y. Const. art. III, § 19 (1938), for an identical provision.

[89] See note 80 *supra*.

[90] *See, e.g.*, N.Y. Educ. Law § § 3813, subd. 2; 6308, subd. 2 (McKinney 1972); N.Y. Mental Hygiene Law § 11.29 (McKinney Supp. 1975); N.Y. Priv. Hous. Fin. Law § § 667, 717 (McKinney Supp. 1975); *cf.* N.Y. Town Law § 67 (McKinney 1965) ("or town superintendent of highways").

[91] *See, e.g.*, N.Y. C.P.L.R. § 9802 (McKinney Supp. 1975). The disjunctive provision is rare in the local laws. Among those cited in App. "E" at p. 424, only the cities of Long Beach and Ogdensburg so provide.

[92] N.Y. County Law § 52, subd. 2 (McKinney 1972); *see* text accompanying notes 285-96 *infra*.

[93] 308 N.Y. 226, 124 N.E.2d 295 (1954).

[94] *Id.* at 230, 124 N.E.2d at 298 (emphasis in original), citing Kosiba v. City of Syracuse, 287 N.Y. 283, 39 N.E.2d 240 (1942), decided under § 50-c of the General Municipal Law before its amendment by ch. 694, § 2, [1945] N.Y. Laws 1488.

[95] 281 N.Y. 266, 22 N.E.2d 367 (1939) (per curiam).

[96] *Id.* at 268-69, 22 N.E.2d at 368.

[97] *See, e.g.*, Sadler v. Horvath, 44 App. Div. 2d 905, 357 N.Y.S.2d 558 (4th Dep't 1974) (mem.); Rusch v. Karpick, 20 App. Div. 2d 954, 248 N.Y.S.2d 451 (4th Dep't 1964) (mem.).

[98] N.Y. Educ. Law § 3813 (McKinney 1972); N.Y. Gen. Munic. Law § 50-j (McKinney Supp. 1975); N.Y. Pub. Auth. Law § 1212 (McKinney 1970).

[99] Sandak v. Tuxedo Union School Dist. No. 3, 308 N.Y. 226, 231, 124 N.E.2d 295, 298 (1954).

[100] *E.g.*, Schubert v. Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); *cf.* Traub v. Dinzler, 309 N.Y. 395, 131 N.E.2d 564 (1955); Winnick v. Kupperman Constr. Co., 29 App. Div. 2d 261, 287 N.Y.S.2d 329 (2d Dep't 1968); *see* W. Prosser, Handbook of the Law of Torts 311 (4th ed. 1971).

[101] When the public corporation is under a duty to indemnify its employee, the time limited for commencing an action against the employee is the same as the time limited for commencing an action against the public corporation. Fitzgerald v. Lyons, 39 App. Div. 2d 473, 336 N.Y.S.2d 940 (4th Dep't 1972). As to the public corporations governed by § 50-i of the General Municipal Law, the time limited is one year and 90 days after the happening of the event upon which the claim is based. *See also* N.Y. Pub. Auth. Law § 1212 (McKinney 1970). As to many other public corporations—indeed, as to

almost all other public corporations—the time limited is one year after the cause of action accrues. *E.g., see* N.Y. Pub. Auth. Law § § 1276, 1299-p, 1299-rr (McKinney 1970); *see also* notes 179 and 187 *infra*.

102 As to the State of New York, *see* N.Y. Pub. Officers Law § 17 (McKinney 1974). As to public corporations, there is no uniform policy. Some statutes insulate particular employees from personal liability. *E.g.*, N.Y. Gen. Munic. Law § 205-b (McKinney 1974), a provision that has led to at least one unfortunate result, Cavanaugh v. Peck, 71 Misc. 2d 1, 335 N.Y.S.2d 238 (Sup. Ct. 1972); N.Y. Pub. Auth. Law § 470 (McKinney 1970); § 666-a (McKinney Supp. 1975). Under most statutes, the public corporation assumes liability to the extent that it must save harmless specified employees for specified misconduct. *E.g.*, N.Y. Gen. Munic. Law § § 50-c, 50-d (McKinney 1965); § 50-j (McKinney Supp. 1975). The 1975 amendment to § 50-j raises one interesting problem, that of a county's liability for the "negligent act or tort" of its sheriff. *See* note 292 *infra*. It has been held that the duty to save harmless includes the duty to defend. Stephens v. Department of Health of Orange County, 65 Misc. 2d 308, 317 N.Y.S.2d 210 (Sup. Ct. 1970).

103 *See* note 98 *supra*.

104 2 N.Y.2d 413, 114 N.E.2d 565, 161 N.Y.S.2d 52 (1957), favorably received by Thornton & McNiece, *Torts & Workmen's Compensation, 1957 Survey of N.Y. Law*, 32 N.Y.U.L. Rev. 1465, 1484 (1957).

105 One court has held that the entry of judgment and not payment is the jurisdictional pre-requisite to the accrual of a claim for indemnity or contribution against the State. O'Sullivan v. State, 83 Misc. 2d 426, 371 N.Y.S.2d 766 (Ct. Cl. 1975) (also holding that the time within which the claim must be interposed is governed by the residual, six-month period of limitations). But another court has held that since a claim for contribution may be asserted "whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought" (N.Y. C.P.L.R. § 1401 (McKinney Supp. 1975)), the claim accrues for the purpose of filing a claim or notice of intention on the date of the State's alleged negligence. Leibowitz v. State, 82 Misc. 2d 424, 371 N.Y.S.2d 110 (Ct. Cl. 1975) (also holding, however, that the residual, six-month period of limitations applies). On the accrual point, *Leibowitz* ignores the distinction between an original claim based on negligence and a claim for contribution, which is based on a "separable legal entity of rights. . . ." Dole v. Dow Chem. Co., 30 N.Y.2d 143, 152, 282 N.E.2d 288, 294, 331 N.Y.S.2d 382, 390 (1972). And there is not even an intimation that the result reached in *Leibowitz*, on the accrual point, was intended by the draftsman, Professor Occhiolino, or by the Judicial Conference. *See* Occhiolino, 19th N.Y. Judicial Conference Rep. at 229, 231-32 (1974); 20th N.Y. Judicial Conference Rep. 211, 217-18 (1975).

106 The Federal Tort Claims Act expressly provides that its notice of claim provisions "shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." 28 U.S.C. § 2675 (1970).

Some jurisdictions have taken a different view. *E.g.*, Bituminous Cas. Corp. v. City of Evansville, Ind., 191 F.2d 572 (7th Cir. 1951); Powell v. Brady, 30 Colo. App. 551, 496 P.2d 328 (1972), *aff'd*, 181 Colo. 218, 508 P.2d 1254 (1973); McGuire v. Hennessy, 292 Minn. 429, 193 N.W.2d 313 (1971) (per curiam); *see also* 56 Am. Jur. 2d *Municipal Corporations* § 717 (1971).

To be carefully distinguished is the situation where plaintiff has not complied with a prior notice of defect provision—a condition precedent to *liability*—in which case a third party claim will not lie. Barry v. Niagara Frontier Transit System, 35 N.Y.2d 629, 324 N.E.2d 312, 364 N.Y.S.2d 823 (1974). *See* text accompanying notes 47 and 48 *supra* and 238-49 *infra*.

107 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); see *Developments in New York Practice — Dole v. Dow Chemical Co.: A Revolution in New York Law*, 47 St. John's L. Rev. 185 (1972). *See*,

on the contribution point, Zillman v. Meadowbrook Hosp., 45 App. Div. 2d 267, 270, 358 N.Y.S.2d 466, 469 (2d Dep't 1974).

[108] Especially Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972), which accurately described *Dole* as a "refinement of the rule of contribution. . . ." *Id.* at 30, 286 N.E.2d at 243, 334 N.Y.S.2d at 855.

[109] N.Y. C.P.L.R. art. 14 (McKinney Supp. 1975); *see* Occhiolino, *Contribution*, 19th N.Y. Judicial Conference Rep. 217 (1974).

[110] N.Y. Gen. Oblig. Law § 15-108 (McKinney Supp. 1975).

[111] N.Y. C.P.L.R. § 1402 (McKinney Supp. 1975).

[112] The residual, six-year statute of limitations governs. N.Y. C.P.L.R. § 213, subd. 1 (McKinney 1972); *see* Occhiolino, 19th N.Y. Judicial Conference Rep. at 229-31 (1974).

[113] The problem in the notice of claim area, no less than in the statute of limitations area, is created by the homage, perhaps undue, paid to the concept of *when* an indemnity or contribution claim accrues. The policy arguments for compelling reasonably prompt adjudication in one action of as many claims among as many parties as is possible without prejudice to the substantial right of any party, to wit, economy of judicial administration and the avoidance of circuity of action and inconsistent results, seem to outweigh continued adherence to a procedural (or substantive) concept as to when a cause of action accrues. For a view by one scholar that the statute of limitations should generally be one year after the defendant is served with a summons and complaint, *see* Occhiolino, 19th N.Y. Judicial Conference Rep. at 233 (1974).

[114] 21 App. Div. 2d 821, 251 N.Y.S.2d 538 (2d Dep't 1964) (mem.), *aff'd without opinion*, 17 N.Y.2d 639, 216 N.E.2d 341, 269 N.Y.S.2d 138 (1966).

[115] *See* text accompanying notes 95 and 96 *supra*.

[116] 273 App. Div. 937, 78 N.Y.S.2d 21 (4th Dep't 1948) (mem.).

[117] Ch. 323, § 1, [1936] N.Y. Laws 674.

[118] 286 App. Div. 104, 142 N.Y.S.2d 465 (4th Dep't 1955).

[119] 21 App. Div. 2d at 822, 251 N.Y.S.2d at 539 (emphasis in original).

[120] The Judicial Council was apparently of that view, as it wrote: ". . . where a notice of claim is served pursuant to proposed new section 50-e, whether a copy of such claim should be served upon the appointee as well as the city itself, must depend on whether such appointee has been made a party to the action on the claim." 10th N.Y. Judicial Council Rep. at 230 (1943).

[121] 308 N.Y. 226, 124 N.E.2d 295 (1954).

[122] *Id.* at 229, 124 N.E.2d at 297.

[123] *Id.* at 231, 124 N.E.2d at 298.

[124] *See* text accompanying notes 19-27 *supra*.

[125] Ottmann v. Village of Rockville Centre, 275 N.Y. 270, 273, 9 N.E.2d 862, 863 (1937); *see also* Abbott v. Page Airways, Inc., 23 N.Y.2d 502, 507, 245 N.E.2d 388, 390, 297 N.Y.S.2d 713, 716 (1969).

[126] 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

[127] Cary v. Koerner, 200 N.Y. 253, 259, 93 N.E. 979, 982 (1910).

[128] Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *motion to amend remittitur granted*, 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied*, 374 U.S. 808 (1963).

[129] *E.g.*, *N.Y. C.P.L.R.* §§ 203 (f), 213, para. 8 (McKinney Supp. 1975).

[130] So, too, in another setting, is Proc v. Home Ins. Co., 17 N.Y.2d 239, 217 N.E.2d 136, 270 N.Y.S.2d 412 (1966).

[131] 5 App. Div. 2d 62, 169 N.Y.S.2d 81 (4th Dep't 1957), *aff'd without opinion*, 5 N.Y.2d 818, 155 N.E. 122, 181 N.Y.S.2d 212 (1958).

[132] 5 App. Div. 2d at 64, 169 N.Y.S.2d at 84.

[133] *Id.* at 66, 169 N.Y.S. 2d at 86.

[134] Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969) (4-3); *Symposium on Mendel v. Pittsburgh Plate Glass Co.*, 45 St. John's L. Rev. 62 (1970). *Mendel* was expressly and unanimously overruled in Victorson v. Bock Laundry Machine Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

[135] 30 N.Y.2d 337, 284 N.E.2d 569, 333 N.Y.S.2d 410 (1972).
[136] N.Y. Ct. Cl. Act § 10, subd. 5 (McKinney 1963), set forth in full in note 276 *infra; see also* N.Y. Const. art. III, § 19 (1938), for an identical provision.
[137] 35 App. Div. 2d 855, 315 N.Y.S.2d 216 (3d Dep't 1970) (mem.).
[138] The dissenting judges relied upon cases saying that "claim accrued" does not mean "cause of action accrued," that a claim accrues when it is complete, when the damages have been ascertained, and it is from that point that the time within which to file a claim starts to run. *E.g.*, Edlux Constr. Corp. v. State, 252 App. Div. 373, 374, 300 N.Y.S. 509, (3d Dep't 1937), *aff'd without opinion*, 277 N.Y. 635, 14 N.E.2d 197 (1938). But in *Edlux*, as the author reads it, the distinction drawn between "claim accrued" and "cause of action accrued" was really another way of distinguishing between the point from which the statute of limitations should begin to run ("claim accrued") from the point at which one first had a right to sue ("cause of action accrued"). In *In re* Board of Educ. v. Wager Constr. Corp., 37 N.Y.2d 283, 333 N.E.2d 353, 372 N.Y.S.2d 45 (1975), the Court of Appeals held that service of a timely notice of claim pursuant to subdivision 1 of § 3813 of the Education Law was a condition precedent to arbitration as well as to a judicial action or proceeding. In the course of his opinion, Chief Judge Breitel (author of the majority opinion in *Boland*) wrote: "...The claims of the contractors 'accrued' when their damages accrued (as distinguished from the event which incurs them), that is, when their damages were ascertainable . . . ." 37 N.Y.2d at 290, 333 N.E.2d at 357, 372 N.Y.S.2d at 50. *See also* Chartrand v. State, 46 App. Div. 2d 942, 362 N.Y.S.2d 237, 239 (3d Dep't 1974) (mem.).
[139] 30 N.Y.2d at 341, 284 N.E.2d at 571, 333 N.Y.S.2d at 413.
[140] Crapo v. City of Syracuse, 183 N.Y. 395, 76 N.E. 465 (1906), Joseph v. McVeigh, 285 App. Div. 386, 137 N.Y.S.2d 577 (1st Dep't), *motion for leave to appeal granted*, 285 App. Div. 941, 139 N.Y.S.2d 894, *aff'd without opinion*, 309 N.Y. 877, 131 N.E.2d 289 (1955); *cf.* Winbush v. City of Mount Vernon, 306 N.Y. 327, 118 N.E.2d 459 (1954).
[141] N.Y. E.P.T.L. § 5-4.1 (McKinney 1967). In actions against public corporations, however, the period may be more than two years, Santaniello v. DeFrancisco, 74 Misc. 2d 229, 344 N.Y.S.2d 589 (Sup. Ct. 1973), *aff'd without opinion*, 44 App. Div. 2d 831, 355 N.Y.S.2d 569 (2d Dep't 1974), or less, Erickson v. Town of Henderson, 30 App. Div. 2d 282, 291 N.Y.S.2d 403 (4th Dep't 1968).
[142] This may, of course, lead to the result that a notice of claim may be timely though served long after the statute of limitations has run. Erickson v. Town of Henderson, 30 App. Div. 2d 282, 291 N.Y.S.2d 403 (4th Dep't 1968).
[143] *See* text pp. 397-403
[144] *See* note 53 *supra.*
[145] *E.g.*, Pugh v. Board of Educ. Cent. Dist. No. 1, 30 N.Y.2d 968, 287 N.E.2d 621, 335 N.Y.S.2d 830 (1972), *aff'g without opinion* 38 App. Div. 2d 619, 326 N.Y.S.2d 300 (3d Dep't 1971) (mem.), discussed at text pp. 400-1, Martinez v. New York City Transit Auth., 33 App. Div. 2d 669, 305 N.Y.S.2d 34 (1st Dep't 1969) (mem.).
[146] Blecker v. City of N.Y., 24 App. Div. 2d 714, 263 N.Y.S.2d 348 (1st Dep't 1965) (mem.).
[147] *In re* DeFelice v. Board of Educ. of City of N.Y., 37 App. Div. 2d 930, 326 N.Y.S.2d 89 (1st Dep't 1971) (mem.).
[148] In re Bloom v. New York City Transit Auth., 19 App. Div. 2d 521, 240 N.Y.S.2d 124 (1st Dep't 1963) (mem.).
[149] *In re* Ostrander v. City of Syracuse, 33 N.Y.2d 960, 309 N.E.2d 353 N.Y.S.2d 732 (1974), *aff'g mem.* 40 App. Div. 2d 622, 336 N.Y.S.2d 558 (4th Dep't 1972) (mem.).
[150] *Id.*
[151] For extreme examples, *see* note 165 *infra.*
[152] *In re* Tashjian v. Cent. School Dist. No. 5, 38 App. Div. 2d 1006, 329 N.Y.S.2d 982 (3d Dep't 1972) (mem.); Biancoviso v. City of N.Y., 285 App. Div. 320, 137 N.Y.S.2d 773 (2d Dep't 1955); *see In re* Crume v. Clarence Cent. School Dist. No. 1, 43 App. Div. 2d 492, 495, 353

N.Y.S.2d 579, 582 (4th Dep't 1974); *cf. In re* Rosenberg v. City of N.Y., 309 N.Y. 304, 130 N.E.2d 629 (1955).

153 Judge Scileppi reviewed the cases in *In re* Murray v. City of N.Y., 30 N.Y.2d 113, 116-19, 282 N.E.2d 103, 105-07, 331 N.Y.S.2d 9, 11-14 (1972); *see also In re* Biberias v. New York City Transit Auth., 27 N.Y.2d 890, 265 N.E.2d 775, 317 N.Y.S.2d 365 (1970) (mem.).

154 *In re* Crume v. Clarence Cent. School Dist. No. 1, 43 App. Div. 2d 492, 353 N.Y.S.2d 579 (4th Dep't 1974).

155 *See* note 153 *supra.*

156 *In re* Pandoliano v. New York City Transit Auth., 17 App. Div. 2d 951, 234 N.Y.S.2d 99 (2d Dep't 1962) (mem.), seemed to settle the problem in favor of the infant claimant until the restrictive interpretations in *In re* Anderson v. County of Nassau, 31 App. Div. 2d 761, 297 N.Y.S.2d 665 (2d Dep't 1969) (mem.), and in *In re* Bauer v. City of N.Y., 33 App. Div. 2d 784, 307 N.Y.S.2d 183 (2d Dep't 1969) (mem.).

157 *See* note 153 *supra.*

158 30 N.Y.2d 113, 282 N.E.2d 103, 331 N.Y.S.2d 9 (1972).

159 Effective September 1, 1974, the age of majority was, for most purposes, reduced to 18 years. Chs. 889-940, [1974] N.Y. Laws 1375 (McKinney).

160 30 N.Y.2d at 119, 282 N.E.2d at 107, 331 N.Y.S.2d at 14.

161 *Id.*, at 120, 282 N.E.2d at 108, 331 N.Y.S.2d at 15.

162 Sherman v. Metropolitan Transit Auth., 44 App. Div. 2d 533, 353 N.Y.S.2d 453 (1st Dep't 1974) (mem.) (3-2), *modified mem.*, 36 N.Y.2d 776, 329 N.E.2d 673, 368 N.Y.S.2d 842 (1975); *In re* Febles v. City of N.Y., 44 App. Div. 2d 369, 355 N.Y.S.2d 147 (1st Dep't 1974) (3-2); *In re* Potter v. Board of Educ. of the City of N.Y., 43 App. Div. 2d 248, 350 N.Y.S.2d 671 (1st Dep't 1974) (3-2).

163 38 App. Div. 2d 992, 329 N.Y.S.2d 430 (3d Dep't), *aff'd mem.*, 31 N.Y.2d 814, 291 N.E.2d 586, 339 N.Y.S.2d 463 (1972).

164 *E.g.*, Speranza v. City of N.Y., 10 Misc. 2d 127, 171 N.Y.S.2d 604 (Sup. Ct. 1958), *rev'd mem.*, 7 App. Div. 2d 936, 183 N.Y.S.2d 785 (2d Dep't 1959), *aff'd without opinion*, 11 N.Y.2d 917, 183 N.E.2d 76, 228 N.Y.S.2d 671 (1962); *see* McLaughlin, *Civil Practice, 1962 Survey of N.Y. Law*, 14 Syracuse L. Rev. 347, 352 (1963). *Accord, In Re* Banas v. City of Syracuse, 204 Misc. 201, 125 N.Y.S.2d 490 (Sup. Ct.), *aff'd without opinion*, 282 App. Div. 826, 122 N.Y.S.2d 532 (4th Dep't), *motion for leave to appeal denied*, 282 App. Div. 850, 125 N.Y.S.2d 288 (4th Dep't), 306 N.Y. 981 (1953).

The facts in *Speranza*, as they appear in the opinion at Special Term, were these. On August 16, 1955, Mrs. Speranza, then in her sixth month of pregnancy, fell on a public highway. On October 19, 1955, a notice of claim was timely filed on behalf of herself and her husband. That very notice, however, also included a statement as to the possible wrongful death of the unborn child.

The child, apparently normal, was born on December 7, 1955. The first sign that something was amiss was noted when the child was five and half months old; other signs appeared when he was 17 months old. The parents thereafter moved for leave to amend their notice of claim in behalf of the infant and for leave to serve a supplemental summons and complaint. Special Term granted the motion, invoking subdivision 6 of § 50-e. The Appellate Division reversed, holding that the amendment was not authorized under subdivision 6 and that the motion was not made within the one-year maximum period specified in subdivision 5. The Court of Appeals affirmed.

The facts cried out for a contrary result. Even courts in other jurisdictions that generally uphold the constitutionality of their notice of claim statutes have taken the view that they would be subject to constitutional attack if rigidly applied to infants and persons under other disability. *E.g.*, McCrary v. City of Odessa, 482 S.W.2d 151 (Tex. 1972); Cook v. State, 83 Wash. 2d 599, 521 P.2d 725 (1974). And it should not be overlooked that the first case to strike down a notice of claim statute on constitutional grounds involved an infant rendered permanently blind from an automobile accident. *See* text accompanying note 36 *supra; see also* note 166 *infra.* Hard cases do not always make bad law!

[165] Corso v. City of N.Y., 42 Misc. 2d 677, 248 N.Y.S.2d 816 (Sup. Ct. 1964) (amnesia resulting from accident lasted nearly two years); *see* McLaughlin, *Civil Practice, 1964 Survey of N.Y. Law*, 16 Syracuse L. Rev. 419, 424-25 (1964).

Even when a prisoner's right to sue was suspended and his time limited for commencing an action was extended during his imprisonment (but for not more than ten years), his time for serving a notice of claim was not extended. Visconti v. City of N.Y., 45 App. Div. 2d 480, 359 N.Y.S.2d 307 (1st Dep't 1974). A fortiori today, when his right to sue is not suspended, N.Y. Civil Rights Law §§ 79, 79-a (McKinney Supp. 1975), and the time limited for commencing an action is not extended, N.Y. C.P.L.R. § 208 (McKinney Supp. 1975). Both statutes were amended by ch. 687, §§ 1-3, [1973] N.Y. Laws 1296 (McKinney).

[166] Russo v. City of N.Y., 258 N.Y. 344, 179 N.E. 762 (1932); Murphy v. Village of Ft. Edward, 213 N.Y. 397, 107 N.E. 716 (1915); *see In re* Martin v. School Board (Long Beach), 301 N.Y. 233, 239, 93 N.E.2d 655, 658 (1950) (dissenting opinion).

The words of Judge Froessel, dissenting in *Martin*, ring loud and clear: "It is no answer to say that it is not ordinarily impossible for an immature infant to have claims filed and suits brought in its behalf. Such an infant's rights may not be made dependent upon the fidelity of others." 301 N.Y. at 243, 93 N.E.2d at 660.

[167] 9th N.Y. Judicial Council Rep. at 231-32 (1943). Much of the litigation and hardship that has resulted from the arbitrary, inflexible one-year bar—most pronounced in cases of infancy and mental or physical incapacity—would have been avoided had the Legislature adopted the Council's recommendation, to wit: "Where the claimant is an immature infant, or mentally or physically incapacitated, the notice may be given within a reasonable time after such disability ceases, although the stated period has expired." *Id.* at 229.

[168] N.Y. Law Revision Comm'n Rep. at 579 (1959); *see also id.* at 585-86, 591-93.

[169] Both the one-year bar and the causal requirement would be removed for infants. *See* text pp. 385, 387-8.

