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A New Procedural Code in New York: A Review of Weinstein, Korn & Miller, New York Civil Practice, Volumes I-III

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FACULTY COMMENT

A NEW PROCEDURAL CODE IN NEW YORK*

A REVIEW OF WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE, VOLUMES I-III. ALBANY: MATTHEW BENDER & COMPANY, 1963.

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THE study of legislation creating a new code of civil procedure calls for new books. Such important legislation is both a windfall for law publishers and a heavy challenge to the time which practicing lawyers can devote to the study of new laws of such extent. The book which is the subject of this review will facilitate such study. Who should be better qualified for giving guidance through the labyrinth of such a bulky procedural legislation than the authors who have devoted their profound studies for so many years to the drafting of the new code. On the whole, American courts, otherwise very responsive to English views, have under the leadership of the Supreme Court in Washington refused to accept *Hilder v. Dexter* [1902] A.C. 474 (H.L. Eng.) in which the Earl of Halsbury, L.C. said that "in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting."[1]

The authors amply implemented their comments also with legal-historical considerations—see, *e.g.*, paragraph 201.01 concerning the statute of limitation—and they refer, of course, always to the legislative history of each and every rule. As far as a rule is adopted or modified by a new provision—and this is true of a great many of the rules—the connection between "old" and "new" is discussed.

The decisional output is given sufficient space in the book. Fortunately, in referring to case law, the authors felt that the addition (in brackets) of factual data promotes expediency in the painful checking of appropriate cases. This reviewer heartily agrees with their warning, *e.g.*, in paragraph 213.22, that in view of the changes in a rule, particularly in the statutory law, it is impossible to gauge the precedential value of a decision without giving consideration to the changes which took place after its rendition. It would be desirable if such words of caution against the senseless and misleading carrying over of decisions thus superseded would be given heed by the editors of statutes and digests.

Frequently, the authors make comparative references to the federal Rules, to the pertinent sections of the Uniform Interstate and International Procedure Act (hereinafter cited as UIPA) and to recent statutes of sister states. Such com-

* The New York Civil Practice Law and Rules (N.Y. CPLR), N.Y. Sess. Laws 1962, chs. 308-18, effective September 1, 1963.

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1. [1902] A.C. 474, at 477.

parisons appear to be very helpful as especially a reading of the authors' treatment of personal jurisdiction over non-residents shows; for the new legislative approach in this field is based on most recent statutes of sister states, particularly of that of Illinois.

Great praise must be given to the authors for the copious comments on a great many important subjects. Instances are the presentation of the general principles governing the statute of limitation, see paragraphs 201.01-27, and the "Introduction" to "jurisdiction over persons, property, and status," in paragraphs 301.01-09. Naturally the immense scope of the law of civil procedure explains why the authors omitted the discussion of a few topics which in the view of the reviewer deserve treatment. It will, of course, always be a question of individual judgment what to include and what to omit.

Thus, this reviewer believes that *forum non conveniens* deserves discussion. True, the authors used the term as the title of paragraph 301.07. However, except for the quotation of section 1.05 of the UIPA, a discussion of the nature and the effects of that doctrine by New York law is missing. The *forum-non-conveniens* doctrine as adopted by New York courts presents an excellent illustration of the effect of concurrent jurisdiction; for the application of this doctrine presupposes that the forum *has* jurisdiction, but declines to exercise it because a foreign court which has likewise jurisdiction seems to be more convenient for handling the case.

The book ties together the *forum-non-conveniens* doctrine with questions of interpretation of jurisdictional concepts such as "cause of action." This leads only to confusion. It is true that according to section 302 of the new law jurisdiction over non-domiciliaries may be based on a cause of action arising out of business transacted or of a wrongful act committed in New York. Likewise, the fact that the cause of action arose in New York is regarded in section 1314(b)(3) of the Business Corporation Law—similarly as in section 225(3) of the General Corporation Law—as one among the five jurisdictional bases for an action by a non-resident or a foreign corporation against a foreign corporation. However, this shows that tightness or looseness of the judge's interpretation of "cause of action" is the determinant of whether the case is or is not within the bounds of New York jurisdiction; while the *forum-non-conveniens* doctrine comes into play only if—and this is an important if—the judge relying on his interpretation held that the cause of action originated in a New York business or tort and that, therefore, a New York court has jurisdiction. And then, using the proper criteria in applying the *forum-non-conveniens* doctrine[2] he may still decline exercising jurisdiction. As the wording of sections 302 and 1314 ("may") shows none of those sections excludes the application of that doctrine.