[170] *E.g., In re* Rosenberg v. City of N.Y., 309 N.Y. 304, 130 N.E.2d 629 (1955); Prude v. County of Erie, 47 App. Div. 2d 111, 364 N.Y.S.2d 643 (4th Dep't 1975); *In re* Reynolds v. Greece Cent. School Dist., 36 App. Div. 2d 1020, 321 N.Y.S.2d 668 (4th Dep't) (mem.), *motion for leave to appeal denied*, 29 N.Y.2d 485, 325 N.Y.S.2d 1025 (1971).

[171] *E.g.*, Moore v. City of N.Y., 302 N.Y. 563, 96 N.E.2d 619 (1951), *rev'g without opinion* 276 App. Div. 585, 96 N.Y.S.2d 324 (1st Dep't 1950); *see* note 165 *supra*.

[172] *See* note 165 *supra*.

[173] *See* notes 167 and 168 *supra*.

[174] Both the one-year bar and the causal requirement would be removed. *See* text pp. 385, 387-8.

[175] *See* N.Y. Statutes § 123, subd. b (McKinney 1971).

[176] *See* text accompanying note 71 *supra*.

[177] *See, e.g.*, notes 80 and 84 *supra*.

[178] Since the author cannot state with certainty that he has found all of the New York provisions relating to notices of tort claims against public corporations, he can hardly do so as to other jurisdictions. Indeed, as to them, he has made no attempt to ascertain whether they have local laws relating to notices of claim, but has limited himself to the statutory codifications. And even these must be negotiated with care because they differ, for example, as to the public entity involved, the type of tort for which the entity is liable, the basic time period for serving a notice of claim, the time, if any, within which leave to serve a late notice must be sought, and the tolls, if any, for infancy or mental or physical incapacity. (As to the tolls, *see* note 188 *infra*.)

Without ordinarily pinpointing any of the many disparities, here are the basic time periods prevailing in most of the other jurisdictions:

United States: Tort claim is barred unless presented in writing within two years after claim accrues or action begun within six months after date of mailing of final denial or expiration of six months without action. 28 U.S.C. §§ 2401(b), 2675 (1970).

Alabama: Six months after cause of action accrues. Ala. Code tit. 37, §§ 476, 504 (1958). 90 days from receipt of injury. *Id.* § 659 (1958) (City of Birmingham).

California: 100 days after accrual of cause of action. Cal. Gov't Code § 911.2 (West 1966).

Colorado: 90 days after discovery of injury. Colo. Rev. Stat. § 24-10-109 (1973).

Connecticut: Re state: 60 days after injury, Conn. Gen. Stat. Rev. § 13a-144 (1972); 30 days if snow or ice, *Id.* § 13a-149. Re city and borough: 30 days after injury from mob, *Id.* § 7-108; re town, city or borough: six months after accrual, *Id.* § 7-465.

District of Columbia: six months after injury or damage sustained. D.C. Code Encycl. Ann. § 12-309 (1966).

Georgia: six months of the happening of the event. Ga. Code Ann. § 69-308 (1967).

Idaho: 120 days from date claim arose or imputed discovery, whichever is later. Idaho Code §§ 6-905, 6-906 (Supp. 1974).

Illinois: One year from date injury or cause of action was received or accrued. Ill. Ann. Stat. § 8-102 (Supp. 1975).

Indiana: 180 days after loss occurs. Ind. Ann. Stat. §§ 34-4-16.5-6, 34-4-16.5-7 (Burns Supp. 1974).

Iowa: Commence action within six months unless notice presented within 60 days. Iowa Code § 613A.5 (Supp. 1975).

Kansas: Six months after injury. Kan. Stat. Ann. § 12-105 (1973).

Kentucky: 90 days after occurrence from defect in thoroughfare. Ky. Rev. Stat. Ann. § 411.110 (1972).

Maine: 14 days after injury or damage from defective highway, town way, causeway or bridge if 24 hours actual notice of defect. Me. Rev. Stat. Ann. tit. 23, § 3655 (1965).

Maryland: 180 days after injury or damage sustained, but court may, upon motion and for good cause shown, entertain suit notwithstanding noncompliance unless defendant shows prejudice. Md. Ann. Code art. 57, § 18 (Supp. 1974).

Massachusetts: 30 days after injury from defective ways, but noncompliance no defense in snow or ice case unless defendant proves prejudice. Mass. Gen. Laws Ann. ch. 84, § 18 (Supp. 1975). Re crime victims, one year from occurrence or 90 days after death, whichever is earlier. *Id.* ch. 258A, § 4.

Michigan: 180 days after injury occurred. Mich. Comp. Laws Ann. § 691.1404 (Supp. 1975).

Minnesota: 60 days after loss or injury discovered but none for intentional tort or involving motor vehicle. Minn. Stat. Ann. § 466.05 (Supp. 1975).

Missouri: All re street defects. Cities of first class, 60 days, Mo. Ann. Stat. § 73.950 (Vernon 1952); of second class, 30 days, *Id.* § 75-860; of third class, 90 days, *Id.* § 77.600; of fourth class, 90 days, *Id.* § 79.480; of 100,000 inhabitants, 90 days, *Id.* § 82.210.

Montana: 120 days from date claim arose or imputed discovery, whichever is earlier. Mont. Rev. Codes Ann. §§ 82-4311, 82-4312 (Supp. 1975).

Nebraska: One year after claim accrued. Neb. Rev. Stat. § 23-2416 (1970).

Nevada: Six months from time payable. Nev. Rev. Stat. §§ 244.245, 244.250 (1973).

New Hampshire: 60 days before commencement of action. N.H. Rev. Stat. Ann. § 49-A:86 (Supp. 1973). 10 days from date of injury on bridge, culvert or embankment. *Id.* §§ 247:17, 247:25 (1964).

New Jersey: 90 days after accrual. N.J. Stat. Ann. § 59:8-8 (Supp. 1975).

North Dakota: 90 days after injury. N.D. Cent. Code § 40-42-01 (1972).

Oklahoma: For other than wrongful death, 30 days after loss or injury. Okla. Stat. Ann. tit. 11, § 1756(a) (Supp. 1974). For wrongful death, one year after injury. *Id.* § 1756(b).

Oregon: For other than wrongful death, 180 days after loss or injury. Ore. Rev. Stat. § 30.275(1) (Supp. 1974). For wrongful death, one year after injury. *Id.* § 30:275(2).

Pennsylvania: Six months from date of negligence. Pa. Stat. Ann. tit. 53, § 5301 (1972). Re metropolitan transportation authority, six months after accrual. *Id.* tit. 66, § 2036 (Supp. 1975)

Rhode Island: 60 days from injury on highway or bridge. R.I. Gen. Laws Ann. § 45-15-9 (Supp. 1974).

South Carolina: Three months from injury. S.C. Code Ann. § 10-2623 (1962).

South Dakota: 60 days after injury. S.D. Compiled Laws Ann. § 9-24-2 (1968).

Tennessee: 90 days after injury for street and highway defects. Tenn. Code Ann. § 6-1003 (1971).

Texas: Except where there is actual notice, six months from date of incident. Tex. Rev. Civil Stat. Ann. art. 6252-19 (Supp. 1974).

Utah: Against city or incorporated town, six months after injury or damage. Utah Code Ann. § 10-7-77 (Supp. 1975). Against any other political subdivision, 90 days after cause of action arises. *Id.* § 63-30-13 (1968).

Vermont: Re bridge or culvert, 20 days after occurrence. Vt. Stat. Ann. tit. 19, § 1373 (1968).

Virginia: Six months after accrual. Va. Code Ann. § 8-653 (Supp. 1973).

Washington: 120 days from date claim arose. Wash. Rev. Code Ann. §§ 4.92.100, 4.96.020 (Supp. 1974). Or 120 days from date damage occurred or injury sustained. *Id.* §§ 35.31.020, 35.31.040, 36.45.010.

Wisconsin: Re town and county liability for highway defects, 120 days after the happening of the event. Wis. Stat. Ann. § 81.15 (Supp. 1975). For all other tort actions except against state officer or employee, same period but noncompliance no bar if defendant had actual notice and injured party shows absence of prejudice to defendant. *Id.* § 895.43(1) (1966). For state officer or employee, service on the attorney general 90 days after the event. *Id.* § 895.45 (Supp. 1975).

Wyoming: Re city or town liability for bridge, street, sidewalk or thoroughfare defects, 30 days after the injury or damage. Wyo. Stat. Ann. § 15.1-275 (1959). Re claims against the state, one year after accrual. *Id.* § 9-71.

[179] As to the public corporations specified in or otherwise governed by § 50-i, the period is one year and 90 days. N.Y. Gen. Munic. Law § 50-i (McKinney 1965). As to *almost* all other public corporations, the period is one year after the cause of action accrues. *See, e.g.*, the citations to the authorities governed by article 7 of the Public Authorities Law at App. "C," p. 420. One exception is N.Y. H'way Law § 139 (McKinney 1962) ("within one year from the date of service of the notice").

[180] Ch. 109, § 7 [1975] N.Y. Laws 137 (McKinney), that chapter amending as well many other chapters of the consolidated laws. The amendment to N.Y. C.P.L.R. § 208 (McKinney Supp. 1975) limited the extension of the statute of limitations for infancy to 10 years after a cause of action for medical malpractice accrues, although it was not put quite that way. Section 208, as amended, reads as follows:

> "If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except, in any action other than for medical malpractice, where the person was under a disability due to infancy. This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape."

[181] Erickson v. Town of Henderson, 30 App. Div. 2d 282, 291 N.Y.S.2d 403 (4th Dep't 1968).
[182] *See* text pp. 401-2.
[183] *See* note 180 *supra*.
[184] *Id.*
[185] A situation that presently exists as to claims for wrongful death. *See* note 181 *supra*.
[186] N.Y. Law Rev. Comm'n Rep. at 579 (1959). Justice Hamilton of the Supreme Court of Washington put it this way:

"Certainly the legislature in enacting the aforementioned proviso to RCW 4-92.100 [if claimant incapacitated or a minor, claim may be filed by relative, attorney or agent] could not have intended such a harsh and unjust result — a result which invidiously discriminates between those who are tortiously injured to the point of mental or physical incapacity for 4 or more months and those who are more fortunate and suffer less disabling injuries."

And *see* Judge Froessel's dissent in *Martin* at note 166 *supra*.

[187] N.Y. Ct. Cl. Act § 10 subd. 5 (McKinney 1963), permits one under legal disability to present a claim within two years after the disability is removed. *Cf.* N.Y. Unconsol. Laws § 7108 (McKinney Supp. 1975), which gives the court discretion to permit service of a late notice and the commencement of the action "within a reasonable time but in any event within three years after the cause of action accrued." *See*, as to § 7108, notes 62 and 67 *supra* and accompanying text.
[188] Most of the statutes reflect greater concern for persons under mental or physical incapacity than they do for infants. *See* Ind. Stat. Ann. § 34-4-16.5-8 (Supp. 1974) (within 180 days after "incompetency" is removed); Mass. Gen. Laws Ann. ch. 84, § 19 (Supp. 1975) (within 30 days after "physical or mental" incapacity is removed); Mich. Comp. Laws Ann. § 691.1404 (Supp. 1975) (within 180 days after termination of physical or mental disability); N.J. Stat. Ann. § 59:8-8 (Supp. 1975) (infant or incompetent person may commence action within the time limitations "after his coming to or being of full age or sane mind"); N.D. Cent. Code § 40-42-01 (1968) (within 90 days after mental incapacity is removed); R.I. Gen. Laws Ann. § 9-31-2 (Supp. 1974) (within 10 days after physical or mental incapacity is removed); Utah Code Ann. § 10-7-77 (Supp. 1975) (within 6 months after happening of injury or damage or within one year after infant reaches majority, whichever is longer); Va. Code Ann. § 8-653 (Supp. 1973) (toll of six-month period during mental or physical disability). *See also* the Texas and Washington cases cited in note 164 *supra*.
[189] *In re* Murray v. City of N.Y., 30 N.Y.2d 113, 282 N.E.2d 103, 331 N.Y.S.2d 9 (1972), discussed in text accompanying notes 158-61 *supra*.
[190] As they do in California, where the basic filing period is 100 days and the outside period one year. Whitfield v. Roth, 10 Cal. 3d 874, 519 P.2d 588, 112 Cal. Rptr. 540 (1974).
[191] *See* Victorson v. Bock Laundry Machine Co., 37 N.Y.2d 395, 404, 335 N.E.2d 275, 279, 373 N.Y.S.2d 39, 44 (1975).
[192] *See, e.g.*, Sherman v. Metropolitan Transit Auth., note 162 *supra*.
[193] *See* text pp. 405-7.
[194] 308 N.Y. 226, 124 N.E.2d 295 (1954).
[195] 281 N.Y. 266, 22 N.E.2d 367 (1939) (per curiam).
[196] 21 App. Div. 2d 821, 251 N.Y.S.2d 538 (2d Dep't 1964) (mem.), *aff'd without opinion*, 17 N.Y.2d 639, 216 N.E.2d 341, 269 N.Y.S.2d 138 (1966).
[197] *See* text accompanying notes 93-102 and 114-25 *supra*.
[198] *See* note 98 *supra*.
[199] 2 N.Y.2d 413, 141 N.E.2d 565, 161 N.Y.S.2d 52 (1957).
[200] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
[201] At text accompanying notes 104-13 *supra*.
[202] At text accompanying notes 126-42 *supra*.
[203] Proposed new paragraph (d) of subdivision 1 of section 50-e, at text p. 386.
[204] *E.g.*, Widger v. Cent. School Dist. No. 1, 18 N.Y.2d 646, 219 N.E.2d 425, 273 N.Y.S.2d 72 (1966), *rev'g mem.* 23 App. Div. 2d 811, 258

N.Y.S.2d 195 (4th Dep't 1965); Montana v. Village of Lynbrook, 23 App. Div. 2d 585, 256 N.Y.S.2d 651 (2d Dep't 1965) (mem.).

205 9th N.Y. Judicial Council Rep. at 233 (1943).

206 *See* Treen Motors Corp. v. Van Pelt, 106 Misc. 357, 360, 174 N.Y.S. 500, 503 (Sup. Ct. 1919).

207 Sandak v. Tuxedo Union School Dist. No. 3, 308 N.Y. 226, 124 N.E.2d 295 (1954).

208 Miller v. County of Putnam, 32 App. Div. 2d 827, 302 N.Y.S.2d 377 (2d Dep't) (mem.), *aff'd without opinion*, 25 N.Y.2d 664, 254 N.E.2d 773, 306 N.Y.S.2d 473 (1969).

209 *E.g.*, the authorities governed by article 7 of the Public Authorities Law. See App. "C" at p. 420.

210 *E.g.*, Cavaliere v. New York City Transit Auth., 36 App. Div. 2d 532, 318 N.Y.S.2d 584 (2d Dep't 1971) (mem.).

211 Ch. 393, § 1, [1951] N.Y. Laws 1059.

212 *E.g.*, Melisi v. Cent. School Dist. No. 1, 25 App. Div. 2d 54, 266 N.Y.S.2d 933 (3d Dep't 1966).

213 35 Misc. 2d 92, 231 N.Y.S.2d 142 (Sup. Ct. 1962).

214 *Id.* at 96, 231 N.Y.S.2d at 145.

215 23 App. Div. 2d 585, 256 N.Y.S.2d 651 (2d Dep't 1965) (mem.).

216 Montez v. Metropolitan Transp. Auth., 43 App. Div. 2d 224, 350 N.Y.S.2d 665 (1st Dep't 1974) (per curiam).

217 *E.g.*, Sayre v. Long Island R.R., N.Y.L.J., March 20, 1974, p. 18, col. 3 (App. Term 2d Dep't); Hills Supermarkets, Inc. v. Long Island R.R. N.Y.L.J., July 1, 1974, p. 15, col. 6 (App. Term 2d Dep't).

218 *E.g.*, N.Y. C.P.L.R. §§ 308, 311 (McKinney 1972 & Supp. 1975).

219 Bender v. Jamaica Hosp., 46 App. Div. 2d 897, 361 N.Y.S.2d 937 (2d Dep't 1974) (mem.); Bender v. New York City Health & Hosps. Corp., 46 App. Div. 2d 898, 361 N.Y.S.2d 939 (2d Dep't 1974) (mem.). *But cf. In re* Economou v. New York City Health & Hosps. Corp., 47 App. Div. 2d 877, 366 N.Y.S.2d 644 (1st Dep't 1975) (per curiam).

220 *See* the *Bender* cases cited in note 219 *supra*.

221 See note 219 *supra*.

222 Ch. 1016, § 1, [1969], N.Y. Laws 2514.

223 47 App. Div. 2d at 878, 366 N.Y.S.2d at 646.

224 Designate the attorney for every public corporation as one to whom a notice of claim may be delivered and validate, under specified circumstances, the service as against the corporation against which the claim exists although it is not the corporation against which the claim was specifically asserted. *See* text pp. 393-4, 394-5.

225 58 Misc. 2d 259, 295 N.Y.S.2d 131 (Sup. Ct. 1968).

226 *Id.* at 260, 295 N.Y.S.2d at 132.

227 *Id.* at 261, 295 N.Y.S.2d at 133.

228 *Id.* at 261-62, 295 N.Y.S.2d at 133-34.

229 N.Y. Educ. Law § 2, subd. 13 (McKinney 1969):

> "School officer. The term 'school officer' means a clerk, collector, or treasurer of any school district; a trustee; a member of a board of education of other body in control of the schools by whatever name known in a union free school district, central school district, central high school district, or in a city school district; a superintendent of schools, a district superintendent; a supervisor of attendance or attendance officer; or other elective or appointive officer in a school district whose duties generally relate to the administration of affairs connected with the public school system."

230 That is the problem of the anonymous subsidiary. *See* text accompanying notes 298-307 *infra*.

231 This recommendation has been made before. *See* N.Y. Joint Leg. Comm. Rep. at 35-37 (1963).

232 *See* notes 213 and 215 *supra*.

233 *See* note 216 *supra*.

234 *Id.*

235 *Compare* N.Y. C.P.L.R. § 311, paras. 2 to 4 (McKinney 1972), *with* paras. 5 to 7.

236 47 App. Div. 2d 877, 366 N.Y.S.2d 644 (1st Dep't 1975) (per curiam), discussed in text accompanying notes 221-24 *supra*.

[237] The phrase is borrowed from a superior casebook. H. Peterfreund & J. McLaughlin, New York Practice — Cases & Other Materials 211 (3d ed. 1973).

[238] N.Y. C.P.L.R. § 9804 (McKinney Supp. 1975).

[239] N.Y. Town Law § 65-a (McKinney 1965).

[240] N.Y. Second Class Cities Law § 244 (McKinney Supp. 1975).

[241] *See* App. "E" at p. 424. *See also* note 59 *supra.*

[242] S. Int. 10749, N.Y. Leg. Record & Index S 860 (1974); *cf.* N.Y. Gen. Munic. Law § 71-b (McKinney Supp. 1975) (concerning the operation of snowmobiles).

[243] *See* App. "F" at p. 426.

[244] *See* App. "G" at p. 427.

[245] *E.g.*, N.Y. C.P.L.R. § 9804 (McKinney 1975) (within a reasonable time); Village of Westbury, Local Laws, 1955, No. 1, p. 550 (24 hours); Village of Ellenville, Local Laws, 1958, No. 1, p. 479 (30 days). Variations abound in many other respects. For example, as to the type of defect covered: Village of Lawrence, Local Laws, 1959, No. 1, p. 509 ("street, highway, bridge, culvert, sidewalk, crosswalk, park, parking field, parking space, golf course, yacht basin, or other recreational area, public building, public grounds, or other building or area open for use by the public"); Town of Hector, Local Laws, 1970, No. 1, p. 1665 ("highway, bridge, culvert or any other property owned by the town of Hector or any property owned by any improvement district"); City of Elmira, Local Laws, 1967, No. 1, p. 113 ("street . . . tree, bridge, viaduct, underpass, culvert, parkway or park approach, sidewalk or crosswalk, pedestrian walk or path, or traffic control sign or signal").

If the municipal corporation creates the dangerous condition, no prior notice is required. Muszynski v. City of Buffalo, 29 N.Y.2d 810, 277 N.E.2d 414, 327 N.Y.S.2d 368 (1971), *aff'g on mem. opinion below* 33 App. Div. 2d 648, 305 N.Y.S.2d 163 (4th Dep't 1969); *cf.* Martin v. City of Cohoes, 37 N.Y.2d 162, 332 N.E.2d 867, 371 N.Y.S.2d 687 (1975), and the brief comment on that case in note 53 *supra.*

Will prior actual but unwritten notice suffice if the local law requires prior written notice and the municipal corporation has not created the dangerous condition? The obvious answer would seem to be no, but there is an unclear dictum to the contrary. Kotler v. City of Long Beach, 44 App. Div. 2d 679, 680, 353 N.Y.S.2d 800, 802 (2d Dep't 1974) (4-1) (mem.), *aff'd without opinion*, 36 N.Y.2d 774, 329 N.E.2d 673, 368 N.Y.S.2d 842 (1975) (". . . There was no evidence that defendant had actual notice of the defect or was in any way alerted to its existence.") The dissenting justice quoted the prior written notice requirement, and later stated: "I do not rest on constructive notice, but rather on the fact that by necessary construction he [the city's beach maintenance superintendent]—and therefore, the city—had actual notice." 44 App. Div. 2d at 681, 353 N.Y.S.2d at 804.

[246] See Rupert v. Town of West Seneca, 293 N.Y. 421, 57 N.E.2d 741 (1944).

[247] *Id.*

[248] *E.g.*, N.Y. Joint Leg. Comm. Rep. 19 (1957); Barry v. Niagara Frontier Transit System, 35 N.Y.2d 629, 634, 324 N.E.2d 312, 314, 364 N.Y.S.2d 823, 826 (1974).

[249] *E.g.*, Stanton v. Village of Waverly, note 47 *supra*; MacMullen v. City of Middletown, 187 N.Y. 37, 79 N.E. 863 (1907); McCord v. Village of Walden, 38 App. Div. 2d 741, 329 N.Y.S.2d 344 (2d Dep't 1972) (mem.).

[250] *See* note 145 *supra.*

[251] *E.g.*, as to applications not made within a reasonable time, *In re* Chadwick v. New York City Transit Auth., 35 App. Div. 2d 810, 316 N.Y.S.2d 168 (2d Dep't 1970) (mem.); *In re* Occhuizzo v. Salamanca Hosp. Dist. Auth., 33 App. Div. 2d 649, 305 N.Y.S.2d 330 (4th Dep't 1969) (mem.); *In re* Jones v. City of N.Y., 30 App. Div. 2d 938, 293 N.Y.S.2d 807 (1st Dep't 1968) (mem.); and, as to applications not made within one year, Camarella v. East Irondequoit Cent. School Bd.,

34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1975) (mem.); *In re* Martin v. School Bd. (Long Beach), 301 N.Y. 233, 93 N.E.2d 655 (1950); Murphy v. Town of Yates, 47 App. Div. 2d 807, 365 N.Y.S.2d 298 (4th Dep't 1975) (mem.); *see In re* Rosenberg v. City of N.Y., 309 N.Y. 304, 308, 130 N.E.2d 629, 632 (1955).

Not only must the original application for leave to serve a late notice of claim be made within one year, but so, too, must a motion for leave to reargue. *In re* Clark v. Manhattan & Bronx Surface Transit Operating Auth., 34 App. Div. 2d 770, 311 N.Y.S.2d 339 (1st Dep't 1970) (mem.), *aff'd without opinion*, 28 N.Y.2d 614, 268 N.E.2d 803, 320 N.Y.S.2d 76 (1971). In that case, a 15-year old infant's claim arose on March 4, 1968. An attorney was retained on March 21. A notice of claim was not served within 90 days after the claim arose. Leave to serve a late notice was denied on September 12, 1968. The motion for leave to reargue was made on March 14, 1969, ten days beyond the one-year period. The main ground of the First Department's (pre-*Murray*) opinion was the absence of a causal relationship between the infancy and the failure to file within 90 days. The court "noted" also that the motion for leave to reargue was made more than one year after the accident. The Court of Appeals affirmed on the ground that "the Appellate Division properly found the motion for reargument untimely." For the reason given by the Appellate Division, or because the motion for leave to reargue was made after the time to appeal from the original order had expired, if that was the fact, or both?

The mere recital of the facts in *Clark* discloses the unsympathetic posture in which the question was presented. If an appeal from the original order would be timely, so, too, should a motion for leave to reargue, whether made within or without the one-year period, since that motion must be based on the original papers and is intended to give the court an opportunity to correct its mistake.

In Prude v. County of Erie, 47 App. Div. 2d 111, 364 N.Y.S.2d 643 (4th Dep't 1975), the court, although reversing Special Term's order denying leave to serve a late notice of claim, held that Special Term had properly exercised its discretion in granting claimant leave to renew after his time to appeal from the original order had expired, relying upon the basic distinctions between motions for leave to reargue and motions for leave to renew. Although both applications were made well within the one-year period, the motion for leave to renew need not be made within that period if the original application, timely made, is denied with leave to renew. *In re* Cohen v. City of N.Y., 14 N.Y.2d 659, 198 N.E.2d 901, 249 N.Y.S.2d 868 (1964), *aff'g without opinion* 19 App. Div. 2d 722, 242 N.Y.S.2d 398 (2d Dep't 1963) (mem.).

[252] Barchet v. New York City Transit Auth., 20 N.Y.2d 1, 228 N.E.2d 361, 281 N.Y.S.2d 289 (1967). For an incisive analysis of this decision, *see* McLaughlin, *Civil Practice, 1967 Survey of N.Y. Law*, 19 Syracuse L. Rev. 501, 507-09 (1967). *See also* note 253 *infra*.

[253] Miller v. County of Putnam, 32 App. Div. 2d 827, 302 N.Y.S.2d 377 (2d Dep't) (mem.), *aff'd without opinion*, 25 N.Y.2d 664, 254 N.E.2d 773, 306 N.Y.S.2d 473 (1969).

Should a public corporation be required to return an untimely notice within a specified time? No other single question has received more of the author's attention. The one major roadblock to an affirmative answer, in the opinion of the author, is this: What sanction should be imposed for a failure to return the notice? Should the notice be deemed timely served? That strikes the author as too drastic and too subject to abuse, if not more. Of course, one is sympathetic to the plight of a claimant whose notice is served on the 91st day. But what of a notice served on the 191st day? Or the 291st day? Or the 365th day? In every instance, the attorney either knows or should know of the untimeliness of service. Furthermore, the attorney is required to plead timely service in the complaint. If he does, the public corporation is required either to move to dismiss the complaint or to deny the allegation of timely service in its answer. If the public corporation does neither, the timeliness of service is not in issue. *See*

Tom Sawyer Motor Inns, Inc. v. Chemung County Sewer Dist. No. 1, 33 App. Div. 2d 720, 722, 305 N.Y.S.2d 408, 412 (3d Dep't 1969) (mem.). An application by the public corporation for leave to amend its answer to deny the allegation of timely service should be denied if the one-year period for applying for leave to serve a late notice has expired, or even if a reasonable time within which to do so does not remain. If, of course, the complaint does not contain an allegation of timely service, then a motion to dismiss may be made at any time, without regard to the contents of the answer. N.Y. C.P.L.R. Rule 3211(e) (McKinney 1972).

Should the sanction for a public corporation's failure to return an untimely notice simply be a tolling of the one-year period for applying for leave to serve a late notice? Again, whether served on the 91st day, or the 191st day, or the 291st day, or the 365th day? An application for leave to serve a late notice is timely if made on the 365th day and the statute of limitations will be tolled while the matter is *sub judice*. Barchet v. New York City Transit Auth., note 252 *supra*. And the toll should apply whether the time limited for commencing the action is that prescribed by § 50-i of the General Municipal Law or by any other statute since in that way alone can full effect be given to the one-year period prescribed in § 50-e *Barchet* was followed in *In re* Hurd v. County of Allegany, 39 App. Div. 2d 499, 336 N.Y.S.2d 952 (4th Dep't 1972), a case involving § 50-i. Many canons of statutory construction support that result. *See, e.g.*, N.Y. Statutes § § 146, 147, 221 (McKinney 1971).

254 *In re* Rosenberg v. City of N.Y., 309 N.Y. 304, 308, 130 N.E.2d 629, 632 (1955).

255 *See* text accompanying notes 151-69 *supra*.

256 See note 141 *supra*.

257 N.Y. C.P.L.R. § 203(a) (McKinney 1972); *see* note 128 *supra; see also* Joseph v. McVeigh, note 140 *supra*.

258 N.Y. C.P.L.R. § 214-a (McKinney Supp. 1975); Borgia v. City of N.Y., 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962), discussed in text accompanying notes 126-29 *supra*.

259 N.Y. C.P.L.R. § 214-a, note 258 *supra*.

260 36 N.Y.2d 925 335 N.E.2d 847, 373 N.Y.S.2d 539 (1975) (per curiam).

261 44 App. Div. 2d 578, 353 N.Y.S.2d 493 (2d Dep't 1974) (mem.).

262 36 N.Y.2d at 928, 335 N.E.2d at 848, 373 N.Y.S.2d at 540.

263 Weed v. County of Nassau, 34 N.Y.2d 723, 313 N.E.2d 787, 357 N.Y.S.2d 493 (1974), *aff'g on mem. below* 42 App. Div. 2d 848, 346 N.Y.S.2d 702 (2d Dep't 1973).

264 Baker v. New York City Health & Hosps. Corp., note 260 *supra* and accompanying text.

265 *In re* Boston v. New York City Transit Auth., 20 App. Div. 2d 709, 247 N.Y.S.2d 177 (2d Dep't 1964)(mem.).

Holmes v. City of N.Y., 269 App. Div. 95, 54 N.Y.S.2d 289 (2d Dep't, *aff'd without opinion*, 295 N.Y. 615, 64 N.E.2d 449 (1945); *cf.* Joseph v. McVeigh, note 140 *supra*, reaching an unfortunate result in a converse situation. Assuming the correctness of the result in *Joseph*, a different result should be reached if the notice of claim for wrongful death is served not only within 90 days after the appointment of the personal representative but also within 90 days after the date of the injury.

267 *In re* Daley v. Greece Cent. School Dist. No. 1, 21 App. Div. 2d 976, 252 N.Y.S.2d 899 (4th Dep't 1964) (mem.), *aff'd without opinion*, 17 N.Y.2d 530, 215 N.E.2d 165, 267 N.Y.S.2d 909 (1966); *In re* Withey v. Board of Educ., 28 App. Div. 2d 800, 280 N.Y.S.2d 925 (3d Dep't 1967) (mem.); *see In re* Murphy v. Town of Yates, 47 App. Div. 2d 807, 365 N.Y.S.2d 298 (4th Dep't 1975) (mem.).

268 *In re* El-Barry Realty Corp. v. City of N.Y., 37 App. Div. 2d 543, 322 N.Y.S.2d 219 (1st Dep't 1971) (mem.).

269 *Id.*

270 Kern v. Cent. Free School Dist. No. 4, 25 App. Div. 2d 867, 270 N.Y.S.2d 137 (2d Dep't 1966) (mem.).

271 38 App. Div. 2d 619, 326 N.Y.S.2d 300 (3d Dep't 1971) (mem.), *aff'd*

without opinion, 30 N.Y.2d 968, 287 N.E.2d 621, 335 N.Y.S.2d 830 (1972).

[272] *E.g.*, Camarella v. East Irondequoit Cent. School Bd., 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974) (mem.), Weed v. County of Nassau, 34 N.Y.2d 723, 313 N.E.2d 787, 357 N.Y.S.2d 493 (1974), *aff'g on mem. below* 42 App. Div. 2d 848, 346 N.Y.S.2d 702 (2d Dep't 1973); Joseph v. McVeigh, note 140 *supra*.

[273] *E.g.*, *In re* Natoli v. Board of Educ. of the City of Norwich, 277 App. Div. 915, 98 N.Y.S.2d 540 (3d Dep't 1950) (mem.), *aff'd without opinion*, 303 N.Y. 646, 101 N.E.2d 761 (1951).

[274] *See* N.Y. C.P.L.R. § 205-a (McKinney 1972).

[275] *See* text accompanying notes 177-92 *supra*.

[276] "A claimant who fails to file a claim or notice of intention, as provided in the foregoing subdivisions, within the time limited therein for filing the notice of intention, may, nevertheless, in the discretion of the court, be permitted to file such claim at any time within two years after the accrual thereof, or in the case of a claim for wrongful death within two years after the decedent's death. The application for such permission shall be made upon motion based upon affidavits showing a reasonable excuse for the failure to file the notice of intention and that the state or its appropriate department had, prior to the expiration of the time limited for the filing of the notice of intention, actual knowledge of the essential facts constituting the claim. The application may be made returnable at any regular or special session of the court and may be heard and determined by any judge thereof. The claim proposed to be filed, containing all of the information set forth in section eleven of this act, shall accompany such application. No such application shall be granted if the court shall find that the state has been substantially prejudiced by the failure of the claimant to file such notice of intention within the time limited therefor. But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed."

The author's recommendation, in somewhat different form, has been made before. *See, e.g.*, 4 N.Y. Joint Leg. Comm. Rep. 28, 43 (1971); Liff & Humburg, *Section 50-e, General Municipal Law Reexamined*, 45 N.Y. State Bar J. 401, 405-06 (1973). The author's recommendation differs in two principal respects: one, actual knowledge in the public corporation's insurance carrier would be as effective as actual knowledge in the corporation itself; and, two, the corporation or carrier would have the burden of showing that it had been substantially prejudiced by the failure to serve a notice of claim within the basic period. In point of fact, the absence of substantial prejudice requirement is an added fillip since actual knowledge alone should make it extremely difficult for the public corporation or its carrier to show substantial prejudice from the failure to serve a notice.

[277] "If the burden is upon the claimant . . . it should rest lightly on his shoulders, for the State would have less difficulty in showing that it was prejudiced than the claimant would have in showing the contrary." *See* Schroeder v. State, 252 App. Div. 16, 19, 297 N.Y.S. 632, 635 (4th Dep't 1937) (speaking of subdivision of 5 former § 15), *aff'd without opinion*, 276 N.Y. 627, 12 N.E.2d 609 (1938); *see also* Gielski v. State, 3 Misc. 2d 578, 585, 155 N.Y.S.2d 863, 871 (Ct. Cl. 1956).

[278] *Id.*

[279] The Court of Appeals has, in different settings, more than once recognized this fact of life. *See, e.g.*, Dobkin v. Chapman, 21 N.Y.2d 490, 504-05, 236 N.E.2d 451, 459, 289 N.Y.S.2d 161, 173 (1968); Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672-73, 287 N.Y.S.2d 633, 637 (1967) (by implication), *motion for reargument denied*, 21 N.Y. 2d 990, 238 N.E. 2d 319, 290 N.Y.S. 2d 914 (1968).

[280] *E.g.*, N.Y. C.P.L.R. art. 4 (McKinney 1972); *id.* art. 22 (McKinney 1975).

[281] *See* N.Y. C.P.L.R. § 103(c) (McKinney 1972).

[282] 9 N.Y. Judicial Council Rep. at 244 (1943).

[283] 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974).

[284] *Id.* at 142-43, 313 N.E.2d at 30, 356 N.Y.S.2d at 555.
[285] There was another. *See* note 94 *supra* and accompanying text.
[286] *See* text p. 385.
[287] Ch. 691, [1950] N.Y. Laws 1579.
[288] *Id.* at p. 1581 n.5.
[289] 64 Misc. 2d 81, 314 N.Y.S.2d 118 (Sup. Ct. 1970).
[290] *Id.* at 82, 314 N.Y.S.2d at 120 (emphasis in the original).
[291] Ch. 188, § 1, [1960] N.Y. Laws 956.
[292] 26 Misc. 2d 20, 208 N.Y.S.2d 75 (Sup. Ct. 1960). *But see* Kritzer v. County of Nassau, 47 App. Div. 2d 950, 367 N.Y.S.2d 308 (2d Dep't 1975) (mem.), dismissing the complaint in an action for malicious prosecution against a county policeman who was not served with a notice of claim. Would the same result have been reached if the cause of action had arisen on or after August 9, 1975, the effective date of the amendment to § 50-j of the General Municipal Law (*see* note 102 *supra*), expanding its applicability "for any . . . tort" of any duly appointed police officer to "every city, county, town, village, authority or agency?" Subdivision 3 of that section specifically requires service of a notice of claim "upon such municipality, authority or agency in compliance with section fifty-e" of the General Municipal Law. It would seem that the later inconsistent statute should control and thus change the result in *Kritzer*.

But suppose the county "police officer" was the county sheriff or deputy sheriff? One is now confronted not only with notice of claim provisions but also with the constitutional provision that "the county shall never be made responsible for the acts of the sheriff." N.Y. Const. art. XIII, § 13(a) (1938). That provision has never been definitively construed by the Court of Appeals. In Commisso v. Meeker 8 N.Y.2d 109, 168 N.E.2d 365, 202 N.Y.S.2d 287, *motion to amend remittitur granted*, 8 N.Y.2d 1015, 170 N.E.2d 205, 206 N.Y.S.2d 781 (1960), plaintiff brought an action to recover damages for severe personal injuries sustained while she was a passenger in a vehicle that collided with a parked patrol car of the deputy sheriff of Oneida County. Among the defendants were the deputy sheriff and the county. Plaintiff recovered a verdict against all defendants and the Appellate Division affirmed the resulting judgment by a divided court. The Court of Appeals reversed as to the county. To Judge Froessel, author of the principal opinion, the constitutional mandate was "crystal clear," but only two other members of the Court concurred on that ground. Another member concurred in the result, only on the ground that the evidence was insufficient as a matter of law to establish negligence. Chief Judge Desmond, dissenting in an opinion concurred in by two other members of the Court, concluded that the constitutional provision had nothing whatever to do with the negligent handling of a county-owned automobile.

In view of the tie in *Commisso*, one special term justice felt bound to follow the Appellate Division in that case and held, on similar facts, that the county was liable via § 388 of the Vehicle and Traffic Law, that the deputy sheriff was liable as a tortfeasor, and that the sheriff would be liable under the doctrine of respondeat superior (§ 54 of the County Law being inapplicable to him) if the deputy sheriff was in his employ, a fact not pleaded by plaintiff. Reck v. County of Onondaga, 51 Misc. 2d 259, 273 N.Y.S.2d 146 (Sup. Ct. 1966).

In the performance of criminal duties, however, the county is not liable for the conduct of the sheriff or the deputy sheriff and the sheriff is not liable for the conduct of his deputy sheriff. And neither § 52 of the county law nor § 50-e of the General Municipal Law is applicable either to the sheriff or to the deputy sheriff since, while so engaged, they are independent officers not county employees. Kawar v. Martin, 25 Misc. 2d 3, 206 N.Y.S.2d 62 (Sup. Ct. 1959), *aff'd mem.*, 12 App. Div. 2d 876, 210 N.Y.S.2d 68 (4th Dep't 1961); *accord*, Snow v. Harder, 43 App. Div. 2d 1003, 352 N.Y.S.2d 523 (3d Dep't 1974) (mem.); Paolucci v. County of Dutchess, 67 Misc. 2d 479, 324 N.Y.S.2d 452 (Sup. Ct. 1971).

But the maze is endless. May a county place the sheriff's appointees in its employ? It may. McMahon v. Michaelian, 38 App.

Div. 2d 60, 326 N.Y.S.2d 845 (2d Dep't 1971), *aff'd on opinion below*, 30 N.Y.2d 507, 280 N.E.2d 651, 329 N.Y.S.2d 821 (1972). This would result in limiting the county's immunity in both civil (at least in non-vehicular cases) and criminal matters to the acts of its *sheriff. See* Szerlip v. Finnegan, 77 Misc. 2d 655, 657-58, 354 N.Y.S.2d 555, 558 (Sup. Ct. 1974), *aff'd without opinion*, 47 App. Div. 2d 603, 365 N.Y.S.2d 1016 (2d Dep't 1975), an action for malicious prosecution and false arrest against both a county and a town.

The author respectfully submits that a persuasive argument could easily be made for deleting the constitutional provision immunizing counties from responsibility for the acts of their sheriffs.

293 Ch. 323, § 1 [1936] N.Y. Laws 674.

294 *Id.*

295 Ch. 694, § 2, [1945] N.Y. Laws 1488 & n.2.

296 *See* N.Y. Joint Leg. Comm. Rep. at 85 (1959): *see also* N.Y. Joint Leg. Comm. Rep. at 19, 32-46 (1964); 4 Joint Leg. Comm. Rep. at 20-21, 38-42 (1971).

297 *See* text accompanying notes 225-29 *supra.*

298 *See* text accompanying notes 90-125 *supra.*

299 N.Y. Pub. Auth. Law § 1276, subd. 6 (McKinney 1970).

300 *Id.* § 1299-p, subd. 6 (McKinney 1970).

301 *Id.* § 1299-rr, subd. 6 (McKinney 1970).

302 *Id.* § § 1317, 1347 (McKinney Supp. 1975).

303 "The authority may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority and may transfer to or from any such corporation any moneys, real property or other property for any of the purposes of this title. The directors or members of each such subsidiary corporation shall be the same persons holding the offices of members of the authority. Each such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities. Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. Each such subsidiary corporation shall be subject to suit in accordance with section twelve hundred seventy-six of this title. The employees of any such subsidiary corporation, except those who are also employees of the authority, shall not be deemed employees of the authority.

"If the authority shall determine that one or more of its subsidiary corporations should be in the form of a public benefit corporation, it shall create each such public benefit corporation by executing and filing with the secretary of state a certificate of incorporation, which may be amended from time to time by filing, which shall set forth the name of such public benefit subsidiary corporation, its duration, the location of its principal office, and any or all of the purposes of acquiring, owning, leasing, establishing, constructing, effectuating, operating, maintaining, renovating, improving, extending or repairing one or more facilities of the authority. Each such public benefit subsidiary corporation shall be a body politic and corporate and shall have all those powers vested in the authority by the provisions of this title which the authority shall determine to include in its certificate of incorporation except the power to contract indebtedness.

"Whenever any state, political subidivision, municipality, commission, agency, officer, department, board, division or person is authorized and empowered for any of the purposes of this title to co-operate and enter into agreements with the authority such state, political subdivision, municipality, commission, agency, officer, department, board, division or person shall have the same authorization and power for any of such purposes to co-operate and enter into agreements with a subsidiary corporation of the authority." N.Y. Pub. Auth. Law § 1266, subd. 5 (McKinney 1970).

[304] Belcastro v. Long Island R.R., 55 Misc. 2d 837, 286 N.Y.S.2d 945 (Sup. Ct. 1968).
[305] Quintero v. Long Island R.R., 31 App. Div. 2d 844, 298 N.Y.S.2d 109 (2d Dep't 1969) (mem.).
[306] Jiminez v. Metropolitan Transit Auth., N.Y.L.J., Oct. 15, 1970, p. 20, col. 6 (Sup. Ct.).
[307] Montez v. Metropolitan Transp. Auth., 43 App. Div. 2d 224, 350 N.Y.S.2d 665 (1st Dep't 1974) (per curiam); Conroy v. Long Island R.R., 31 App. Div. 2d 834, 298 N.Y.S.2d 105 (2d Dep't 1969) (mem.).
[308] *See* text accompanying notes 282-84 *supra.*
[309] *Id.*
[310] *See* notes 80 and 84 *supra.*
[311] *See* text p. 367.
[312] *See* text accompanying notes 93-94 *supra.*
[313] *See* text accompanying notes 95-96 *supra.*
[314] *See* text accompanying notes 114-19 *supra.*
[315] *See* text accompanying notes 221-24 *supra.*
[316] *See* text accompanying notes 283-84 *supra.*

STUDY OF ATTACHMENT, REPLEVIN, RECEIVERSHIP, ARREST*

by

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CONTENTS

*EDITOR'S NOTE: This study was prepared by Professor Donnelly upon commission of the Office of Court Administration on the recommendation of the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules. Legislative recommendations in the area of civil arrest, submitted by the Judicial Conference in 1976, were based in part upon this study. Other recommendations contained in the study remain under active consideration by the CPLR Advisory Committee.

MEMORANDUM

Introduction

It is recommended that the provisions of Article 62 of the CPLR providing for attachment of property prior to judgment and the provisions of Article 71 of the CPLR which provides an action to try the right to possession of property and a procedure for replevying such property prior to judgment be amended to conform more specifically to the requirements of due process of law under the 14th Amendment to the United States Constitution.

It is recommended that the provisions of Article 64 providing for the appointment of a temporary receiver be amended to clarify the treatment of issues raising constitutional questions. The related provision of Real Property Actions and Proceedings Law Sec. 1325(1) should be amended for the same purpose. The provisions of Article 61 providing for civil arrest and the related provisions of the Judiciary Law should be amended to conform to the requirements of due process of law under the 14th amendment to the United States Constitution.

Similar constitutional difficulties are presented in regard to attachment and replevin. These articles of the CPLR are discussed in relation to each other in the following study. The receivership and arrest articles present somewhat different problems and are discussed separately. The opening discussion of the decisions of the United States Supreme Court is pertinent to the studies of all four articles of the CPLR.

Decisions of U.S. Supreme Court

Four principal decisions of the United States Supreme Court must be considered in discussing the constitutionality of provisional remedies. These are *Sniadach v. Family Finance Corp.*,[1] *Fuentes v. Shevin*,[2] *Mitchell v. W. T. Grant Co.*[3] and *North Georgia Finishing Inc. v. Di-Chem, Inc.*[4]

In *Sniadach* the Supreme Court held unconstitutional Wisconsin's pre-judgment garnishment statute. Justice Douglas who wrote the majority opinion found that the defendant in the garnishment action had been deprived of property without due process of law in violation of the Fourteenth Amendment to the federal constitution. Under the garnishment procedure then available in Wisconsin a creditor could garnish the wages of a defendant before trial and without notice or hearing. Justice Harlan who concurred noted that: "The 'property' of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit."[5] Justice Douglas explained that wages are "a specialized type of property presenting distinct problems in our economic system"[6] and "that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall."[7]

In *Fuentes* the Supreme Court declared unconstitutional Florida and Pennsylvania statutes which authorized the

summary seizure of goods or chattels under a writ of replevin. Justice Stewart who wrote the majority opinion found that the statutes in question did not provide the possessor of the property with notice or an opportunity to challenge the seizure at any kind of prior hearing.[8] He held that these procedures deprived the possessor of the property of due process of law in violation of the Fourteenth Amendment. Justice Stewart rejected the contention that due process protection should be restricted to circumstances where there is a taking of absolute necessities of life such as wages. He held that there was a deprivation of property without due process of law because chattels were taken from their possessor without a *prior* opportunity to be heard. He explained, however, that the holding was a "narrow one":[9]

> "We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation — not adjudication."[10]

In a footnote Justice Stewart added:

> "Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute."

In *Mitchell*[12] the Supreme Court held the Louisiana sequestration procedure constitutional. W. T. Grant Company had sold Mitchell a refrigerator, range, stereo, and washing machine and under Louisiana law had retained a vendor's lien for the unpaid balance of the purchase price. Grant brought an action against Mitchell in New Orleans city court for the overdue purchase price and asked that the goods be sequestered pending resolution of its action. The writ of sequestration was issued without prior notice to Mitchell and without an opportunity for a hearing. The constable seized the goods. Mitchell filed a motion to dissolve the writ of sequestration because, among other grounds, the seizure violated the due process clause of the fourteenth amendment. Ultimately the Supreme Court of Louisiana upheld the writ and was affirmed by the United States Supreme Court.

Certain aspects of the Louisiana sequestration procedure are worth describing. The writ may issue only with a judge's consent upon a verified affidavit.[13] The debtor has an immediate opportunity to seek dissolution of the writ by filing a bond or by challenging the grounds for its issuance. In the latter instance, the creditor must then, before trial, prove the existence of the debt, his lien, and the debtor's default. If the

creditor fails in his proof, the court may direct the return of the debtor's goods and may award damages including attorney's fees to the debtor.[14] Sequestration is only available where the plaintiff has a prior interest in the goods and is not the equivalent of attachment in New York. Among other occasions the procedure is used when there is an unpaid seller holding a vendor's lien on goods. In this instance the creditor's concern with the goods is particularly strong since under the civil law of Louisiana, the vendor's interest is extinguished if the vendee transfers possession to any third party.[15]

Justice White who dissented in *Fuentes* wrote the majority opinion in *Mitchell.* However, he carefully distinguished the holdings in *Sniadach* and *Fuentes.* The principal points of distinction may be summarized as follows:

1. In *Mitchell* the Supreme Court upheld the Louisiana sequestration procedure. In *Fuentes* the Court found replevin statutes unconstitutional. In *Sniadach* prejudgment garnishment statutes were struck down.

2. Under the Louisiana sequestration procedure the debtor could have a prompt hearing on the merits shortly after seizure. Neither the replevin statutes in *Fuentes* nor the prejudgment garnishment statute in *Sniadach* provided for such a hearing before trial.