A discussion of the doctrine in the book would have brought up also the question whether its application is a matter of pleading or, as was held in

2. Gulf Oil Corp. v. Gilbert Storage & Transfer Co., 330 U.S. 501 (1947).

Collard v. Beach, 81 App. Div. 582 (1903), can be resorted to by the court at its own motion and at any stage of the proceedings.

Since complete agreement as to what should be included in commentaries on a procedural code can hardly be expected, there are other matters which some students of the field might miss. Thus, (non-domiciliary) "residents" are not within the scope of section 313 of the CPLR. (Their inclusion in that section was suggested by the Advisory Committee, but the suggestion was refused.) Accordingly, personal jurisdiction by service without the state can be acquired only upon domiciliaries. But cannot such jurisdiction be acquired by substituted service in New York if the non-domiciliary has a permanent residence there? The book does not deal with the question. Under the CPA, New York courts have sustained jurisdiction when substituted service was obtained in New York on, *e.g.*, domiciliaries of Canada or Switzerland during their residence in New York.[3]

It is true that section 230 of the CPA dealing with substituted service used the word "residing." However, section 301 of the CPLR commands that "a court may exercise such jurisdiction over persons, property, or status as might have been exercised *heretofore*." (Emphasis added.) As the authors properly state in paragraph 301.10, this section 301 "carries into new practice all present New York statutory and case law principles on bases of jurisdiction." Since the concept of personal service, which still forms the jurisdictional basis for the bulk of in personam proceedings, is wider than the service by "delivering the summons . . . to the person"[4] and embraces substituted service—see paragraph 308.02 of the book—personal jurisdiction over such a non-domiciliary who is a resident of New York can be obtained "without personal delivery of the summons to him within the state."[5] The interpretation, here submitted, is well supported by CPLR section 6201(2). According to this provision, an order of attachment may be granted when the defendant *resides* or is domiciled in the State of New York and cannot be personally served there despite diligent efforts to do so. It is well to be noted that the statute does not say "personally served by delivery of the summons," but uses the words "personally served." These words cover as the authors emphasize—see *supra*—also substituted service in the meaning of section 308(3) of the CPLR. This approach has also another important effect. The statute of limitation will not be tolled during the habitual residence of a non-domiciliary in New York even though he might very frequently be absent from New York.[6]

The last mentioned innovation of the CPLR eliminating the tolling of the statute of limitation refers as its wording shows—"jurisdiction over the per-

3. For recent decisions, see Cottakis v. Pezas, 12 Misc. 2d 215, 176 N.Y.S.2d 495 (Sup. Ct. 1958); Scoe Corp. v. Paramount Pictures Corp., 17 Misc. 2d 192, 185 N.Y.S.2d 383 (Sup. Ct. 1959). In the latter case the residence was established only for the time required for the filming of a motion picture.

4. N.Y. CPLR § 308(1).

5. N.Y. CPLR § 207(3).

6. *Ibid.*

son"—to personal jurisdiction only. The authors, in paragraph 207.02, pages 2-127 to 129, take another view. They believe that the possibility of bringing in rem actions under section 314(2) before a New York court might exclude the applicability of the tolling provisions. However, it is not only the clear wording of section 207(3), but also the legislative history which argues very strongly against their optimistic view. The Advisory Committee suggested the elimination of the tolling rule in all cases where jurisdiction can be obtained without personal service on the defendant.[7] However, the Senate Finance Committee added the words "over the person of the defendant."[8] In the Report it was said that thus "the meaning of paragraph 3 (of section 207) was clarified." This word "clarified" is not without any significance. By restricting the inapplicability of the tolling provision to cases where jurisdiction "over the person" can be obtained without personal service, the Senate Committee clearly intended to maintain the legal position taken under the CPA.[9] Accordingly, there is no basis for the belief that this important decision has been superseded by the CPLR.