In distinguishing *Fuentes,* Justice White placed considerable emphasis upon the post-taking, pre-trial hearing available in Louisiana. He explained: "*Fuentes* was decided against a factual and legal background sufficiently different from that now before us . . . that it does not require the invalidation of the Louisiana sequestration statute." In particular:[16]

> "Under Louisiana procedure . . . the debtor, Mitchell, was not left in limbo to await a hearing that might or might not 'eventually' occur, as he was under the statutory schemes before the Court in *Fuentes.* Louisiana law expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.'"[17]

3. In *Sniadach* the debtor could be driven "to the wall" by seizure of his wages. The Court did not find that element present in *Mitchell.*

4. In *Mitchell,* the creditor had a prior interest in the property seized, the value of which could deteriorate during continued possession by the debtor. In *Sniadach* the creditor had no prior interest in the property seized.

Justice White considered this a significant aspect of the facts explaining that both buyer and seller had property rights in the goods and that "the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time."[18] The pre-taking rights of the seller in the property was one aspect which enabled Justice White to find "a constitutional accommodation of the conflicting interests of the parties."[19]

5. The Louisiana law provided damages to the debtor including attorneys' fees if the writ of sequestration were dissolved. This element is missing in the statutes struck down by *Fuentes* and *Sniadach*.

6. Justice White in *Mitchell* continually emphasized the presence of judicial supervision throughout the Louisiana sequestration procedure. There was an absence of judicial supervision in the statutes examined in *Fuentes*.

Despite some departure from the stern insistence of *Fuentes* upon a pre-taking hearing, *Mitchell* has not overruled that decision.[20] *Fuentes* along with *Sniadach* and *Mitchell* must be considered in determining the constitutionality of provisional remedies. In one case, *Sugar v. Curtis Circulation Co.*,[21] the three judge federal court stated that the test was whether the questioned statutory provisions "squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory charted in *Fuentes*."[22] It has been suggested that after *Mitchell* an evaluation of the constitutionality of a statute authorizing the taking of property could be based upon the points of distinction between *Mitchell*, *Fuentes* and *Sniadach* enumerated above.[23] However, *Mitchell* not only has balanced protection of the rights of the creditor in the property against the debtor's interest in the same property but has also employed the balancing traditional in due process decisions.[24] While the Louisiana sequestration procedure considered in *Mitchell* most closely resembles replevin procedures, differences would remain even after a post-taking pre-trial hearing is provided and other necessary adjustments made in replevin statutes.[25] The factors enumerated above then can serve only as a guide, especially when considering statutes other than replevin. Careful planning, however, would require that this guidance be followed as closely as possible and that *Mitchell* not be considered as providing a general constitutional blessing for any statute authorizing a taking of property supported by an alleged balancing of interests. In particular, it has been suggested that the Supreme Court in *Mitchell* meant to provide some specific guidance to legislatures reconsidering their replevin procedures after the *Fuentes* decision.[26]

The vitality of the *Sniadach* and *Fuentes* decisions after *Mitchell* has been confirmed by the Court's recent opinions in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[27] In that case the Court declared the Georgia pre-judgment garnishment statute unconstitutional. Unlike the Wisconsin statute struck down by *Sniadach*, the Georgia statute did not permit the prejudgment garnishment of wages.[28] The statute more closely resembles New York's attachment proceedings. The particular debt garnished in the Georgia proceedings was a corporation's bank account.

Justice Stewart who had written the majority opinion in *Fuentes* commented in a short concurring opinion: "It is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . seems to have been greatly exaggerated."[29] Justice White who wrote the majority opinion stated that the Georgia

Supreme Court had "failed to take account of *Fuentes v. Shevin* . . ., a case decided by this Court more than a year prior to the Georgia court's decision."[30] Echoing *Mitchell*, however, Justice White found the Georgia taking unconstitutional because of the absence of an "early hearing"[31] on notice rather than a pre-taking hearing. The Court, however, cited favorably *Sniadach v. Family Finance Corp.* which had required a pre-taking hearing on notice where wages are garnished.[32] Justice Powell in his concurring opinion, which appears to represent the minimal position of the majority,[33] states explicitly that in cases like *Sniadach*, "the Due Process Clause requires notice and a hearing *prior* to the application of the garnishment remedy."[34] He explains, however, that "the *Sniadach* rule is limited to wages, 'a specialized type of property presenting distinct problems in our economic system'".[35]

The majority opinion provides some guidance regarding the standard of proof at the required hearing. It found the Georgia statute unconstitutional because "there is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."[36] Justice Powell while spelling out more explicitly a desirable procedure repeats the standard of probable cause — "the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt."[38]

ATTACHMENT

Grounds for Attachment

There are eight grounds for attachment under CPLR §6201. That section reads as follows:

"An order of attachment may be granted in any action, except a matrimonial action, 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 assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or
5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or
6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any government agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

Attachment serves two functions. It is a means of obtaining *quasi in rem* jurisdiction when it is difficult to obtain personal jurisdiction. Attachment of property also provides security for the judgment. Wachtell explains that since attachment is "a drastic interference with the property rights of the defendant before there has been any adjudication of the validity of plaintiff's claims", its availability "is restricted to those classes of cases where the legislature has deemed it to be necessary for jurisdictional purposes, security purposes, or both."[1]

Grounds 1 through 3 as listed in §6201 appear to be directed primarily at obtaining jurisdiction. However, that is not necessarily the exclusive purpose of these sections. It may be easy to obtain jurisdiction over a foreign corporation doing business in New York. The provision of §6201 may represent also a legislative judgment that where the defendant is a foreign corporation, it is important to obtain security for the judgment. It has been suggested that courts may interpret §6201(1) to exclude a foreign corporation doing business and having its principal office in New York.[2] In this instance attachment may not be necessary either for jurisdiction or security.

Grounds 4 through 8 as listed in §6201 appear to be directed primarily at providing security for the judgment. However these provisions may represent a legislative decision that jurisdiction will be difficult to obtain in these circumstances. In particular ground 7 was included at the request of the Judicial Conference to facilitate the acquisition of jurisdiction.[3]

Grounds 5 and 6 as listed in §6201 were omitted in the original draft of the CPLR. The omission and replacement is explained as follows:

> "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 . . .
>
> "In the final revision of this section, however, pars. 5 and 6 of this section were inserted . . . . The new paragraphs are required, states the Fifth Report to the Legislature, in a case where attachment of the

very funds which have been wrongfully received is the only effective remedy, such as where persons receive welfare funds by fraud or borrow money upon fraudulent representations. While the paragraphs are not limited to a cause of action to recover the very funds which may be attached, they are intended to cover these situations."[4]

Property Which May Be Attached

Under CPLR §6202 "Any debt or property against which a money judgment may be enforced as provided in §5201 is subject to attachment."[5] The exemptions which apply to levies based upon a judgment are also relevant here.[6] For example, a creditor could reach by attachment only 10% of a debtor's wages if he were earning over $85 a week.[7]

Order of Attachment

The order of attachment under CPLR §6211 may be granted without notice at any time prior to judgment. Under §6223 the defendant whose property is attached may move to vacate or modify the order of attachment. Such a motion is addressed to defects in the attachment proceeding and not to the merits of the action.

Third parties may have an interest in the property attached or indeed claim it adversely to the defendant. When a debt or other property in the hands of a third party is garnisheed or attached, the third party may refuse to yield it. In that event, the plaintiff must bring an action under §6214(d) within 90 days to compel delivery of the property to the sheriff.[8] By this means the third party may contest rights in the property. There is also a proceeding under §6221 to determine adverse claims. In some instances, however, under §6215 the plaintiff may direct the sheriff to physically seize the property before there is an opportunity for these hearings. Normally the sheriff will not at first physically seize the property but will levy by serving the order of attachment on the person in possession of the property.[9]

Constitutionality of Attachment Proceedings

The principal decision directly attacking the constitutionality of the New York attachment procedure is *Sugar v. Curtis Circulation Co.*[10] Sugar whose property had been attached by the Curtis Circulation Co. challenged the constitutionality of CPLR §6201(4) (5) and (8) and CPLR §6211 before a three judge federal court. The court declared the provisions unconstitutional.

§6201(4) allows attachment where "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts."[11] §6201(5) allows attachment in a contract action when the defendant was guilty of fraud in

contracting or incurring the liability. §6201(8) permits attachment where there is a cause of action for conversion of personal property, or for fraud or deceit.

The court relying upon its analysis of *Mitchell* and *Fuentes* explained:

> "The questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex parte determination particularly where, as here, the critical allegations of fraud, however detailed are based on information and belief."[12]

This position of the court would apply only to the provisions of §6201 which allow attachment on the basis of an allegation of fraud. Two other grounds urged by the court for its holding, however, would appear to have a broader impact: (1) The court noted that unlike the sequestration procedures upheld by the Supreme Court in *Mitchell*, in the New York attachment procedure there is no opportunity for a prompt post-taking hearing in which the merits of the controversy can be raised. On a motion to vacate the attachment, the court explained, the New York courts have always avoided deciding the merits of the controversy, unless the "affidavits *clearly indicate* that the plaintiff *must* ultimately fail."[13] The court concluded that these "considerations alone would be dispositive".[14] (2) Unlike the circumstances in *Mitchell*, the plaintiff ordinarily does not have a pre-attachment interest in the plaintiff's property. The court noted that the Supreme Court in *Mitchell* thought this factor was significant.[15]

The broader implications of *Sugar* are confirmed by the subsequent decision of the Supreme Court in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[16] where the majority found the Georgia pre-judgment garnishment procedure unconstitutional. The Georgia statute did not allow the pre-judgment garnishment of wages but in some other respects resembled New York's attachment procedure.[17] The particular debt garnisheed in that case, for example, was a corporation's bank account. Property of that type could be attached in New York on the ground that the defendant was a foreign corporation.[18] The majority found the Georgia procedure unconstitutional because: "There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."[19]

In assessing cases outside of New York which rule upon the constitutionality of attachment statutes one must recognize that these statutes in some instances differ substantially from those in New York. The California Supreme Court in *Randone v. Appellate Department of Superior Court*[20] held its state's attachment statutes unconstitutional. California, however, allowed attachment in a great variety of instances and not just for purposes of jurisdiction or in instances where it is peculiarly necessary to preserve assets to satisfy a judgment.

Likewise Massachusetts whose attachment statute was

declared unconstitutional in *Schneider v. Margossian*[21] permitted most civil actions to "be commenced by attaching the defendant's property".[22] The Georgia statute declared unconstitutional in *North Georgia Finishing, Inc.* allowed garnishment in most civil actions. Both the California and Massachussetts cases unlike *Sugar* were decided before *Mitchell*.[23] In *Lebowitz v. Forbes Leasing and Finance Corp.*,[24] the Third Circuit held constitutional the foreign attachment statute in Pennsylvania. The attaching plaintiff contended and the court agreed that "foreign attachment, by providing a basis for obtaining jurisdiction over non-residents, serves the important state policy of according resident plaintiffs access to the state forum in actions against non-residents".[25] *Lebowitz* was decided before *Mitchell.*

Because special problems are present in regard to the provisions of CPLR §6201 relating to fraud, those subsections will be discussed separately. First the validity of the other provisions designed to provide quasi in rem jurisdiction and security for the judgment will be discussed.

The Constitutionality of Attachment in Other Than Fraud Cases

In *Sugar*, the court found unconstitutional §6211 providing for an order of attachment without notice. The court found the absence of a prompt post-taking hearing on the merits "dispositive".[26] This holding would seem to apply to all instances of attachment in New York. To that extent, *Sugar* is not in accord with the Third Circuit decision in *Lebowitz* which upheld attachment without a hearing for the purpose of obtaining jurisdiction over non-residents. *Lebowitz*, however, was decided before *Mitchell* and *North Georgia Finishing, Inc.* After *Mitchell* it is strongly arguable that the interest of the plaintiff in obtaining jurisdiction over the defendant's property must be balanced by protection for the defendant's interest in that property. The principal technique suggested by *Mitchell* for such balancing of interests is a prompt post-taking hearing. If such a hearing is provided, then, in most instances attachment for the purpose of jurisdiction would seem to be constitutional. Under *North Georgia Finishing, Inc.* an "early" hearing would be necessary to the constitutionality of attachment proceedings.[27] It must be recognized, however, that some have argued that attachment for purposes of obtaining quasi in rem jurisdiction is no longer necessary because of such developments as the long-arm statutes.[28] However, it would seem to be a legitimate legislative judgment that attachment to obtain quasi in rem jurisdiction is necessary to allow ready access to its state's courts.

It is not clear, hqwever, that attachment is necessary in most instances to obtain jurisdiction over a foreign corporation.[29] §6201(1) allowing attachment where the defendant is a foreign corporation is based also on a legislative judgment that attachment in this instance is also necessary to provide security

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for the judgment. It is arguable that this too is a legitimate protection of the interests of plaintiffs. It has been noted above that the provision allowing attachment where the defendant is a foreign corporation may be broader than is required by the need to provide for jurisdiction and security for the judgment. For this reason, it may be challengable under *Randone* where the court said of the California attachment statute: "Nor is the overbroad statute narrowly drawn to confine attachment to extraordinary circumstances which require special protection to a state or creditor interest."[30]

However, a narrowly drawn statute designed to allow attachment followed by a prompt post-taking hearing for the purpose of obtaining quasi in rem jurisdiction or providing security for the judgment in circumstances where it is peculiarly necessary would seem to be constitutional.

Provisions Based on Fraud

Arguably the provisions of CPLR §6201 (3), (4), (5), (6) and (8) which contain allegations of fraud are narrowly drawn provisions designed in some instances to obtain jurisdiction and in others to provide necessary security for the judgment. In *Sugar*, however, the court found:

> "The questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex parte determination particularly where, as here, the critical allegations of fraud, however detailed, are based on information and belief."[31]

The court further noted that:

> "The Supreme Court itself has emphasized that such issues, which involve determination of subjective elements of motive and intent, are notably unsuitable to determination on documentary proof alone."[32]

In *Mitchell*, the issues before the Court were "ordinarily uncomplicated matters that lend themselves to documentary proof."[33] It was in these circumstances that *Mitchell* found that a prompt post-taking but pre-trial hearing on the merits would adequately protect the debtor's interests.

A question must be raised, then, as to whether such a post-taking hearing will adequately protect the defendant when the attachment is based on an allegation of fraud. In order to avoid answering this difficult question it may be necessary to drop the provisions of CPLR §6201 relating to fraud.[34]

Sec. 6201 (4) which was declared unconstitutional in *Sugar* presents a particular problem. A provision similar to this may be necessary to protect the jurisdiction of the court and to provide necessary security for judgment in some instances. When a prospective defendant is engaged in moving substantially all his property from the state, it may be necessary to attach that property.

If the right to attach in these circumstances turned upon the removal of property in an amount sufficient to deprive the court of jurisdiction or to render a judgment virtually unenforceable within New York rather than upon the fraudulent intent, objections based upon *Sugar* may not be pertinent.

Pre-Taking Hearing—In Some Instances

Even after *Mitchell*, it is likely that a pre-taking hearing will be required in cases analogous to the pre-judgment garnishment of wages in *Sniadach*. Under §6202 "any debt or property against which a money judgment may be enforced . . . is subject to attachment". This would include 10% of the wages of one who earns $85 a week or more.[36] It is strongly arguable that under *Sniadach* a pre-taking hearing is necessary in this instance. This is confirmed by dicta in *North Georgia Finishing, Inc.* It is also arguable that a pre-taking hearing is necessary when the bank account in which a wage earner deposits his wages is attached or when the creditor attaches an automobile required for work or necessary to reach the place of employment. In these instances, the debtor may be "driven to the wall" as Justice Douglas described the defendant's plight in *Sniadach*.

Recommendations

1. The grounds for attachment should be drafted very narrowly and should include only instances in which attachment is important as a means of obtaining quasi in rem jurisdiction or to provide security for the judgment.
2. Allegations of fraud should not serve as a basis for attachment.
3. CPLR §6201 (1), (2),[37] (4) and (7) should be retained. Subsection (1) should be drafted more narrowly. Subsection (4) should be changed to eliminate the reference to fraud and to substitute removal of property from the state in an amount sufficient to deprive the court of jurisdiction or the plaintiff of necessary security for judgment.
4. A prompt post-taking hearing on the merits should be provided.
5. CPLR §6202 should be amended to eliminate pre-judgment garnishment of wages.
6. A pre-taking hearing should be required in instances where the debtor may be "driven to the wall".

REPOSSESSION [REPLEVIN]

An action may be brought under CPLR §7101 "to try the right to possession of a chattel".[1] Under §7102 (d) the plaintiff may obtain an order directing the sheriff to seize the chattel in question. Because of this provision Article 71 of the CPLR is considered for many purposes a provisional remedy.[2]

After *Laprease v. Raymours Furniture Co.*[3] found the procedure established by §7102 unconstitutional, that section

was amended to require a court order before seizure. The court in issuing the order is directed "to conform to the due process of law requirements of the fourteenth amendment to the Constitution of the United States."[4]

Long Island Trust Co. v. Porta Aluminum Corp.[5] describes one version of New York practice under the amended Article 71. A secured creditor, in that case, brought an action against a corporation which had purchased from the debtor vehicles in which the creditor had a security interest. The plaintiff served an order to show cause on the defendants. At the hearing extensive affidavits were presented. The Appellate Division remarks that if the defendants had requested an opportunity to cross-examine the plaintiff's witnesses that the trial court would have ordered such a hearing "out of a superabundance of caution". While the court found the procedures in the trial court constitutional, it found that the replevin order had been improvidently granted. The defendants had argued that the indication of a security interest in "proceeds" in the plaintiff's financing statement had authorized sale of chattels free of liens. The court found a serious factual issue as to whether the plaintiff had authorized sale. It also found that seizure of vehicles would substantially disrupt the defendant's business. For these reasons it modified the order below to eliminate the order for replevin but to continue the order restraining the defendants from disposing of the chattels in question.

General Replevin and Repossessions by Creditors

It should be recognized that a large portion of the actions brought under Article 71 will be repossessions by a creditor holding a security interest under Article 9 of the Uniform Commercial Code. Under UCC §9-501, a creditor may enforce his security interest "by any available judicial procedure" and under UCC §9-503 a creditor seeking to repossess collateral "may proceed by action". There is a plain possibility that a proceeding to repossess may require a different statutory structure than general replevin actions either on constitutional grounds or for other sound policy reasons.

UCC §9-503 also permits a secured creditor to repossess by self-help if this can be accomplished without breach of the peace. The constitutionality of the self-help provisions of UCC §9-503 has been challenged and these provisions have been continually questioned by consumer advocates. A reform of the self-help provisions of UCC §9-503 would probably require revision of Article 71 of the CPLR. It would make sense to co-ordinate any such revision with the steps necessary to assure the constitutionality of general replevin and repossession by judicial action.

Constitutionality

The principal cases affecting the constitutionality of Article 71 have concerned repossessions of collateral by creditors. In *La Prease v. Raymour's Furniture* the court found the then existing

version of Article 71 invoked by such a creditor unconstitutional under the Fourth and Fourteenth Amendments. *Fuentes v. Shevin* while finding the Florida and Pennsylvania replevin statutes unconstitutional under the Fourteenth Amendment because of the absence of a pre-taking hearing, struck down the attempts of creditors to repossess goods. In *Mitchell v. W. T. Grant* repossessing creditors were successful under Louisiana's sequestration procedure which the court found to be a constitutional balancing of interests of the creditor and debtor. The court relied upon a variety of factors including the presence of a post-taking hearing on the merits.

Long Island Trust Co. v. Porta Aluminum Corp. which sustained the constitutionality of revised Article 71, however, was a general replevin action by a creditor seeking to reclaim from a third party goods sold by the debtor allegedly in violation of the security agreement.

The procedure under revised Article 71 as described in *Long Island Trust Co.* would appear to be constitutional under *Mitchell.* As required by *Fuentes* there is a pre-taking hearing in which the defendant can raise the merits of the plaintiff's claim. Even if the debtor were driven "to the wall"—for example, by seizure of an automobile required in his employment, the pre-taking hearing requirement of *Sniadach* is met. In most, although not all instances, the plaintiff will have a prior interest in the property seized. There is judicial supervision throughout. The provision for damages to the defendant in the event of a wrongful taking, however, may not be as satisfactory as in Louisiana. This is balanced by the pre-taking hearing which is not present in Louisiana where there is an immediate post-taking hearing on the merits.

Either the procedure described by *Long Island Trust Co.* or some comparable procedure should be embodied in statutory language. There is now sufficient development of law to replace the general language requiring comformity "to the due process of law requirements of the Fourteenth Amendment" with specific guidance to courts throughout the state.

The Constitutionality of Self-Help Repossession

If in analyzing self-help repossession one employs the factors which the Supreme Court considered in *Mitchell v. W. T. Grant* while upholding the Louisiana sequestration procedure, one must conclude that in self-help repossession there is a complete absence of due process of law. There is no immediate post-taking hearing on the merits of the creditor's claim. Indeed there is no hearing, normally not even a trial. There is a complete absence of judicial supervision not only over the taking itself but over the disposition under UCC § 9-504.

Cases which have upheld the constitutionality of self-help repossession have relied not on the presence of due process of law but on the absence of the state action necessary for application of the Fourteenth Amendment.

In *Adams v. Southern California First National Bank*[15] the

plaintiffs brought the action to declare California Uniform Commercial Code §9-503 and §9-504 unconstitutional. They argued that these provisions constituted state action because creditors who repossessed and disposed of goods under the authority of these provisions acted under color of law and were performing a public function. The court disagreed and found that in order to find state action under the color of law theory there must be significant involvement by the state. The court noted that while "English law in the thirteenth century rigorously prohibited self-help" it had become customary before authorized by the Uniform Commercial Code. The Uniform Commercial Code, then, did not authorize private parties to perform an action traditionally a function of the state.

The Second Circuit in *Shirley v. State National Bank*[16] reached a similar conclusion in regard to the self-help repossession provisions of the Connecticut Retail Installment Sales Financing Act. UCC §9-503 was not in question in this case. The court explained that "since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action. No delegation of traditional state power has been grated to any private person."[17] In dissent, Chief Judge Kaufman contended that "the lawful non-consensual taking of property is a uniquely governmental function."[18] He concluded:

> "Under the so-called 'public function' test, then, self-help repossession is infused with the requisite 'state action' because the creditor acts pursuant to a grant of the state's monopoly power to lawfully seize a significant property interest without the consent of the holder."[19]

One can argue that in New York, a court should reach a different conclusion than in *Adams* and *Shirley*. The New York Court of Appeals has found state action in regard to Lien Law §181, the innkeeper's lien and has declared that provision unconstitutional.[20] The innkeeper uses self-help in asserting and taking possession under his lien. In regard to the state action issue the Court explained:

> "In this State, the execution of a lien, be it a conventional security interest (Lien Law §207), a writ of attachment (CPLR, art. 62) or a judgment lien (CPLR, art. 52) traditionally has been the function of the Sheriff. On this view 'State action' can be found in an innkeeper's execution on his own lien. Then, too, it cannot be gainsaid that innkeepers are possessed of certain powers by virtue of §181 of the Lien Law. By that token, their actions are clothed with the authority of State Law and their actions may be said to be those of the State for purposes of the due process clauses."[21]

Under similar arguments one would find the self-help repossession provisions of UCC-Sec. 9-503 and the disposition provisions of UCC-Sec. 9-504 to constitute state action.

In *Mitchell*, Justice White who wrote the majority opinion made the following statements in a footnote concerning self-help repossession:

> "The advisability of requiring prior notice and hearing before repossession has been under study for several years. A number of possibilities have been put forward to modify summary creditor remedies, whether taken through some form of court process or effected by self-help under Art. 9 of the Uniform Commercial Code, §9-503. Influenced by *Sniadach*, and providing preseizure notice and hearing, are two model acts drafted by the National Consumer Law Center—National Consumer Act, §5.206-5.208 (1970) and Model Consumer Credit Act, §7.205 (1972). Other similar reforms are reflected in the Report of the National Commission on Consumer Finance, Consumer Credit in the U.S., 30-31 (1972), the Wisconsin Consumer Act, Wis. State §421.101-427.105 (1973); and the amendments to the Illinois Replevin Statute, Public Act 78-287, 1973 Illinois laws. Looking in the other direction and leaving summary procedures intact for most part are the National Conference of Commissioners on Uniform State Laws, Committee on Uniform Consumer Credit Code—Uniform Consumer Credit Code, Working Redraft No. 5, November 1973, §5.110, 5.112; and the Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Art. 9 of the Uniform Commercial Code, Final Report, §9-503 (April 25, 1971) together with revised Art. 9 of the U.C.C., 1972 official text and comments, §9-503.
>
> As revealed in the various studies and proposals, the principal question yet to be satisfactorily answered is the impact of prior notice and hearing on the price of credit, and more particularly, of the mix of procedural requirements necessary to minimize the cost. The commentators are in the throes of debate. See, e.g., Symposium, Creditors Rights, 47 S. Calif. L. Rev. 1-164 (1973) and basic questions remain unanswered. See generally, Note, Self-Help Repossession; the Constitutional Attack, the Legislative Response and the Economic Implications, 62 Geo. L.J. 273 (1973).
>
> We indicate no view whatsoever on the desirability of one or more of the proposed reforms. The uncertainty evident in the current debate suggests caution in the adoption of an inflexible constitutional rule. Our holding in this case is limited to the

constitutionality of the Louisiana sequestration procedures."[22]

The Supreme Court has denied certiorari in a series of self-help repossession cases including *Adams* and *Shirley*.[23] It is arguable that the Court's denial of *cert.* represents a wait and see attitude towards self-help repossession. After *Mitchell* a number of states while revising their replevin statutes may include revisions of their rules concerning self-help repossession.[24] These revisions may produce satisfactory provisions and solutions to the cost problem which apparently troubles the Supreme Court.

New York, then, should consider revising its procedure for self-help repossession because (1) it remains arguable that the present procedure is unconstitutional, (2) the Supreme Court may expect such revision and may examine self-help repossession in a subsequent case, (3) there is a complete absence of due process of law under the present procedure for self-help repossession which should offend the state's policy, whether or not the requisite state action is present for purposes of the Fourteenth Amendment.[25]

Cost of Restricting Self-Help Repossession

The principal study related to the costs of restricting self-help repossession is R. Johnson, Denial of Self-Help Repossession, An Economic Analysis, 47 S. Calif. L. Rev. 82 (1973). The Supreme Court in *Mitchel* cited both this study and a refutation, E. Dauer and T. Gilhool, The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply, 47 S. Calif. L. J. 116 (1973).[26]

Professor Johnson assumes for the purposes of his study that legislatures will replace self-help repossession with requirements that creditors must (i) file a complaint with a court, (ii) serve a summons and complaint on the defendant with notice to answer in 30 days, (iii) in the event no answer is received, demonstrate nevertheless at a "prove-up" hearing a right to possession of the property, (iv) in the event an answer is received, demonstrate a right to judgment either at trial or by summary judgment, (v) following judgment, enlist the aid of the state in enforcing the writ of replevin.[27] In regard to these steps, he states:

> "Even if the debtor chooses to settle after notice, foregoing his right to a hearing, the combination of attorneys' fees and charges for filing and service of the complaint will average at least $135 in Louisiana and between $193 and $248 in California. These costs are in a sense a 'front end load' to the posthearing replevin process; regardless of subsequent results, they must be paid whenever a creditor wishes to initiate the process for recovering his property.
>
> If the defendant neither reaches a settlement nor files an answer to the notice within the 30-day period, it is presumed that a prove-up hearing is held, a writ of replevin is issued, and the sheriff or marshall

> seizes the property. The additional costs of these steps are considerably higher in Louisiana (an average incremental cost of about $116) than in California ($50). At this point the additional legal costs of reacquiring the property under the post hearing replevin system, as compared to current self-help repossession, amount to an average of about $250 in Louisiana and between $245 and $300 in California.
>
> Finally, if the defendant files an answer raising one or more defenses, the legal fees and court costs will be considerably higher than for settlements or replevins where no responsive pleadings are filed."[28]

On the basis of California statistics, Professor Johnson concluded "that the repossession rate in relation to volume on new cars is 8.7 percent and on used cars, 13.6 percent."[29] However, "one large firm operating in California was able to obtain voluntary relinquishment on 62 percent of its repossession actions and employed self-help on the remaining 38 percent."[30] Where the debtor voluntarily relinquishes the property the costs of judicial proceeding listed above would not be incurred.

The cost of repossession by judicial proceeding would necessarily be added to the price of the goods or to interest charges. Creditors might also take steps to cut their losses by restricting credit to certain segments of society.

As a useful model, one might assume that repossession by judicial action is necessary in regard to five automobiles out of every 100 sales.[31] If the cost of proceeding by judicial action is $300,[32] then $1500 in additional cost must be added to the total sales price of 100 cars. This would increase the cost of each car by $15.

One should note that in the vast majority of instances debtors can be expected to default or not appear in the judicial proceeding. Caplovitz, in his recent book, Consumers in Trouble, A Study of Debtors in Default,[33] states that in the consumer credit actions which he studied only "5 percent of the Chicago, Detroit, and New York debtors filed answers with the court."[34] This would be the percentage of those served who filed answers. The percentage of those served who make an initial appearance in court differs. In New York that percentage is four percent.[35]

Professors Dauer and Gilhool have attacked the methodology of Professor Johnson's study. His study concentrates on California whose population "is a good deal less stable than is the case in other parts of the country."[36] He fails to make a careful study of Louisiana, "a state which does not allow self-help repossession".[37] Had Johnson studied the Louisiana automobile finance market, it would have been possible for him to describe with satisfactory confidence whether the effects he predicts will in fact occur."[38] They suggest that a likely result of the increased cost of repossession would be less frequent use of this device by creditors and in turn "more conversation,

more complete exchange of information and more workouts; and in economic terms, the benefit of more workouts—less loss all around, less waste."[39] They add:

> "Indeed, it may be that one of the finest consequences of constitutionalized repossession will be a shifting of the burden of proceeding with litigation from the debtor to the creditor. That would be no mean consequence, for the burden of the entry fees or their analog would also be shifted. Very likely the marginal utility of court costs—up-front is significantly greater for the debtor than for the creditor; very likely the opportunity costs, in financial and personal terms, are greater to the debtor. Thus, the result of a shifted burden might be fewer pleas 'copped' by debtors and more good defenses preserved."[40]

The costs enumerated by Professor Johnson, of course, would be cut back greatly or eliminated by changes in the procedure he assumes as the basis for his study. For example, a state could reduce the costs considerably by eliminating the "prove-up" hearing or by allowing creditors to proceed without attorneys in small claims court.

A procedure employed in New York's recently revised wage assignment law would effectively eliminate most of the costs which Professor Johnson hypothesizes. Under that law[41] a creditor who has taken a wage-assignment from a debtor may send the assignment to the employer upon default in the debtor's payments. However, before sending the assignment to the employer the creditor must notify the debtor that it is about to do so and provide a notice which the debtor can return to creditor to demand a hearing.[42] If the debtor in fact returns the notice, then the creditor must bring on a judicial hearing before sending the wage assignment to the employer.

A state could require a creditor to serve a similar notice accompanied by a tear-off postcard upon a debtor either before or at the time of repossession by self-help. If the debtor in fact returned the tear-off postcard demanding a hearing the creditor would be required to bring on a pre-taking or an immediate post-taking hearing.

Given the great frequency of default judgments, particularly in consumer matters, one would expect that many debtors would not return the tear-off postcard. Professor Caplovitz's studies support this conclusion.[43] The costs, then, of affording this opportunity to demand a hearing would be minimal when spread over the cost of all items sold. However, alert debtors with good defenses or counterclaims would have an opportunity for an early hearing at which their position could be presented. It is highly unlikely that the credit market cannot afford this minimal due process of law.

Recommendations

1. Article 71 of the CPLR should be revised to provide specific procedures which satisfy the due process requirements of the Fourteenth Amendment to the United States Constitution.

2. Under such procedures the state should at least provide an immediate post-taking hearing in all instances of judicial action at which the creditor would be required to show "probable cause" for the replevin. In some instances due process would require a pre-taking hearing. Whenever reasonable a pre-taking hearing should be required.

3. Article 71 of the CPLR should be revised to deal explicitly with repossessions by creditors holding security interests under Article 9 of the Uniform Commercial Code including repossessions without judicial actions. The provisions of the revised Article 71 should remove questions concerning the constitutionality of self-help repossession.

4. While it would be possible to eliminate self-help repossession by requiring the creditor to repossess by judicial action in all instances,[44] questions of cost provide a reason for not establishing this requirement at this time.

5. The provisions of the revised wage assignment law of New York should be adapted to repossession proceedings for the purpose of balancing the rights of creditors and debtors in accordance with *Mitchell v. W. T. Grant* and for the purposes of providing minimal due process of law to debtors whose goods are repossessed.

6. When a creditor repossesses without judicial action he should be required to serve a notice of opportunity for a hearing on the debtor either before or at the time of repossession. The notice should contain a tear-off postcard, the return of which by the debtor, will trigger a requirement that the creditor bring on a prompt hearing by an order to show cause.

FOOTNOTES

Decisions of U. S. Supreme Court

[1] 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).
[2] 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).
[3] 416 U.S. 600, 94 S. Ct. 1895 40 L. Ed. 2d 406 (1974).
[4] 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).
[5] 89 S. Ct. at 1823.
[6] Id. at 1822.
[7] Id. at 1822, 1823.
[8] 92 S. Ct. 1983 at 1995 (1972).
[9] Id. at 2002.
[10] Id.
[11] Id. at 2002 n. 33.
[12] The following discussion of Mitchell is taken from S. Donnelly and M.A. Donnelly, Annual Survey of Commercial Law, 26 Syr. L. Rev. 233 at 261 et seq. (1975).
[13] The Supreme Court was only concerned with the validity of the

procedure in Orleans Parish where only a judge may issue such writs. Elsewhere in Louisiana the writs of sequestration are issued by a clerk.

[14] Louisiana Code of Civil Procedure Art. 3506:

"The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or sequestration is dissolved, the action shall then proceed as if no writ had been issued.

The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits." See 94 S. Ct. 1895 at 1907 (1974).

[15] See The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41 at 75, 76 (1974).

[16] 94 S. Ct. at 1904.

[17] Id. at 1905.

[18] Id. at 1900.

[19] Id.

[20] But see the concurring opinion of Justice Powell particularly Id. at 1908 and the dissenting opinion of Justice Stewart particularly Id, at 1913.

[21] 383 F. Supp. 643 (1974).

[22] Id. at 647.

[23] S. Donnelly and M. A. Donnelly, Annual Survey of Commercial Law, 26 Syr. L. Rev. 233 at 265, 266 (1975).

[24] The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41 at 77 (1974).

[25] For example, in Louisiana the vendor's lien is destroyed on transfer to a third party. Under UCC-Sec. 9-307(2) there are significant occasions on which the security interest continues in goods despite transfer and the secured creditor is offered the opportunity in any event to protect himself by filing. The need for immediate protection of the creditor's interest in replevin actions outside Louisiana is less great than the situation portrayed in Mitchell.

[26] The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41 at 82 (1974).

[27] 95 S. Ct. 719 (1975).

[28] 95 S. Ct. at 720 n. 1; Georgia Code Annotated Sec. 46-101.

[29] 95 S. Ct. 719 at 723.

[30] Id. at 722.

[31] Id. Justice White stated:

"Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer." 95 S. Ct. 719 at 722.

[32] 95 S. Ct. 719 . t 722.

[33] There were three dissenting judges. In the absence of the vote of Justice Douglas, the vote of Justice Powell would be essential to the majority.

[34] 95 S. Ct. 719 at 724 n. 2. Justice Powell states:

"The Court also cites Sniadach v. Family Finance Corp., . . . which established an exception for garnishment of an individual's wages. In such cases, the Due Process Clause requires notice and a hearing *prior* to application of the garnishment remedy. As the opinion itself indicates, however, the *Sniadach* rule is limited to wages, 'a specialized type of property presenting distinct problems in our economic system.'" 95 S. Ct. 719 at 724 n. 2.

[35] Id.

[36] Id. at 723.

[37] Id. at 725.

Attachment

[1] H. Wachtell, New York Practice Under The CPLR 192, 193 (4th Ed. PLI 1973) (Hereafter cited as Wachtell).

[2] CPLR Sec. 6201, Legislative Studies and Reports, McKinney's

Consolidated Laws of New York Annoted Book 7B, at 34. (Book 7B hereafter cited as McKinney).
[3] CPLR Sec. 6201, Supplementary Practice Commentary, McKinney Pocket at 14.
[4] CPLR Sec, 6201, Legislative Studies and Reports, McKinney at 36, 37.
[5] CPLR Sec. 6202.
[6] Wachtell at 201.
[7] See CPLR Sec. 6202, Supplementary Practice Commentary, McKinney Pocket at 20.
[8] See also CPLR Sec. 6219.
[9] Wachtell at 202.
[10] 383 F. Supp. 643 (S.D.N.Y. 1974); *appeal docketed* No. 74-859.
[11] CPLR Sec. 6201(4).
[12] 383 F. Supp. at 650.
[13] 383 F. Supp. at 649. "The Second Department in *AMF Inc. v. Algo Distrs.* [48 A.D. 2d 352, 1975] has disagreed with the holding in *Sugar*. The court argued that 'New York's statutory provisions regarding attachment (see CPLR 6201 *et seq*) are closely analogous to the Louisiana statute which passed constitutional muster in *Mitchell*.' " [48 A.D. 2d at 359] The motion to vacate under CPLR Sec. 6223 affords the defendant an opportunity to seek a post-taking hearing. The Appellate Division argued that *Sugar* misconstrued this motion as addressed to narrow considerations such as the necessity of the attachment for security purposes. It should be noted, however, that the Second Department does not claim that the plaintiff in response to the motion to vacate must demonstrate that he will probably succeed in his action. Indeed the court states, "Moreover these defendants on their motion to vacate have not established that the plaintiff must ultimately fail." [48 A.D. 2d at 358]. Under *North Georgia Finishing, Inc.* which was not discussed by the court the plaintiff should have the burden which the court imposed on the defendant." S. Donnelly and M. A. Donnelly, Annual Survey of Commercial Law, 27 Syr. L. Rev. at (1976).
[14] Id.
[15] Id.
[16] 95 S. Ct. 719 (1975).
[17] 95 S. Ct. 719 at 720 n. 1; Georgia Code Annotated Sec. 46-101.
[18] CPLR Sec. 6201(1); CPLR Sec. 6202. One should note, however, that the Georgia statute allows attachment in "cases where suit shall be pending". Georgia Code Annotated Sec. 46-101. The New York provision is narrower.
[19] 95 S. Ct. at 723.
[20] 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P. 2d 13 (1971); cert. denied 407 U.S. 924, 92 S. Ct. 2452, 32 L. Ed. 2d 811.
[21] 349 F. Supp. 741 (D. Mass. 1972).
[22] 349 F. Supp. at 743.
[23] See also Gunter v. Merchants Warren National Bank, 360 F. Supp. 1085 (D. Me, 1973); McClellan v. Commercial Credit Corp. 350 F. Supp. 1013 (1972); Manning v. Palmer, 381 F. Supp. 713 (1974); Vath v. Isreal, 364 N.Y.S. 2d 97 (1975).
[24] 456 F. 2d 979 (3rd Cir. 1972); See also Maxwell v. Hixson 383 F. Supp. 320 (E.D. Tenn. 1974).
[25] 456 F. 2d at 981, 982.
[26] 383 F. Supp. at 649.
[27] 95 S. Ct. at 723.
[28] See Liebowitz v. Forbes Leasing and Finance Corp., 456 F.2d 979 at 983 (3rd Cir. 1972).
[29] This would apply also to other provisions of CPLR Sec. 6201.
[30] 488 P. 2d at 32.
[31] 383 F. Supp. at 649, 650.
[32] Id. at 649.
[33] 94 S. Ct. at 1901.
[34] In a preliminary hearing it may be very difficult, time consuming or perhaps impossible to find probable cause to believe fraud is present. A finding of probable cause appears to be required by North Georgia Finishing, Inc. v. Di Chem Inc., 95 S. Ct. 719 (1975). See discussion below.

[35] CPLR Sec. 6202.
[36] CPLR Sec. 5201; CPLR Sec. 5205(c); CPLR Sec. 5231(b). Note that Georgia and California do not permit the attachment of wages.
[37] CPLR Sec. 6201(2) probably encompasses the difficulties of service arising from the events described in CPLR Sec. 6201(3). For this reason CPLR Sec. 6201(3) is not necessary.

Repossession

[1] CPLR Sec. 7101.
[2] CPLR Sec. 6001.
[3] 315 F. Supp. 716 (N.D.N.Y. 1970).
[4] CPLR Sec. 7102(d); See also CPLR Sec. 7102(c)(5); CPLR Sec. 7103(c).
[5] 44 A.D. 2d 118, 354 N.Y.S. 2d 134 (1974).
[6] 354 N.Y.S. 2d at 141.
[7] In a repossession proceeding both the creditor and debtor have rights in the chattels prior to the replevin. In other replevin actions competing parties may be claiming the same chattel but only one may have rights in it.
[8] 315 F. Supp. 716 (N.D.N.Y. 1970).
[9] 92 S. Ct. 1983 (1972).
[10] 94 S. Ct. 1895 (1974).
[11] In assessing the constitutionality of a replevin statute one must also consider Sniadach v. Family Finance Corp. 89 S. Ct. 1820 (1969) and North Georgia Finishing Inc. v. Di Chem, Inc., 95 S. Ct. 719 (1975).
[12] 354 N.Y.S. 2d 134 (1974).
[13] See UCC Sec.-9-507. This provision unlike the law of Louisiana does not provide attorney's fees for the successful defendant.
[14] CPLR Sec. 7102(d)(1).
[15] 492 F. 2d 324 (9th Cir. 1973) *cert denied*, 95 S. Ct. 325 (1974).
[16] 493 F. 2d 739 (2nd Cir. 1974) *cert. denied* 95 S. Ct. 329 (1974); See also Frost v. Mohawk National Bank, 74 Misc. 2d 912, 347 N.Y.S. 2d 246 (Sup. Ct., Rensselaer Co. 1973); S. Donnelly and M.A. Donnelly, Annual Survey of Commercial Law, 26 Syr. L. Rev. 233 at 268-273 (1975).
[17] 493 F. 2d at 743.
[18] 493 F. 2d at 745.
[19] 493 F. 2d at 747.
[20] Blye v. Globe Wernicke Realty Co., 33 N.Y. 2d 15, 347 N.Y.S. 2d 170(1973); But see Frost v. Mohawk National Bank 74 Misc. 2d 912, 347 N.Y.S. 2d 246 (Sup. Ct. Rensselaer Co. 1973).
[21] 33 N.Y. at 20.
[22] 91 S. Ct. 1895 at 1905 n. 13. The Illinois statute cited by Justice White is the Illinois Replevin Statute, Chap. 119, Illinois Annot. Statutes (Smith-Hurd 1975-76 Pocket). It reads in part as follows:

Sec. 4 (a). Notice-Necessity-Waiver

The defendant shall be given 5 days written notice in the manner required by Rule of the Supreme Court, of a hearing before the Court to contest the issuance of a writ of replevin. No writ of replevin may issue nor may property be seized pursuant to a writ of replevin prior to such notice and hearing except as provided in Section 4b.

As to any particular property, the right to notice and hearing established in this Section may not be waived by any consumer. As used in this section a consumer is an individual who obtained possession of the property for personal, family, household, or agricultural purposes.

Any waiver of the right to notice and hearing established in this Section must be in writing and must be given voluntarily, intelligently, and knowingly.

Sec. 4(c). Hearing on issuance of writ-Proof required-Issuance of writ

At the hearing on the issuance of the writ of replevin, which may be a hearing to contest pursuant to notice under Section 4b, the court shall review the basis of the plaintiff's claim to possession. If the plaintiff establishes a prima facie case to a superior right to possession of the disputed property, and if the plaintiff also demonstrates to the court the probability that he will ultimately prevail on the underlying claim to

possession, the court shall so find as a matter of record and a writ of replevin shall issue on the order of the court.

The Wisconsin Consumer Act, Wisconsin Statutes Annotated Sec. 421.101-427.105(1974), cited by Justice White reads in part as follows:

Sec. 425.205 Action to recover collateral

(1) Except as provided in s. 425.206, a creditor seeking to obtain possession of collateral shall commence an action for replevin of such collateral.

(d) On the return date of the summons or any adjournment date thereof the customer shall have the right to a hearing on the issue of default or other matter which questions the validity of the creditor's claim to the collateral, and the customer may answer, demur or otherwise plead to the complaint orally. . .

Sec. 425.206 Nonjudicial enforcement limited

(1) Notwithstanding any other provision of law, no creditor shall take possession of collateral by means other than legal process in accordance with this subchapter except when:

(a) The customer has surrendered the collateral; or

(b) Judgment for the creditor has been entered in a proceeding for recovery of collateral under s. 425.205. . .

[23] Adams v. Southern Calif. Nat'l Bank, 492 F. 2d 324 (9th Cir. 1973), *cert. denied* 95 S. Ct. 325 (1974). Nowlin v. Professional Auto Sales, Inc. 496 F. 2d 16 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 328 (1974). Shirley v. State Nat'l Bank, 493 F. 2d 739 (2d Cir. 1974), *cert. denied*, 95 S. Ct. 329 (1974).

[24] See. for example: Wisconsin Consumer Act, Wisconsin Statutes Annotated, Sec. 425.205, Sec. 425.206. See also La. Code Civ. Pro. art. 2631 et seq., art 3571, 3501, 3571, 2638. Louisiana law has been summarized as follows:

"In Louisiana a creditor must ordinarily proceed by way of a writ of sequestration, La. Code Civ Pro. art. 3571 (1961), or by way of a writ of seizure and sale in an executory proceeding, La. Code Civ. Pro. art. 2631 *et seq.* (1961). . .

Thus, while Louisiana does not require an opportunity to be heard before seizure . . . Louisiana does require that a creditor resort to the court. . ." E. Dauer and T. Gilhool, The Economics of Constitutionalized Repossession: A Critique For Professor Johnson, and A Partial Reply, 47 S. Calif. L. Rev. 116 at 121 n. 17 (1973).

[25] One may also raise a question concerning the constitutionality of self-help repossession under the Constitution of the State of New York Art. 1 Sec. 12 which protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" and Art. 1 Sec. 6 which states, "No person shall be deprived of life, liberty, or property without due process of law."

[26] 91 S. Ct. 1895 at 1905 n. 13.

[27] 47 S. Calif. L. Rev. 82 at 97.

[28] Id. at 99.

[29] Id. at 107.

[30] Id.

[31] This is a rough model based upon the repossession rate reported for automobiles in California reduced by the percentage of voluntary reliquishments.

[32] This appears to be the highest cost reported in California in cases where there is no trial.

[33] D. Caplovitz, Consumers in Trouble, A Study of Debtors in Default (1974).

[34] Id. at 216.

[35] Id. at 204.

[36] 47 S. Calif. L. Rev. 116 at 118.

[37] Id. at 121. See also Wisconsin Consumer Act, Wisconsin Statutes Annotated, Sec. 425,205, Sec. 425,206. See also Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974) declaring self help repossession of automobiles in Michigan unconstitutional.

[38] 47 S. Calif. L. Rev. 116 at 121-122.

[39] Id. at 144.

[40] Id.
[41] N.Y. Pers. Prop. Law Sec. 46 to 49-b (McKinney Supp. 1974); See S. Donnelly and M.A. Donnelly, Annual Survey of Commercial Law, 26 Syr. L. Rev. 233 at 272, 273 (1975).
[42] N.Y. Pers. Prop. Law Sec. 48 (McKinney Supp. 1974).
[43] See D. Caplovitz, Consumers in Trouble, A Study of Debtors in Default at 204, 205, 216 (1974).
[44] See, for example, the statutes cited in n. 24, supra.

APPENDIX*

No. 176

NOTICE TO JUDGES AND CLERKS

Re: REPLEVIN — MINIMAL GUIDELINES

A three-judge District Court (N.D. N.Y.) on July 29, 1970 raised constitutional objections to the requisition for the seizure of a chattel under our then Article 71 of the CPLR (Laprease v. Raymours Furniture Co., Inc., 315 F. Supp. 716). Immediately thereafter, my Directive No. 122 was issued providing for all such applications to be submitted to the Judge presiding in Special Term, Part II, for approval, instead of being issued by the plaintiff's attorney alone.

Article 71 has now been amended (Ch. 1051, Laws of 1971), effective July 2, 1971 in an attempt to conform to the requirements of constitutional "due process" suggested by said case. However, as stated by Governor Rockefeller on signing the measure, there are "serious deficiencies in the bill in its present form that require further consideration", the most troublesome being "the failure to establish clear and easily useable standards to guide attorneys and the courts in taking action under the statute".

Remedial legislation is expected to be introduced at the 1972 Session of the Legislature. Pending such corrective measures the following is set forth as a *minimal* guideline in passing upon such orders.

NON-BREAKING

Where an order of seizure is sought which authorizes the sheriff or marshall *merely* to seize the chattel *without* in any way breaking open and entering the place to search for the chattel, CPLR 7102(c) requires that the supporting affidavit shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;
2. that the chattel is wrongfully held by the defendant named;
3. whether an action to recover the chattel has been commenced, whether defendants have been served, whether they are in default, and, if they have appeared, where papers may be served upon them;
4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed.

If the order does not include a provision for breaking and entering, CPLR 7102 (d) (2) provides:

*Directives numbers 176, 219 and 288 of Hon. Edward Thompson, Justice of the Supreme Court, as Administrative Judge of the Civil Court of the City of New York, to the judges and clerks of the Civil Court, were a prompt response on the part of the judiciary to new constitutional and statutory problems arising in the area of replevin.

"* * * the court shall grant a restraining order that the chattel shall not be removed from the state if it is a vehicle, aircraft or vessel or, otherwise, from its location, transferred, sold, pledged, assigned or otherwise disposed of or permitted to become subject to a security interest or lien *until further order of the court.* Unless the court otherwise directs, the restraining order does not prohibit a disposition of the chattel to the plaintiff. Disobedience of the order may be punished as a contempt of court." (emphasis added)

Such an order may be procured ex parte without prior notice to the defendant.

BREAKING AND ENTERING

Where the plaintiff seeks to include a provision authorizing the sheriff or marshal to break open and enter the place to search for the chattel, then the supporting affidavit must, in addition to the requirements set forth above, recite "*fact sufficient*" under the due process of law requirements of the 14th Amendment to the U.S. Constitution to authorize such a provision. Except in exigent or most unusual circumstances, such an order shall be signed *only where the defendant has been given prior notice of the application and has had an opportunity to be heard thereon.*

This notice must inform the defendant that plaintiff will apply for approval thereof at a Special Term, Part II of this Court on a day and time specified therein; such notice shall be given to the defendant at least *seven* days prior to said date. It shall be in substantially the following form:

Dated the day of 1972

TO: (name of defendant)

PLEASE TAKE NOTICE that on behalf of our client (name of plaintiff) we filed this day, in an Action to Recover its (description of chattel), an application for an Order of Seizure directing the Marshal to break open, enter and search for such (chattel) in the place where the (chattel) may be and to take such (chattel) into his possession pursuant to Article 71 of the CPLR.

You have the right to be heard on this application in the Civil Court of the City of New York located at 111 Centre Street, New York, New York, 10013, at Special Term, Part II (Room 488), within seven days from the above date.

If you do not appear in Court by the day of ,1972, the Order of Seizure will be presented for the Judge's signature.

Very truly yours,

(attorney for Plaintiff)
BY:

A copy of such notice which the plaintiff shall have sent to the defendant must be annexed to the order submitted for the Judge's signature.

Proof of mailing shall be attached to said copy. It may be in the form of:

(1) registered mail receipt; or
(2) certified mail receipt; or
(3) affidavit of mailing; or

as an alternative to such proof of mailing. *Proof of service*, pursuant to CPLR 308, shall be attached to said copy of the notice submitted with the order. Note that CPLR 308 provides the various methods of service of a summons all of which constitute personal service under the statute.

RESIDENTIAL PROPERTY

In all cases (with or without notice) applications for seizure of household chattels (such as bedroom furniture, kitchen stove, refrigerator, and the like) shall be scrutinized with utmost care and surrounded with stringent requirements. Luxury chattels (television sets, pianos, etc.) shall be subject to less stringent requirements.

COMMERCIAL PROPERTY

Generally, business chattels (cash registers, television sets, trade fixtures, etc.) are not such items as to require extreme scrutiny. However, it may well be that a stove or refrigerator or the like may be a basic necessary essential to the conduct of a business, in which case extreme scrutiny should be given to applications for seizure thereof.

THE UNDERTAKING

In all cases, since the amount of the bond must be twice the amount of the value of the chattel *as stated in plaintiff's affidavit*, the value so alleged by plaintiff must be scrutinzed so as to avoid arbitrary and patent deficiency.

EDWARD THOMPSON, J. S. C.
Administrative Judge

Dated: March 17, 1972

NOTICE TO CLERKS OF SPECIAL TERM

RE: Replevin Guidelines

Supplementing my Directive 176 of March 17, 1972 and pending further orders, all applications for prejudgment seizure of a chattel under Article 71 of the CPLR shall be denied unless evidence is submitted therewith showing that a written notice has been sent to the respondent affording him an opportunity to be heard thereon before the Judge presiding at SPECIAL TERM, PART I prior to the signing of such order of seizure.

As in the past, at least seven days notice shall be given to the respondent.

EDWARD THOMPSON, J.S.C.
Administrative Judge

July 11, 1972

No. 219

DIRECTIVE TO JUDGES, CLERKS AND SPECIAL TERM II CLERKS.

Re: Replevin — Minimal Guidelines

When a special situation demands summary seizure of the goods without a hearing, in order to avoid immediate destruction of disputed property a movant may apply to the Judge in Special Term, Part II for a stay enjoining such a party from disposition or destruction of such property.

Such application shall be carefully scrutinized to avoid failure to comply with my Directive 176 of March 17, 1972.

EDWARD THOMPSON, J. S. C.
Administrative Judge

December 5, 1972

No. 288

DIRECTIVE TO JUDGES AND CLERKS
RE: REPLEVIN — MINIMAL GUIDELINES FOR UTILITIES
(Supplement to Directives 176 and 219 of
March 17 and December 5, 1972 Respectively)

Where a plaintiff-utility seeks to include a provision authorizing the Sheriff or Marshal to break open and enter premises to search for a gas or electric meter the order, except in exigent or most unusual circumstances, shall be signed only where the defendant has been given prior notice of the application and an opportunity to be heard thereon, as follows:

The application shall:

1. Include a copy of a notice bearing boxed legends or caveats at the top thereof in not less than 12 point bold upper case type, as follows:

NOTICE! YOUR GAS OR ELECTRICITY MAY BE CUT OFF! IF YOU WISH A HEARING YOU MUST GO TO THE CLERK'S OFFICE OF THE CIVIL COURT AT (fill in address), PROMPTLY!

AVISO! SU GAS O ELECTRICIDAD PUEDEN SER CORTADOS! SI USTED DESEA UNA AUDIENCIA USTED DEBE IR A LAS OFICINAS DEL SECRETARIO DE LA CORTE CIVIL EN (ponga la direccion), IMMEDIATAMENTE!

(a) The copy of the notice shall have adequately apprised the defendant of the:

(1) index number of the proceeding, the nature of the application and the basic elements of the impending complaint. This shall include:

(i) the amount of money alleged to be due, the proof of which, shall be made available at the hearing;

(ii) the date of the last billing rendered to the defendant;

(iii) either the actual meter readings, or the estimated meter readings, the basis of which, shall be made available at the hearing; and

(iv) the defendant's account number.

(2) consequences of the Marshal's or Sheriff's execution of the order, if signed, i.e., that his dwelling may be entered and searched, or the public areas of the multiple dwelling in which he resides may be entered and searched; and that in either event his gas or his electrical services will be terminated and the meter seized;

(3) right to be heard on this application;

(4) fact that if he wishes a hearing, he or his designated representative must appear in the Civil Court of the City of New York, County of ,at ,, ,at Special Term, Part II weeksdays between 9 A.M. and 5 P.M. within ten (10) days from the date of service of the notice as set forth in Section 2 hereof, in order to obtain a return date for the hearing;

(5) fact that at the hearing he will be required to be present, shall have the right to be represented by an attorney and shall have an opportunity to refute the bill;

(6) fact that if he does not appear in court by the last day permitted, the order of seizure will be presented for the Judge's signature.

2. State that service of the notice and the accompanying papers, if any, had been made by:

(a) delivery within the City of New York pursuant to Section 308(1), 308(2), or 308(5) of the CPLR; or

(b) affixing a copy thereof upon the door of the residence of the defendant at the premises in which the property to be seized is located, and in addition, within one day thereafter, by mailing a copy to the defendant; or

(c) registered or certified mail to the defendant, and in addition by ordinary mail addressed in the following manner:

(named defendant) or Occupant
(address)
(apartment number, if available); and

the affidavit of service of the notice must have been filed within seven (7) days of such service.

3. Include an affidavit which contains all the elements upon which this application is based together with a statement that there has been compliance with the statutory provisions relating to discontinuance of service, and

(a) a refusal by the defendant or by a person of suitable age in the premises (setting forth the date of the refusal and by whom made) to permit the utility employees to enter into or upon the premises to disconnect the meter, or

(b) that no one was home after at least two attempts to gain such admittance (setting forth the dates and times of day thereof).

The Marshal or Sheriff to whom the order of seizure is delivered shall give at least a full seventy-two hours notice, in writing, by mail, to the defendant advising him of the date and whether in the morning of afternoon, of the intended breaking and entering upon his premises to search for and seize the meter, and shall execute the order, a copy of which is attached thereto, only between the hours of sunrise and sunset.

The proposed order shall direct service of the copies of the affidavit, order, summons and verified complaint upon the defendant in accordance with the appropriate sections of the CPLR, and the filing of the affidavits of service thereof with the Clerk of this Court. It shall also contain a particular description of the gas or electric meter to be seized (identification number) and shall specify the place on the defendant's premises where the meter is located.

An undertaking shall be submitted in a sum of not less than $500.00 supported by appropriate affidavit.

Edward Thompson, J.S.C.
Administrative Judge

March 19, 1974

RECEIVERSHIP

Appointment of a Temporary Receiver

CPLR Sec. 6401(a) provides for the appointment of a temporary receiver on the "motion of a person having an apparent interest in property which is the subject of an action in the supreme or county court."[1] The receiver may be appointed at any time prior to judgment, either before or after service of the summons. The court may also appoint a receiver while an appeal is pending.

A temporary receiver is "merely the custodian of the property."[2] He does not have title to the property and his function is "to preserve the property until the rights of the parties are finally determined."[3]

Temporary receivership as a provisional remedy is ancillary to an action in supreme or county court regarding property. Typically a receivership would be used in an action to foreclose

a real property mortgage. In such actions the court may appoint a receiver "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed."[4] In a mortgage foreclosure the receiver may collect the rents and profits from the property.[5] In some circumstances these rents and profits ultimately will be awarded to the foreclosing party[6] or to a junior lienor.

The old Civil Practice Act in CPA Sec. 974 provided for a temporary receivership "on the application of a party who establishes an apparent right to, or interest in, the property, where it is in possession of an adverse party. . ."[7] The old CPA Sec. 975 provided that notice:

> "must be given to the adverse party, unless he has failed to appear in the action and the time limited for his appearance has expired. But where an order has been made directing the service of the summons upon a defendant by publication, the court, in its discretion may appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as may be proper. But where the action is for the foreclosure of a mortgage, which mortgage provides that a receiver may be appointed without notice shall not be required."[8]

In the CPLR the requirements concerning notice were consolidated in such provisions as Rule 2103 and Rule 2214. The resulting rules concerning notice of a motion for appointment of a temporary receiver are less clear and more dependent upon the practice of the courts than the precise provisions quoted above from CPA Sec. 975.[9] The practice appears parallel to that under the CPA except that all parties who appear are now entitled to notice of motion.[10]

Where a party has not appeared even if he is an adverse party in possession of the property in dispute he will probably not receive notice.[11] It is customary for some mortgages to contain a waiver of notice of motion for appointment of a receiver.[12] Such waivers are upheld by the courts.[13] Real Property Actions and Proceedings Law Sec. 1325(1) provides:

> "Where the action is for the foreclosure of a mortgage providing that a receiver may be appointed without notice, notice of a motion for such appointment shall not be required."[14]

Vacating Appointment, Removal of Receiver

CPLR Sec. 6405 provides "upon motion of any party or upon its own initiative, the court which appointed a receiver may remove him at any time."[15] The motion provided for in this section is apparently used also for the purposes of vacating the original order appointing a receiver.[16] A party not served with notice of the motion to appoint a receiver either because the party had not yet appeared or because there was a waiver of notice might use this provision to obtain a post-appointment

hearing at which the merits of the action and the need for appointment of a receiver might be considered. There is no indication that this is the current practice.

Constitutionality of Temporary Receivership

The four decisions of the United States Supreme Court discussed in the study on attachment and replevin would seem to affect the constitutionality of temporary receivership as a provisional remedy. Under *Sniadach v. Family Finance Corp.*,[17] *Fuentes v. Shevin*,[18] *Mitchell v. W. T. Grant Co.*[19] and *North Georgia Finishing Inc. v. Di-Chem, Inc.*[20] whenever there is a taking of property even provisionally there must be at a minimum a prompt post-taking hearing on notice in which the merits of the principal action can be raised. In some instances where the defendant may be "driven to the wall" by the taking of his property there must be a pre-taking hearing on notice. Under *North Georgia Finishing Inc. v. Di-Chem, Inc.* the plaintiff at the hearing must "demonstrate at least probable cause"[22] for the taking. At a post-taking hearing there is an indication that the plaintiff "has the burden of showing probable cause to believe there is a need to continue" the [provisional remedy] "for a sufficient period of time to allow proof and satisfaction of the alleged debt."[23]

Normally under New York temporary receivership procedure a party who has appeared is provided with notice of motion before a receiver is appointed to take charge of the property. This would comply with the constitutional requirements found in the Supreme Court decisions just noted.

However, where parties have not appeared even though they are adverse parties in possession of the property they may not be provided with notice of motion for appointment of a receiver. It is not clear that such notice will be provided even where the time to answer has not yet expired.[24] In these instances there is a potential violation of the due process of law provision of the Fourteenth Amendment.

However, actions in which a temporary receivership may be sought as a provisional remedy may often involve multiple parties some of whom may have small interests. A complex mortgage foreclosure where junior lienors and other parties in interest must be joined would be an example. The foreclosure of a corporate mortgage in which a receivership is sought may also involve multiple parties some of whom may have small interests. Where these parties have not appeared in the principal action it may be burdensome to serve on them a notice of motion for appointment of a temporary receiver. Where the interests of these parties are small and they have been served in the principal action an appropriate balancing of interests under *Mitchell v. W. T. Grant Co.* may be achieved by affording them an opportunity to seek a post-appointment hearing. Such an opportunity is probably available under CPLR Sec. 6405 which provides for removal of a receiver "at any time" at the "motion of any party."[25]

In regard to an adverse party in possession of the property, however, more substantial questions of due process are presented. In the instance of foreclosure of a home mortgage, *Sniadach* and *North Georgia Finishing, Inc.* may require pre-appointment notice to an adverse party in possession whether or not such a party has appeared. In a corporate foreclosure where a receivership might substantially interfere with the conduct of the business, sound policy may demand pre-appointment notice whether or not the adverse party in possession has appeared. The desirability of such notice would be particularly strong where the time to answer had not yet expired.

In *North Georgia Finishing, Inc.*, the Supreme Court requires that the one seeking a provisional remedy "demonstrate at least probable cause"[26] for the taking. The showing of probable cause would normally include a demonstration that the plaintiff would probably be entitled to judgment in the principal action. It is somewhat difficult to apply this requirement to motions for a temporary receivership. Some actions in which this remedy is sought may involve multiple parties. In a mortgage foreclosure action, a junior lienor may be seeking appointment of a receiver. In some instances, it may not be inconceivable to find the defendant seeking a receivership. In such circumstances it may be inappropriate to require a showing that the plaintiff will probably succeed in the principal action. Where the plaintiff, however, is seeking the receivership and an adverse party is in possession of the property it would appear reasonable and necessary to require a showing that the plaintiff would probably be entitled to judgment.

CPLR Sec. 6401(a) now requires that the one seeking a receivership have an "apparent interest" in the property. Courts could interpret that provision flexibly to require a showing that the plaintiff probably would be entitled to judgment when such a requirement is appropriate and to dispense with such demonstration where it is not appropriate. Some change in this provision may be desirable to draw the attention of courts applying it to the constitutional requirements.

Constitutionality of Waiver of Notice

In *Fuentes v. Shevin*, Justice Stewart addressed the problem of waiver in the following terms:

> "In D. H. Overmyer v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L.Ed.2d 124, the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding — although not holding that such standards must necessarily apply — the Court held that on the particular facts of that case, the contractual waiver of due process rights was "voluntarily, intelligently and knowingly" made. Id., at 187, 92 S. Ct. at 783. The contract in

> Overmyer was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. As the Court noted, it was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion." Id., at 186, 92 S. Ct. at 782. Both parties were "aware of the significance" of the waiver provision. Ibid.
>
> The facts of the present cases are a far cry from those of Overmyer. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.
>
> The Court in Overmyer observed that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." Id., at 188, 92 S. Ct. at 783. Yet, as in Overmyer, there is no need in the present cases to canvass those consequences fully. For a waiver of constitutional rights in any context must, at the very least, be clear. The contractual language relied upon must, on its face, amount to a waiver."[27]

As Justice Stewart indicates in *D. H. Overmyer v. Frick Co.*[28] the Court upheld a waiver clause with dicta stating that in other instances a waiver would not be proper. In *Fuentes* Justice Stewart held against the waiver argument on grounds that appear extraordinarily similar to those used by courts in consumer cases to find a contractual provision unconscionable under Uniform Commercial Code Sec. 2-302. These grounds would include great disparity in bargaining power and lack of awareness of the waiver provision.

When a waiver of notice of motion for appointment of a temporary receiver appears in a home mortgage, it may not be constitutionally proper under *Fuentes* and *Overmyer*. For this reason the provision of Real Property Actions and Proceedings Law Sec. 1325(1) providing that where there is a waiver of notice in a mortgage such notice "shall not be required" may be too absolute to be constitutional. There should be some indication in CPLR Sec. 6401 that the court may require notice where according to current practice it is not required. The court could use such a provision in instances where it finds a waiver clause unconscionable or not constitutionally proper.

In *Security Nat. Bank v. Village Mall at Hillcrest*,[29] a New York court found R.P.A. & P. Law Sec. 1325(1) constitutional. The court noted, however, that "the defendant, which was represented by able counsel dealing at arm's length with the

plaintiff, agreed to the appointment of a receiver in the event of a foreclosure"[30] and waived notice in accord with R.P.A. & P. Sec. 1325(1). The court's position, then, reflects the view expressed by the United States Supreme Court in *Overmyer* and *Fuentes*. The court added that under "CPLR 6405 the defendant was entitled to move immediately to vacate the receivership."[31] In these circumstances, the motion to vacate would provide the post-taking hearing required by *Mitchell v. W. T. Grant Co.*

In *Northrip v. Federal National Mortgage Association*,[32] the court citing the discussion of waiver in *Fuentes* found an absence of waiver under the sale by advertisement foreclosure law in Michigan. In other advertisement and sale cases such as *Global Industries, Inc. v. Harris*[33] courts have upheld waivers as "knowingly and intelligently made"[34] while citing *Fuentes* and *Overmyer*. The Michigan statute was found unconstitutional in *Garner v. Tri-State Development Company*[35] because it did not provide for an appropriate hearing. In discussing the waiver clause in the mortgage, the court distinguished between waivers by individuals and waivers in commercial settings and held:

> "A factual hearing must still be conducted to determine whether this waiver was knowingly and intelligently made, and if so whether it was also voluntarily made."[36]

Recommendations

1. CPLR Sec. 6401 should be amended to require that notice of motion for appointment of a temporary receiver shall be given to an adverse party in possession of the property whether or not such party has appeared.
2. With the exception of the rules in regard to waiver, current practice concerning notice should not be altered in other respects because of the complexity of some actions in which a temporary receivership may be requested.
3. CPLR Sec. 6401 should be amended to require that a party seeking a temporary receivership must show a substantial rather than an apparent interest in the property. In instances where a plaintiff is seeking the receivership and an adverse party is in possession of the property a showing of a substantial interest should include a demonstration that the plaintiff should probably be entitled to judgment.
4. CPLR Sec. 6405 should be amended to make it clear that a party may move under it for vacation of the order appointing a receiver. This would make it possible for a party who has not received notice of the original motion to seek a prompt post appointment hearing. Such parties are likely to be represented by attorneys, it would be appropriate to have them seek a post-appointment hearing rather than impose that burden on the moving party.
5. Real Property Actions and Proceedings Law Sec. 1325(1) should be amended to allow notice of a motion for appointment of a temporary receiver even in the presence of a

waiver clause in a mortgage where such waiver is unconscionable.

FOOTNOTES

[1] CPLR Sec. 6401(a).
[2] H. Wachtel, New York Practice Under The CPLR at 227 (4th Ed. PLI 1973). Hereafter cited as Wachtell.
[3] Id.
[4] CPLR Sec. 6401(a).
[5] See Wachtell at 226. But see Wachtell at 229, (a receiver may bring action for rents and profits only at the order of the court).
[6] See R.P.A. & P. Law Sec. 1325(2).
[7] CPA Sec. 974.
[8] CPA Sec. 975.
[9] See CPLR Sec. 6401, Practice Commentary, McKinney's Consolidated Laws of New York Annotated, Book 7B at 223, 224 (1963). Book 7B hereafter cited as McKinney.
[10] CPLR Rule 2103(e); CPLR Sec. 6401 McKinney Practice Commentary at 224 where it is stated:

> "It is probable that subdivision (a) is intended to require notice and that the notice is to be served on all parties who have appeared . . . Otherwise, . . . the practice under this subdivision is substantially the same as the former practice."

[11] See CPLR Sec. 6401 McKinney Practice Commentary at 223, 224; Wachtell at 228.
[12] See Wachtell at 228.
[13] Real Property Actions & Proc. Law Sec. 1325(1), Mandel v. Nero, 52 Misc. 2d 604, 277 N.Y.S.2d 247 (1967).
[14] Real Property Actions & Proc. Law Sec. 1325(1).
[15] CPLR Sec. 6405.
[16] See Security Nat. Bank v. Village Mall at Hillcrest, Inc. 79 Misc. 2d 1060, 361 N.Y.S.2d 977 at 980 (Sup. Ct. 1974).
[17] 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969).
[18] 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972).
[19] 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 406 (1974).
[20] 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751 (1975).
[21] Sniadach v. Family Finance Corp., 89 S. Ct. 1820 (1969).
[22] 95 S. Ct. 719 at 723.
[23] Id. at 725.
[24] See CPLR Sec. 6401, McKinney Practice Commentary at 223, 224.
[25] CPLR Sec. 6405. In actions where a receivership is used the parties will normally be represented by attorneys and will be better able to seek a posttaking hearing themselves than would be true in the usual repossession in consumer cases.
[26] 95 S. Ct. 719 at 723.
[27] 92 S. Ct. 1983 at 2001, 2.
[28] 405 U.S. 174, 92 S. Ct. 775, 31 L.Ed.2d 124 (1972).
[29] 79 Misc. 2d 1060, 361 N.Y.S.2d 977 (Sup. Ct. 1974).
[30] 361 N.Y. Supp. 2d at 980.
[31] Id.
[32] 372 F. Supp. 594 (E.D. Mich. 1974).
[33] 376 F. Supp. 1379 (N.D. Ga. 1974); See also Bryant v. Jefferson Federal Savings and Loan Association, 509 F.2d 511 (Ct. App. D.C. 1974); United States Hertz, Inc. v. Nibrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44 (1974).
[34] 376 F. Supp. at 1382.
[35] 382 F. Supp. 377 (E.D. Michigan 1974); But see Hoffman v. United States Department of Housing and Urban Development, 371 F. Supp. 576 (N.D. Tex. 1974); Caffey Enterprises Realty & Development Company, Inc. v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975).
[36] 382 F. Supp. at 381.

ARREST

The grounds for civil arrest under the old CPA[1] were considerably reduced in the CPLR.[2] Arrest both before and after judgment now is available primarily in cases where the plaintiff would be entitled by the judgment to a remedy in equity directing the defendant to perform an act.[3] There is also a somewhat strange provision in CPLR §6101(1) allowing arrest in some instances in an action at law for damages.

Equity

The reason for permitting arrest as a provisional remedy in certain actions in equity is to secure the presence of the defendant so that the court may punish him for contempt if he neglects or refuses to obey a judgment or order directing him to perform some act. Under CPLR §6101(2) three conditions must be met before the court may grant an order for arrest: (1) the plaintiff must be seeking "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";[4] (2) the defendant must be either a non-resident of the state or about to depart from it; and (3) the non-residency or imminent departure of the defendant must create a danger that the judgment or order will be rendered ineffectual.[5]

Dean McLaughlin in his Supplementary Practice Commentary to §6101 states that "virtually the only equity actions"[6] which survive these restrictions are:

> "(1) actions for alimony (see Domestic Relations Law §245); (2) actions to compel the conveyance of property not located in New York (see CPLR 5104); (3) actions to compel a defendant to pay money into court in tort actions (see CPLR 5105); (4) actions to compel a fiduciary to pay damages for a wilful wrong (see CPLR 5105)."[7]

In the circumstances permitted by §6101(2) an order of arrest may be granted under §6111 either before or after judgment.

Law

Arrest in an action at law for damages originally was designed to secure the presence of the defendant so that after judgment body execution could be issued against him.[8] The Third Report of the Advisory Committee severely criticized arrest at law and body execution "as an undesirable vestige of imprisonment for debt."[9] The CPLR abolished execution against the person and most instances of arrest at law. Dean McLaughlin has described "the retention of civil arrest in certain actions at law" as "one of the great mysteries of the CPLR."[10] Although the revisers had abolished civil arrest in actions at law for damages, the provisions of §6101(1) appeared in the final draft without comment. That subsection allows arrest:

> "where there is a cause of action to recover damages for the conversion of personal property, or for fraud

> or deceit, and the person to be arrested is not a woman."[11]

Since the 1964 amendment to §6111 abolished arrest after judgment in actions at law for damages the provisions of §6101(1) allowing pre-judgment arrest in these cases would seem to serve no purpose.[12]

Hearing

Under §6111 the sheriff is required to bring the arrested defendant "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."[13] Under Rule 6113, "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."[14] If the defendant has not been brought before the court for a hearing within the time specified by the order, "he shall immediately release the defendant from custody."[15]

Wachtell states: "The function of the hearing is to assure an automatic and prompt review of the propriety of the arrest, in view of the fact that a poor or ignorant defendant might otherwise have difficulty in taking the initiative to secure such review by means of formal motion."[16]

At the hearing under Rule 6113 "the plaintiff shall have the burden of establishing his right to the arrest and detention of the defendant."[17] In *DeBierre v. Darvas*[18] the First Department described that burden as follows:

> "Upon the hearing plaintiff will have the burden of establishing first, that her complaint demands performance of an act by the defendant, which if not performed, would subject defendant to contempt proceedings. Second, that she would be entitled to a judgment implementing the demands of her complaint. Third, that defendant is a nonresident or is about to leave the State and by reason thereof the judgment or order would be ineffectual . . . .
>
> We envision such a hearing to be of a preliminary nature and not a plenary trial. The issues to be decided encompass a narrow area and the mandate of the statute contemplates that the hearing should be short and concise with a summary determination as to whether defendant should or should not be continued in custody."[19]

Constitutionality of Arrest Provisions

While arrest is the taking of a person rather than property, the four United States Supreme Court decisions discussed in the Study on Attachments and Replevin raise some questions concerning New York's provisional and post-judgment remedy of arrest.

Under *Mitchell v. W. T. Grant Co.*[20] the Supreme Court of the United States would find that in some instances where property is taken, a prompt post-taking hearing would preserve the constitutionality of the procedure despite the absence of a pre-taking hearing because of the need to balance the interests of plaintiff and defendant in the property. Both *Fuentes v. Shevin*[21] and *Sniadach v. Family Finance Corp.*[22] required a pre-taking hearing. Justice White who wrote the majority opinion in *Mitchell* took great care to distinguish *Fuentes* and *Sniadach*. In weighing the constitutionality of the New York civil arrest provisions one must ask whether under *Mitchell* these statutes are constitutional because there is a prompt post-arrest hearing or whether in these circumstances a pre-arrest hearing is required. One could employ as a test the factors[23] which distinguish *Mitchell* from *Fuentes* and *Sniadach*.

Using these factors one would find the following difficulties with the New York arrest procedure: (1) Unlike *Mitchell*, which dealt with a sequestration of property, the New York arrest procedures allow the taking of a person; (2) There is no pre-arrest hearing; (3) The arrest procedures more closely resemble the pre-judgment garnishment statute struck down by *Sniadach* than the sequestration procedure upheld in *Mitchell*. In *Sniadach* the debtor could have been driven "to the wall" by seizure of his wages. The Court did not find that element in *Mitchell*. The New York arrest procedures do raise the possibility of driving the defendant "to the wall"; (4) The creditor in *Mitchell* had a prior interest in the property taken. While the plaintiff in arrest cases has interests, he has no prior interest in the person of the defendant; (5) It is questionable whether the damages available under Rule 6112(b) would be adequate to compensate a wrongfully arrested defendant.[24]

However, as in *Mitchell*, there is a prompt post-taking hearing, damages are available under Rule 6112(b) and there is judicial supervision throughout.[25]

The safer view would apply the requirements of *Sniadach* rather than *Mitchell* to the New York arrest procedures, especially since the Supreme Court always demands a higher standard of due process where the freedom of persons rather than the taking of property is in question. In most instances then there should be a pre-arrest hearing on notice to the defendant.

In *Fuentes* Justice Stewart, who wrote the majority opinion, listed a number of exceptions to the pre-taking hearing requirement. He stated:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, supra, 401 U.S. at 379. . . .These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has

> been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food."[26]

Again in *Sniadach*, Justice Douglas explained: "Such summary procedure may well meet the requirements of due process in extraordinary situations. . . .But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and in personam jurisdiction was readily obtainable."[27]

On the basis of these excerpts it can be argued that the arrest of a person prior to a hearing on notice may be justified where it is necessary to protect the court's jurisdiction or the power of an equity court to enforce its orders. The statute, however, should be narrowly drawn to cover only those instances in which a pre-hearing arrest is demonstrably necessary to protect the court's jurisdiction or power and to exclude those instances where the arrest is simply for the convenience of a private party. Under *Mitchell*, there must be a prompt post-arrest hearing on the merits, and the court must maintain its supervision of the proceeding.

In all instances where a pre-hearing arrest is not necessary to protect the jurisdiction or power of the court, it is strongly arguable under the analysis above that there must be a pre-arrest hearing on notice to the defendant. This would normally occur in instances where the plaintiff alleges that a non-resident defendant or one about to depart from the state[28] will avoid enforcement of the equity court's orders but cannot demonstrate that the steps towards such avoidance are imminent.

The Constitutional Requirements Regarding the Form of the Hearing

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[29] *the* Supreme Court found Georgia's pre-judgment garnishment procedure unconstitutional because: "There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."[30] In his concurring opinion Justice Powell requires a pre-taking showing "of a factual basis of the need to resort to the remedy

as a means of preventing removal or dissipation of assets required to satisfy the claim"[31] and "a prompt post-garnishment judicial hearing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt."[32]

The language of "probable cause" used by the Court in *North Georgia Finishing, Inc.* echoes the Fourth Amendment to the United States Constitution which may apply to the states through the Fourteenth Amendment. The Fourth Amendment states: "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Cases regarding criminal arrest have commented upon probable cause as follows:

> "In dealing with probable cause. . .as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . .Probable cause exists where 'the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[33]

These cases would support the requirements concerning the post arrest hearing found in *De Bierre v. Darvas* quoted above, particularly that the plaintiff show "that she would be entitled to a judgment implementing the demands of her complaint."[34] Reading these cases together, the court would be required to find "probable cause" to believe that the plaintiff would obtain judgment at trial. Where a court directs a pre-arrest hearing on notice the same standards would apply.

In instances where the court issues an order of arrest without notice, the court should find with "probable cause" a "factual basis of the need to resort to the remedy."[35] In addition, in accord with the discussion above, the court should find the "extraordinary situation" that would "justify postponing notice and opportunity for a hearing."[36] The court should also, albeit on the basis of one party's presentation, find probable cause to believe that the plaintiff will be entitled to judgment.

Other Uses of Arrest and Imprisonment in Civil Cases

The provisional remedy of arrest is available under §6101(2) where the plaintiff "would be entitled 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."[37] Under §6111 the order of arrest in these circumstances is available "after judgment." Arrest, then, in an

action in equity is a pre-judgment and post-judgment remedy. It is directly related to the post-judgment remedy of contempt. There is also a post-judgment remedy of arrest under § 5250 to assure that the debtor will be available for examination and "will obey the terms of any restraining notice."[38]

In the process of collecting a judgment the creditor may use a variety of techniques to discover assets including an information subpoena under Rule 5224(a) (3). Failure to answer the information subpoena (which one may suspect would be frequent given the general ignorance of legal proceedings reported by Professor Caplovitz[39]) is punishable as contempt of court.[40]

Post-judgment arrest and contempt present different issues and problems than pre-judgment arrest. There no longer is any question concerning the plaintiff's likelihood of success in his action. Under § 6102 and § 6111 there may be a question as to whether the defendant is a non-resident or is about to depart from the state. Similar questions may arise under § 5250 where arrest is available when "the judgment debtor is about to depart from the state or keeps himself concealed therein and. . .there is reason to believe that he has in his possession or custody property. . .".[41] When a judgment debtor is punished for contempt because of disregard of an order or subpoena, a question may arise as to whether the debtor has disobeyed the order or ignored the subpoena. A possibility may also be present that the debtor was unable to respond, perhaps because of some physical disability or because he was ignorant of court procedure.

Under § 5250 the debtor is afforded a hearing on the relevant questions. That section directs: "the warrant shall command the sheriff to arrest the judgment debtor forthwith and bring him before the court."[42] Under § 6111 there is a hearing "within a time specified in the order, not exceeding forty-eight hours. . .from the time of arrest."[43] The provisions of both these sections require the sheriff to bring the judgment debtor before the court.

In proceedings to punish a defendant for civil contempt, however, the relevant statutes do not require the defendant to be brought before the court. Under Judiciary Law § 756 a warrant "may issue, without notice. . .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."[44] Under Judiciary Law § 757 a court authorized to punish for contempt may proceed either by order to show cause or by warrant of attachment. The warrant of attachment commands the sheriff "to arrest the accused, and bring him before the court or judge. . .to answer for the alleged offense."[45] Courts more normally proceed by order to show cause. Because of the general ignorance of court procedure in certain segments of society[46] the defendant may not respond to the order to show cause. This phenomenon resembles the failure to respond which results in default judgments.[47] When the defendant does not appear in response to an order to show

cause, the court will fine the defendant and in the alternative commit him to jail.[48] In these circumstances the defendant may go to jail without ever appearing in court.[49] If the defendant was physically unable to respond to the order to show cause or was simply ignorant of court procedure he may have been deprived of a hearing at a meaningful time. The procedures under the warrant of attachment where the defendant is brought before the court would have afforded the defendant the hearing which he was deprived of under the order to show cause proceeding.

Imprisonment for Debt

The problems arising from use of the order to show cause proceeding under Judiciary Law §757 coupled with the ordinary lack of response to court papers in certain segments of society have resulted in the continuation of imprisonment for debt or the equivalent of body execution in parts of New York. This phenomenon has been studied in R. Alderman, Imprisonment for Debt: Default Judgments, The Contempt Power and The Effectiveness of Notice Provisions in the State of New York,[50] described briefly by Professor Caplovitz[51] and challenged recently before a three judge federal court.[52]

Alderman describes one method in which these procedures result in imprisonment for debt as follows:

> "In order to assist the judgment creditor in his search for assets, New York allows the judgment creditor to compel the judgment debtor to disclose the nature, value and location of all his assets. . .
>
> Although three types of subpoenas are statutorily authorized, the most commonly used forms are (1) the subpoena requiring attendance of the debtor for the taking of deposition, and (2) the information subpoena, which is accompanied by written questions to be answered and returned by the debtor. Upon service of either of these subpoenas the judgment debtor must, under penalty of contempt, comply with its directions. . . .The procedures that the judgment creditor must follow to have the recalcitrant debtor held in contempt are found in the Judiciary Law. . . .the practice generally followed in the case of nondisclosure is the issuance of a show cause order and a subsequent hearing to determine the guilt or innocence of the alleged contemnor.
>
> In the event that the judgment debtor fails to appear at the show cause hearing he will be adjudged in contempt in absentia. . . .After return of the show cause order and a determination that the judgment debtor is in contempt, the debtor may be fined an amount sufficient to indemnify the aggrieved creditor, or to pay him an amount not exceeding costs plus $250. Immediately thereafter a commitment order will issue, directing that the judgment

> debtor stand committed to the local jail until such time as the fine is paid. The judgment debtor may then remain incarcerated, without the assignment of counsel or judicial review, for up to 90 days. The fine, when paid, is remitted directly by the court to the judgment creditor and is applied to the debt."[53]

Alderman's study demonstrates the frequent use of these procedures in Onondaga County. Their use in Dutchess County has been challenged recently.[54] Decisions of the New York City Civil Court show that these proceedings are employed at least occasionally in New York City.[55]

In *Sure Fire Fuel Corp. v. Martinez*,[56] the New York City Civil Court dealt with contempt in connection with failure to comply with an installment payment order.[57] The debtor was not before the court. Judge Gabel, citing *Fuentes v. Shevin*, explained:

> "From the very nature of the severity of the punishment, however, this powerful weapon should not be deployed on such a free and easy basis that contempt is determined by default or on a pro forma affidavit. . . .Here, certainly, 'the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner'."[58]

Judge Gabel, then, suggested that the appropriate procedure would be use of the warrant of attachment. She stated, "this court should not issue a fining order with a provision for commitment without first bringing the debtor before the court."[59]

The use of post-judgment contempt in New York which is related to arrest under CPLR §6101(2) presents problems of procedural due process similar to those raised in *Sniadach v. Family Finance Corp.*, *Fuentes v. Shevin*, *Mitchell v. W. T. Grant Co.* and *North Georgia Finishing, Inc. v. Di-Chem, Inc.* These problems would be substantially resolved by mandating the use of the warrant of attachment as recommended by Judge Gabel before any order of commitment on contempt could be issued by a court.

Bringing the defendant before the court in all cases of contempt before an order of commitment is issued would provide a hearing at a meaningful time and in a meaningful manner.[60]

Recommendations—Arrest

1 The provisions of §6101(1) providing for pre-trial arrest in some actions at law for damages should be eliminated. Authorities on the CPLR have stated that these provisions serve no function after the elimination of post-judgment arrest in such cases. Under *Sugar v. Curtis Circulation Co.*[61] there would be considerable difficulty in establishing the grounds for such arrest at any pre or post arrest summary hearing.

2 The provisions of §6101(2) should be retained.

3 There should normally be a pre-arrest hearing on notice to the defendant.

4 In extraordinary circumstances where the defendant is demonstrably taking steps which will lead to depriving the court of jurisdiction or avoiding enforcement of its orders, the court should be allowed to issue an order of arrest before a hearing on notice to the defendant. In these instances there should be a prompt post-arrest hearing.

5 At a pre-arrest hearing the plaintiff should be required to show on the information then available the grounds for arrest and probable cause to believe that he will be entitled to judgment. A similar showing should be made at a post-arrest hearing.

Recommendations—Contempt—Imprisonment for Debt

1 Since CPLR §6101(2) and the proposed revisions in §6101 allow arrest in instances where a court's order may be enforced by contempt proceedings, an adequate revision of this section should include provisions to assure the constitutionality of contempt proceedings.

2 Judiciary Law §757 should be revised to compel the presence of the defendant before the court before he is punished for contempt.

In instances where the defendant has not appeared in response to an order to show cause, a revised Judiciary Law §757 should direct the court to issue a warrant for attachment. This would embody in statutory language, the solution recommended by Judge Gabel in *Sure Fire Fuel Corp. v. Martinez.*

FOOTNOTES

[1] CPA Sec. 826.
[2] See CPLR Sec. 6101.
[3] CPLR Sec. 6101(2).
[4] CPLR Sec. 6101(2).
[5] Cf. H. Wachtell, New York Practice Under the CPLR 210 (4th Ed. PLI 1973) (hereafter cited as Wachtell).
[6] CPLR Sec. 6101, Supplementary Practice Commentary, McKinney's Consolidated Laws of New York Annotated, Book 7B 1974-75 Pocket at 9, (Book 7B hereafter cited as McKinney).
[7] Id. See also Wachtell at 210.
[8] Wachtell 211.
[9] Id.
[10] CPLR Sec. 6101, Supplementary Practice Commentary, McKinney Pocket at 8.
[11] CPLR Sec. 6101(1).
[12] See Wachtell 211. Wachtell states:

> "Somewhat anomolously, the CPLR repealed all provisions of prior law providing for execution against the person, but retained the provisional remedy of arrest at law in the types of action specified above. There would appear to be little point in arresting a defendant in order to assure his presence before the court after judgment, if the court will in any event be without power to act with respect to his person. The subject is one that should be clarified by the legislature".

[13] CPLR Sec. 6111.
[14] CPLR Rule 6113.
[15] Id.
[16] Wachtell 214.
[17] CPLR Rule 6113.
[18] 22 A.D. 2d 550, 257 N.Y.S. 2d 179 (1st Dept. 1965).
[19] 257 N.Y.S. 2d at 181.
[20] 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974).
[21] 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).
[22] 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).
[23] See S. Donnelly and M. A. Donnelly, Annual Survey of Commercial Law, 26 Syr. L. Rev. 233 at 264 (1975). These factors are described as follows:

> In view of the suggestions in the concurring and dissenting opinions that Fuentes has been overruled, it is worth reiterating that Justice White in his majority opinion carefully distinguished Sniadach and Fuentes and worth summarizing the principal points of distinction.
>
> 1. In Mitchell the Supreme Court upheld the Louisiana sequestration procedure. In Fuentes the Court found replevin statutes unconstitutional. In Sniadach prejudgment garnishment statutes were struck down.
>
> 2. Under the Louisiana sequestration procedure the debtor could have a prompt hearing on the merits shortly after the seizure. Neither the replevin statutes in Fuentes nor the prejudgment garnishment statute in Sniadach provided for such a hearing before trial.
>
> 3. In Sniadach the debtor could be driven "to the wall" by seizure of his wages. The Court did not find that element present in Mitchell.
>
> 4. In Mitchell the creditor had a prior interest in the property seized, the value of which could deteriorate during continued possession by the debtor. In Sniadach the creditor had no prior interest in the property seized.
>
> 5. The Louisiana law provided damages to the debtor including attorneys' fees if the writ of sequestration were dissolved. This element is missing in the statutes struck down by Fuentes and Sniadach.
>
> 6. Justice White in Mitchell continually emphasized the presence of judicial supervision throughout the Louisiana sequestration procedure. There was an absence of judicial supervision in the statutes examined in Fuentes and indeed in a variety of other statutes providing creditors' remedies.

[24] Compare n. 23 *supra*.
[25] See factors (2), (5) and (6) in fn. 23 *supra*.
[26] 92 S. Ct. at 1999, 2000.
[27] 89 S. Ct. at 1821.
[28] See CPLR Sec. 6101(2).
[29] 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).
[30] 95 S. Ct. at 723.
[31] 95 S. Ct. at 725.
[32] 95 S. Ct. at 725.
[33] Draper v. U.S., 358 U.S. 307 at 313, 79 S. Ct. 329 at 333, 3 L. Ed. 2d 327 at 332 (1959); See also Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134.
[34] 257 N.Y.S.2d at 181.
[35] 95 S. Ct. at 725.
[36] 92 S. Ct. at 1999, 2000.
[37] CPLR Sec. 6101(2).
[38] CPLR Sec. 5250.
[39] D. Caplovitz, Consumers in Trouble, A Study of Debtors in Default (1974).
[40] See CPLR Sec. 5251.
[41] CPLR Sec. 5250.
[42] CPLR Sec. 5250.
[43] CPLR Sec. 6111.
[44] Judiciary Law Sec. 756.
[45] Judiciary Law Sec. 757(2).

[46] See D. Caplovitz, Consumers in Trouble, A Study of Debtors in Default 201-216 (1974).
[47] Id. at 205.
[48] R. Alderman, Imprisonment For Debt: Default Judgments, The Contempt Power and the Effectiveness of Notice Provisions in the State of New York, 24 Syr. L. Rev. 1217 (1973).
[49] Id. at 1224.
[50] 24 Syr. L. Rev. 1217 (1973). The Alderman article is attached as Appendix A.
[51] D. Caplovitz, Consumers in Trouble, A Study of Debtors in Default 225, 226 (1974). Caplovitz states:

> "The tactic of the supplementary proceeding allows for the resurrection in the latter third of the twentieth century of that seemingly outmoded institution, debtor's prison. It is not known whether any debtor in our sample went to jail because of his failure to appear at a supplementary proceeding, but this contempt of court weapon was widely used against debtors in Maine, and an upstate New York Supreme Court judge has told us in a private communication that such sentences have occurred in his area. One victory for the OEO's legal services program was won in Maine in the summer of 1970, when legal services attorneys successfully argued before a three-judge federal court panel that such jail sentences were unconstitutional."

[52] See Vail v. Quinlan 387 F. Supp. 630 (S.D.N.Y. 1975). See also Desmond v. Hachey, 315 F. Supp. 328 (S.D. Me. 1970); Note, Postjudgment Procedures for Collection of Small Debts: The Maine Solution, 25 Maine L. Rev. 43 (1973).
[53] R. Alderman, Imprisonment for Debt: Default Judgments, The Contempt Power and The Effectiveness of Notice Provisions in the State of New York, 24 Syr. L. Rev. 1217 at 1222, 23, 24 (1973). See CPLR Section 5223, Rule 5224; Judiciary Law Sec. 757, Judiciary Law Sec. 773, Judiciary Law Sec. 774. Alderman describes a second practice as follows:

> "In parallel fashion, New York's installment payment order is also enforceable by the contempt power. The installment payment order, originally designed to replace the remedy of income execution (wage garnishment), is a court order directing the judgment debtor to make periodic payments to the judgment creditor. The amount of the payment is to be determined by the court after notice is given to the judgment debtor and a hearing is held. In deciding upon the amount of the payments the court is directed by law to consider the reasonable needs of the judgment debtor and his dependents. Like contempt proceedings, the hearing for the installment payment order is upon an order to show cause. Field observations in Onondaga County disclosed that when the judgment debtor fails to appear, an installment payment order generally issues in the amount requested by the judgment creditor.

[54] See Vail v. Quinlan 387 F. Supp. 630 (S.D.N.Y. 1975).
[55] Sure Fire Fuel Corp. v. Martinez, 75 Misc. 2d 714, 348 N.Y.S. 2d 502 (Civ. Ct. N.Y. Co. 1973); Uni-Serv. v. Linker, 62 Misc. 2d 861, 311 N.Y.S. 2d 726 (Civ. Ct. N.Y. Co. 1970). See also S. Donnelly and M. A. Donnelly, Annual Survey of Commercial Law, 26 Syr. L. Rev. 233 at 273 (1975). For a notorious example from another state see Desmond v. Hachey, 315 F. Supp. 328 (S.D. Me. 1970); Note, Postjudgment Procedures for Collection of Small Debts: The Maine Solution, 25 Maine L. Rev. 43 (1973).
In Desmond v. Hachey, the Court explained:

> "The evil attacked here is the summary imprisonment of one who, for whatever reason, fails to obey a disclosure commissioner's subpoena. Such a drastic infringement upon personal liberty cannot be tolerated unless the procedure is hedged about with sufficient safeguards to assure that one who is innocent of any wrongdoing will not be punished. Only a procedure which provides an opportunity for the debtor to explain, prior to incarceration, why he failed to obey the subpoena can

adequately meet the constitutional imperative. Due process normally requires a hearing and an opportunity to be heard *before* incarceration, and the fact that there is a subsequent procedure by which the debtor may obtain his release does not change the result." 315 F. Supp. at 333.

[56] 75 Misc. 2d 714, 348 N.Y.S.2d 502 (Civ. Ct. N.Y. Co. 1973).

[57] Earlier in the same action the plaintiff moved to punish the debtor for contempt for failure to answer a subpoena to appear for examination.

[58] 348 N.Y.S.2d at 504.

[59] 348 N.Y.S.2d at 505, 506.

[60] Id. at 506.

Alternately one could employ a structure similar to that adopted in Maine. The new Maine procedure has been described as follows:

> "The new Maine statute abolishes both imprisonment and conventional wage garnishment. It substitutes an installment payment order based on a judicial determination of the debtor's ability to pay. For default of such payments, the creditor may have the debtor's employer ordered to make regular deductions from the debtor's earnings and pay the creditor directly. Conventional remedies against the debtor's nonexempt property are preserved and made procedurally more expedient by the new system.
>
> The vehicle for administering postjudgment remedies is the debtor disclosure hearing carried over in part from the former law. However, under the old law, the creditor's goal was often to make the debtor default and render himself liable for imprisonment. Under the current law, such sanctions are removed and the emphasis is on exchange of information rather than intimidation.
>
> The judgment creditor initiates the process by subpoena. If the debtor fails to appear for the hearing, the court may issue a "capias to bring in," an order for the sheriff to arrest the debtor on a subsequent date and to bring him before the court. The sheriff's authority to restrain the debtor for such purposes is limited to a three-hour period. If the debtor fails to show good cause for having missed the first hearing, he must bear the expense of his capias arrest. However, neither a contempt order nor detention for any more than three hours is permitted for mere failure to appear. Once a hearing is completed, the creditor may not subpoena the debtor for further disclosure until six months have passed unless special circumstances justify an earlier date.
>
> Note: Postjudgment Procedures For Collection of Small Debts: The Maine Solution, 25 Maine L. Rev. 43 at 51, 52.
>
> Key provisions of the revised Maine statute are:
>
> §3134. Failure to appear
>
> If the judgment debtor fails to appear after being duly served with a subpoena under section 3123 and the judgment creditor has not failed to appear at the time and place named in said subpoena, the judge shall upon the request of the judgment creditor issue a capias to bring in the debtor to a disclosure hearing at a time and date specified in said capias. 14 M.R.S. Sec. 3134 (Supp. 1974-75).
>
> §3135. Capias to bring in.
>
> After a capias to bring in has been issued pursuant to section 3134, the sheriff shall cause the judgment debtor to appear at the time and place stated in the capias to bring in and to that end may, if necessary, take the judgment debtor into custody, provided that the sheriff shall not incarcerate the judgment debtor but shall deliver the judgment debtor to the District Court. If the time set for the disclosure hearing is more than 3 hours subsequent to the delivery of the judgment debtor to the District Court, the judgment debtor shall be released upon his personal recognizance for his appearance at the disclosure hearing without the necessity of a hearing before a bail commissioner. The personal recognizance of the judgment debtor shall be given to the judge of the District Court, or in his absence or disability, to the sheriff, in which event it shall be filed with the court. If,

upon hearing, the judgment debtor does not show good cause for his failure to appear after being duly served with a subpoena under section 3123, he shall be ordered to pay the costs of issuing and serving said capias to bring in. After the question of costs of issuing and serving said capias has been determined, the judge shall proceed with the examination required by section 3122. 14 M.R.S. Sec. 3135 (Supp. 1974-5).

[61] 383 F. Supp. 643 (S.D.N.Y. 1974).

PROPOSALS FOR AMENDMENTS TO ARTICLE 31 OF THE CPLR AUTHORIZING VIDEOTAPE DEPOSITIONS AND DEPOSITIONS OF A PARTY'S OWN MEDICAL EXPERT*

by

William P. McCooe
Judge of the Civil Court of the City of New York and Acting Justice of the Supreme Court

CONTENTS

* EDITOR'S NOTE: At the request of the Committee to Advise and Consult with the Judicial Conference on the Civil Practice Law and Rules, this study was made by Hon. William P. McCooe, Judge of the Civil Court of the City of New York and Acting Justice of the Supreme Court. Recommendations on the expanded use of videotaped depositions, made by the Judicial Conference to the 1976 Legislature, were based upon this study.

I. INTRODUCTION

The prime purpose of this study is to examine the feasibility of utilizing videotape in the trial process and to propose implementing legislation. The advantages of videotape will be considered together with a comparative study of the law and procedural rules of various jurisdictions using videotape. The New York experience in videotaped depositions will be discussed together with a proposed amendment to CPLR 3113(b) which refers to the method of recording.

A second aspect of the study will consider permitting medical witnesses' depositions to be taken and used at trial without the necessity of showing special circumstances. The focus of the study will center on the difficulty of obtaining the attendance of the medical witness at trial. CPLR 3101(a) will be examined with a view to enlarging its scope relevant to the classes of persons who may be examined and their testimony used at trial without a showing of special circumstances. This would be accomplished by adding an additional paragraph to CPLR 3101(a).

The legislative proposals recommended in this study are treated in two parts because legislative action need not be concurrent on all the proposals, although concurrent treatment is recommended.

The reader who desires to study this topic in greater depth is encouraged to examine a wealth of materials which are available. *The Record* of the Association of the Bar of the City of New York, Vol. 3 no. 3 (March 1975) contains an excellent bibliography on videotape and the courts (see pp. 221-225). The Rules of Superintendence of the Supreme Court in Ohio, (see Rules 10, 11 and 15) the Michigan General Court Rules (see Rule 315) and the Civil Procedural Rules of Pennsylvania (see Rule 4017.1) provide good examples of rules adopted to govern the proper use of videotapes in court proceedings.

Technical studies of the cost factor in videotaping depositions have been made by the National Center for State Courts. These materials, as well as those referred to in the footnotes, were carefully examined by the author before the recommendations made in this study were formulated.

II. ADVANTAGES OF VIDEOTAPE

The future of videotape was well described by Associate Justice Tom Clark (Ret.) of the United States Supreme Court when he said:

> I predict the universal use of video in personal injury cases especially as to the medical testimony and its expansion to other litigation as the Bar and the courts become satisfied as to its adaptability . . . I hope that every bar association will organize a program for its members, in which depositions can be taken on video at the costs of the tape consumed. Thousands

> of dollars would be saved and a like number of cases would be settled.[1]

Justice Clark could not have anticipated that nine months after he made these remarks the President of the United States would appear for a videotape deposition.

Videotape has the potential to improve the quality of justice and to help alleviate court congestion. It offers both the audio and visual perspective to the nonappearing witnesses' testimony. The extent of the implementing of videotape has ranged from the full trial to depositions of single witnesses.[2] The full trial has the entire testimony pre-recorded and only the opening and closing arguments are made by the attorneys. The advantages generally cited for this procedure are: (1) the trial flows without interruption from objections, bench conferences, delays for witnesses, counsel's pauses, client conferences and chamber retreats; (2) maximum utilization of juror time is achieved; (3) the time required for a given trial is shortened considerably; (4) the trial can be scheduled, with certainty, for a specific day; (5) the witnesses can be presented in the desired order, obviating the need for adjustment to availability at the last moment; (6) the chance of mistrial is greatly reduced; (7) there is no need to recess for the preparation of instructions; (8) directed verdict motions are decided when the tapes are previewed and do not infringe on courtroom time; (9) opening statements should be more effective with knowledge of precisely what the evidence will show; (10) the judge need not be present during the viewing of the tape, freeing him for other duties; (11) the presence of the lawyers is not required during the viewing of the tape; (12) it is possible for judge and counsel to conduct simultaneous trials; (13) trial preparation can be more effectively scheduled and the taping may be in the most convenient order of witness availability; (14) last-minute preparation is eliminated; (15) time is afforded for study of evidentiary questions; (16) testimony on location is facilitated; (17) elimination of live trial impediments give the jury a comprehensive related view of the entirety of the case; (18) the tape can serve as the transcript of proceedings on appeal; (19) retrial is facilitated; (20) extra-judicial judge influence through reaction to witnesses and comments to counsel is reduced; (21) the court need no longer resort to the fiction that a juror can disregard what he has heard in accordance with the judge's instructions.[3]

The advantages of the videotaped deposition are more limited. Depositions, whether videotaped or stenographically recorded, are generally taken for disclosure purposes or for purposes of perpetuating a witness' testimony for trial. Perpetuation of a witness' testimony may be necessary because of advanced age, sickness or geographical unavailability. Stenographically recorded depositions, assuming a proper foundation can be laid of a party's own witness, are resorted to at trial as a last resort. Attorneys are cognizant of the fact that the reading of a deposition to a jury reduces its impact and

jurors tend to attach less weight to the testimony of a witness they have never seen. The reading of a deposition is a tedious procedure to both the attorneys and the jury. It is understandable why attorneys employ the deposition of their own witness only as an absolute necessity. The videotaped deposition offers the opportunity for the jury to see the witness and to hear his testimony. The benefits thereby will be obvious to any attorney. Preliminary studies conducted by Michigan State University under a grant from the National Science Foundation indicate the favorable acceptance of videotape by juries in comparison to a live trial.[4]

It is important to appreciate one point when the advantages of videotaped depositions are discussed We are discussing the advantages of videotaped depositions over stenotyped depositions and not the advantage of videotaped depositions over the live witness at the trial.

Videotape is a tool which should be available to attorneys so they may make the decision whether or not to implement it. It is not being recommended that its use be mandatory but optional with the party.

III. THE VIDEOTAPE EXPERIENCE IN OTHER JURISDICTIONS

The scope of this study is limited to a consideration of the use of videotape in civil actions. Its use in criminal actions[5] for lineups[6] and confessions[7] is outside the ambit of this study.

Ohio has been the pioneer in the use of videotape both for depositions and for entire trials. The first complete videotape trial took place in Ohio[8] in 1971 and was followed by California.[9] It is a procedure whereby the entire presentation of evidence is videotaped and edited in advance of jury selection. The jury has only limited contact with the witnesses. The tape is shown to the jury just as a film would be shown to an audience in a movie theatre.

The use of videotape for depositions is authorized by the procedural rules of numerous states,[10] and the Federal courts.[11] Once it is determined that videotape is authorized, rules peculiar to videotape must be adopted. The technical nature of the videotape process requires the inclusion of certain necessary ingredients in the rules. The prime reason is to insure the integrity of the process. The more important ingredients are:

(1) Statements of who is authorized to order, record and edit a video recording of testimony which is to be used for trial, or an official video record of proceedings.

(2) Definition of equipment and operating standards of video system components to insure faithful and accurate reproduction, safeguards against tampering, standardization and compatability with other video components; and sufficient maintenance procedures, and component control features to assure system operation.

(3) Definition of the proper method of indexing the

videotape for uniform and rapid referencing of objections and events.

(4) Guidelines for camera placement and focus, camera microphone control and accessibility, and the control of video equipment.

(5) Standards for placement of the video equipment control center for courtroom recording. The video medium offers the flexibility of remote operation; therefore, the operator/court reporter can be remotely located in another room, viewing and hearing courtroom activity through this control center's monitors.

(6) Rules for the proper manner of preserving, editing—such as electronic versus manual editing—filing, safe-guarding, storing and re-using the video recordings; i.e., the court must exercise supervision of the integrity and preservation of unedited and edited tapes. The availability of the video record immediately after recording would dispense with the need of having the court reporter hold the public record until transcribed. This shift in responsibility for the record from the court reporter to the court can be accomplished by simply turning the video record over to the clerk upon completion of the proceedings.

(7) Requirements for administration of oaths to witnesses; by either the video operator making the video record, or an officer of the court (who may be the video operator).

(8) Description of a procedure for verification of the video tape by the recorded witness, and certification by the equipment operator, and officer of the court. The court might require certification on the tape or in writing within an established time prior to filing the video record.

(9) Procedure to allow counsel's objections to be recorded, ruled on, and if deemed objectionable, excluded from presentation to the jury.

(10) Explanation of the procedure and equipment to be used for courtroom playback for trial by jury or by judge (e.g., the number, size, and location of monitors).

(11) Rules to permit the videotape to be the official record of proceedings; i.e., video recording becomes an advanced method of court reporting replacing other alternatives.

(12) Rules for allocation of costs to parties.

(13) Procedures for presenting the videotape on appeal.[11]

The National Center for State Courts has compiled voluminous material on videotape and is presently engaged in developing special videotape rules for Hawaii. The Federal Judicial Center has just developed videotape rules and is engaged in pilot projects implementing the rules.[13] It is recommended that these special rules be promulgated after the completion of the projects referred to and that the rules be part of the Administrative Rules of the Judicial Conference and not in the CPLR. Technological changes in this field are rapid and it is important to develop standardized rules and equipment. Cassettes are less complicated than tapes and have received general acceptance.

IV. THE NEW YORK VIDEOTAPE EXPERIENCE

Authorization for the use of videotape must be determined by an interpretation of CPLR 3113 (b)[14] which controls the conduct of a deposition. The statute provides in part ". . . The testimony shall be transcribed."

In *Rubino v. G. D. Searle & Co.*,[15] the defendant moved to perpetuate the testimony of its former director of research, who had suffered a myocardial infarction, through the medium of a videotaped deposition in lieu of the traditional stenographic recording. The court in granting the motion conditioned it upon a simultaneous stenographic examination. The court referred to the procedure as "an avenue of great procedural significance in the efficient and economic administration of justice . . . Moreover, it is the opinion of this court that the use of the videotaped deposition at trial could result in the obtaining of expert testimony which often is impossible to obtain because of the expenses involved and could expedite the trial of the action which often is delayed because of the unavailability of the expert witness." The court did not pass upon the admissibility of the deposition at the trial under CPLR 3117 (a)(3).

In *Bichler v. Eli Lilly and Co.*,[16] the defendant moved to examine a medical witness in California using videotape together with a stenographic examination. The court denied the motion indicating that videotape was "but another method of deposition recording with no additional benefit in the search for justice." The facts in this case are similar to *Rubino* and the cases cannot be readily distinguished. The denial was best described by a recognized authority who stated "It is apparent, therefore, that the court was simply hostile to the idea of videotaping . . . If demeanor of a witness may be considered by the jury in assigning probative force to the testimony, should not the jury be given the opportunity to view the tape?"[17] Fortunately, and significantly, this trial court judgment was later reversed by the Appellate Division (*Bichler v. Eli Lilly and Co.*, — AD 2d — (First Department) NYLJ p. 1, col. 6 (1/5/76). The Appellate Division permitted the simultaneous videotaping and deposing of the testimony of a medical witness who had retired and was residing in California, and quoted with approval a recommendation of the American Bar Association that "the use of videotape as a means of presenting the testimony of physicians should be encouraged." This is the first time an appellate court in New York has expressly upheld the videotaping of depositions.

Professor David D. Siegel in the Supplementary Practice Commentary to CPLR 3113[18] speaks of videotape depositions and states: "The experiment deserves the full support of bench and bar. The merits of videotaping of a deposition, if it faithfully reproduces the scene and the sounds, are manifest. When and if the occasion arises to make use of such a taped deposition—and the use may not be made until a proper foundation is laid under CPLR 3117 at the trial itself—the fact

trier will have distinct additional advantages. To cite just one: being able to see the deposing witness and to adjudge his demeanor at much closer to firsthand than could ever be attained by the reading, by some other person, of the deponent's written deposition. The ability of the fact trier to observe the demeanor of the witness, whether the deposition is being used for impeachment purposes or for evidence-in-chief, is an integral part of the package of rights that our historical jurisprudence has always treasured."

It is therefore recommended that CPLR 3113 be amended to permit the use of videotape. The following is the draft proposal.

V. PROPOSED CPLR AMENDMENTS

Rule 3113. Conduct of the examination

a) . . .

b) Oath of witness; transcription of testimony; objections; continuous examination; written questions read by examining officer. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction, record the testimony. The testimony shall be [transcribed] *recorded by stenographic or other means.*

Depositions of a Party's Own Expert

a) Background of the Problem

A problem facing trial attorneys is the difficulty in obtaining the appearance in court of their expert witness. Every trial lawyer has faced the dilemma of expecting his expert witness in court at a certain hour and being disappointed in his non-appearance. This situation is particularly prevalent when the expert witness is a physician.

A partial solution to the problem is to amend the procedural rules to authorize the deposition of a medical witness without the necessity of showing special circumstances. Generally a party may take and use the deposition of his witness only in limited instances where the witness is unavailable or ill or a great distance from the place of trial.

The procedural rules in some jurisdictions have been amended to specifically provide for the videotaping of a medical expert's testimony without the necessity of laying a foundation.[19] The Ohio Rules of Civil Procedure authorize the taking of a medical expert's deposition and its use at the trial even though he is available. The Automobile Accident Reparations Committee of the American Bar Association states that "the use of videotape as a means of presenting the testimony of a physician should be encouraged."[20] The videotaping of the testimony of the medical witness has the advantage of insuring that the testimony will be available at trial and that it can be presented at the correct tactical moment. The

deposition can be taken at the physician's office at a mutually agreeable time and the physician's fee should be less than if he had to physically appear in court.[21]

b) The state of the law in New York

CPLR 3101 (a) (3) (4) enumerates the grounds for the deposing of a non-party witness.[22] The grounds include the geographical basis, illness and adequate special circumstances. There is no provision authorizing the examination of a party's own medical witness unless he fits within one of these categories. CPLR 3117 (a) (3) controls the use of the deposition of a non-party witness and states the foundation necessary to authorize its use at trial.[23] The grounds are similar to those under CPLR 3101 and restrictive in that they make no provision for the deposition of a medical witness to be read at trial unless he fits within one of the enumerated exceptions.

It should be noted that the original draft of CPLR 3101 (a) was broader in scope than the statute enacted.[24] The reason for the change of the provision before its enactment was to give the Legislature and the Judicial Conference time for further study.[25]

There is a judicial trend towards liberalizing the "special circumstances" provision of CPLR 3101 (a) (4). In *Villano v. Conde Nast Publications Inc.*[26] the defendant moved under CPLR 3101 (Subd. [a] [par. [4]), to examine plaintiff's treating physicians in an action for invasion of privacy claiming "special circumstances." The Appellate Division reversed Special Term's denial of the motion stating that "a mere showing by the lawyer that he needs such witnesses' pretrial deposition in order to prepare fully for the trial should suffice as a 'special circumstance'." The court cited with approval *Kenford Co. v. County of Erie.*[27] The above cited cases are authority for a party taking the testimony of his adversary's medical witness and not the testimony of his own medical witness. The need remains for statutory provision permitting a party to depose his own medical witness without the necessity of showing special circumstances and using it at the trial.

This projected amendment should provide an additional tool to the trial lawyer. It is not equivalent to the actual appearance of the physician. It is a substitute in appropriate cases where the physician is not available or the projected recovery does not justify the actual appearance of the physician. It is not contemplated that this amendment will be utilized in the larger case except where the physician is unavailable.

The following is the draft proposal:

Rule 3101. Scope of disclosure

(a) *Generally.* There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:
(1) .....
(2) .....

(3) .....
(4) .....
(5) *A party's own medical witness*

Rule 3117. Use of depositions

(a) *Impeachment of witnesses; parties; unavailable witnesses.*
4. The deposition of a medical witness may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move pursuant to Rule 3103 to prevent abuse.[28]

The proposed amendment makes no reference to the method of recording the physicians' testimony. The testimony could be taken stenographically or by audio tape under the present state of the law and is not dependent upon the passage of legislation authorizing videotape depositions.

The proposed amendment is limited to the medical experts' testimony. Future legislation could encompass all experts once the success of this amendment has been established.

VI. CONCLUSION

Videotape research and planning has received nearly $1 million in grants from the Law Enforcement Assistance Administration, psychological studies by two universities and a pilot project in four U. S. District Courts sponsored by the Federal Judicial Center. The United States District Court for the Southern District of New York is undergoing physical changes which include a videotape studio where depositions may be taken. The studio should begin operations in 1976 and the only costs to the litigants will be for the videotapes.[29] It should be clear that the videotape concept is past the theory stage. It has become a working tool for the lawyer.

The proposals submitted herein provide for an amendment to the CPLR authorizing the use of videotape for depositions. Rules to protect the integrity of the procedure should be formulated and be contained in the Rules of the Administrative Board of the Judicial Conference because of their technical nature.

A proposal to authorize the taking and using of a physician's deposition without the necessity of laying a foundation has also been submitted.

The time of the videotape deposition in New York has come.

FOOTNOTES

[1] Legal Communications Workshop 2, San Francisco, Calif. Jan. 31, 1975.
[2] McCall v. Clemens, No. 39,301 (C.P. Erie County, Ohio, Nov. 18, 1971.)
[3] McCrystal & Young, Pre-recorded Videotape Trials—An Ohio Innovation, 39 Brooklyn L. Rev. 560, 563 (1973).
[4] Miller, Televised Trials, How Do Juries React?, 58 Judicature 242, Dec. 1974.
[5] State of Vermont v. Arthur H. Moffett, 340 A. 2d 39 (1975).
[6] Washington v. Newman, 484 P.2d 473 (1971).
[7] Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972).
[8] See text p. 509; Time, Dec. 17, 1973 at 83.

[9] Liggons v. Hanisko et al, Case No. 637-707, Superior Court, San Francisco, Calif., Sept. 17, 1973; N.Y.L.J., Nov. 27, 1973; at 1, col. 1; 57 Judicature 171 (1973).

[10] Fla. R. Civ. P., Rule 1.310; Gibson v. John B. Hicky & Co., No. 27079 (Pinellas County Cir. Ct., Fla., Dec. 16, 1971); On Trial: Videotape, 46 Fla. B.J. 159 (1972); N.Y.L.J., Aug. 10, 1972, at 4, col. 5.
Ohio R. Civ. P., Rule 30 (b) (3), 40
Mich. Gen. Ct. R. No. 315
Minn. Civ. R.P., Rule 15
Penna. R. Civ. P., Rule 4017.1
Mo. Sup. Ct. Rule 57.21
Hawaii R. Civ. P., R. 30 (64)

[11] The Federal Rules of Civil Procedure state:

The Court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made a party may nevertheless arrange to have a stenographic transcription made at his own expense.

Fed. R. Civ. P. §30 (b) (4); See C. Wright & A. Miller, 8 Federal Practice and Procedure §2115 (1970); Carson v. Burlington Northern Inc., 52 F.R.D. 492 (D. Neb. 1971).

[12] Video Support in the Criminal Courts, National Center for State Courts, pg. 31.

[13] Guidelines for Pre-recording Testimony on Videotape Prior to Trial, FJC PUB NO 74-9.

[14] N.Y.C.P.L.R. §3113 (b) (McKinney 1970) provides in part: The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction, record the testimony. The testimony shall be transcribed . . . .

[15] 73 Misc. 2d 447, 340 N.Y.S.2d 574 (Sup. Ct., Nassau County 1973); McLaughlin, New York Trial Practice, N.Y.L.J., Mar. 9, 1973, at 1, col. 1.

[16] N.Y.L.J., Apr. 14, 1975, pg. 17, col. 2 Sup. Ct., Bx. Co. 1975.

[17] McLaughlin, New York Trial Practice, N.Y.L.J., May 9, 1975, pg. 5, col. 4.

[18] N.Y.C.P.L.R. Sec. 3113 (McKinney 1974, Supp.)

[19] Penna. R. Civ. P., 4017.1 (g); Ohio R. Civ. P. 32, Ohio Rev. Code Ann. (Anderson 1971).

[20] 55 A.B.A.J. 374, 375 (1969).

[21] Meyer, The Expert Witness: Some Proposals for Change, 45 St. John's L. Rev. 105, 109 (1970).

[22] N.Y.C.P.L.R. §3101. Scope of disclosure

(a) Generally. There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he will not be able to attend the trial; and

(4) any person where the court on motion determines that there are adequate special circumstances.

[23] N.Y.C.P.L.R. §3117. Use of depositions

(a) Impeachment of witnesses; parties; unavailable witnesses. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness;

2. the deposition of a party or of anyone who at the time of taking

the deposition was an officer, director, member, or managing or authorized agent of a party, or the deposition of an employee of a party produced by that party, may be used for any purpose by any adversely interested party; and

3. the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion or notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

[24] Furth, The New Civil Practice Law and Rules, N.Y.L.J., May 8, 1962, at 4, col. 2. The original draft of N.Y.C.P.L.R. §3101 (a) (McKinney 1970) provided:

> Full disclosure required. Except as otherwise specifically provided in these rules, there shall be full disclosure before trial of all relevant evidence and all information reasonably calculated to lead to relevant evidence.

3A J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶3101.02 (1973). See also 1 N.Y. Adv. Comm. Rep. 555 (pre-CPLR comparative law study of disclosure).

[25] See 3A J. Weinstein, H. Korn & A. Miller, supra note 22, ¶3101.01.

[26] 46 A.D.2 118 (1st Dept. 1973).

[27] 41 A.D.2 586 (4th Dept. 1973).

[28] N.Y.C.P.L.R. §3103. Protective orders

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

(c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

[29] N.Y.L.J. Sept. 29, 1975, pg. 1, col. 2.

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