Concerning the provisions dealing with the effect of disabilities on the running of the statute of limitations—CPLR section 208—the new Code, like the old one, gives consideration to them only if they exist "at the time the cause of action accrues." This is an antiquated view going as far back as to a 17th century case based on the statute of 21 Jac. I, ch. 16 (1623-24).[10] It was taken over as a matter of course in America.[11]

With this view so firmly entrenched in all the American states except Georgia[12] it is not surprising that the book in paragraph 208.04 mentions only the much discussed question of whether insanity resulting from an injury extends the limitation period of the injury action. Obviously, a positive answer would rest upon the last-event rule, namely upon the assumption that the cause of action only rose after insanity resulted. As one sees, it does not present any exception from the New York traditional view of the ineffectiveness of subsequent disabilities. A short comparative note would have shown that, by contrast, in many civil law countries a disability such as insanity arising subsequently to the accrual of the cause of action, suspends or affects the running of the limitation period.[13]

The legislative record of New York in the last two years is excessive. It demonstrates at times a legislative obsession for moving statutory rules like the pawns in a chess play. For more than a century a short section in the pro-

7. 2 Report of the Advisory Committee on Practice and Procedure 56-57 (1958).
8. 5 Report of the Senate Finance Committee 42 (1961).
9. See Chapman v. Posner, 299 N.Y. 31, 85 N.E.2d 172 (1949).
10. Shutford v. Penow, Cro. Car. 139, 79 Eng. Rep. 722 (K.B. 1629); see 3 Blackstone, Commentaries 1281-85, n.65 (Lewis's Ed. 1902). The statute (Limitation Act, 21 Jac. I, ch. 16 (1623-24)) is discussed at 3 Blackstone, Commentaries *306-07.
11. See the New York Code of 1848 § 88, and the Code of Civil Procedure §§ 375, 396 (1877).
12. See Ga. Code Ann. tit. 3, § 802.
13. See, *e.g.*, Code Civil art. 2252 (Fr.); Civil Code § 206 (Ger.); Civil Code § 1494 (Aus.).

cedural codes regulated an express or implied waiver of the statute of limitation.[14] In 1961, the legislature felt the urge to put into statutory form what had been well established by decisional law. Thus, a new section 34 was added to the Personal Property Law. It deals with promises to waive the statute of limitation provided that the promise was made after the accrual of the contractual cause of action. In 1962, the contents of section 59 of the CPA were shifted to the Personal Property Law as a "new" section 33-d. And then the Legislature in the *annus mirabilis* 1963 repealed both new provisions in order to repeat them in the "new" General Obligations Law, sections 17-101 and 17-103. Incidently, the General Obligations Law is on the whole, with only a few exceptions, a collection of existing statutes placed in a new volume of the Consolidated Laws of New York.

The book discusses (in paragraph 201.12) the erstwhile section 34 of the Personal Property Law, but a complete discussion of acts done, after the statute of limitation had run, such as acknowledgment of claimant's right or a promise to pay one's debt, or a partial payment thereof, is missing. The partial-payment effect is mentioned only in a later paragraph (211.06) with respect to the statutory exceptions to the "conclusiveness" of the presumption that the money judgment has been paid after 20 years. Note the wording of CPA section 44 and CPLR 211(b).

Turning to the comments on article 3 of the CPLR entitled "Jurisdiction and Service, Appearance and Choice of Court," we find that a discussion of contractual clauses conferring jurisdiction upon a New York Court, or, conversely, on a foreign court, is omitted. There is only a little sentence at the end of paragraph 301.02 to the effect that the parties may confer in personam jurisdiction by consent. But the book is silent as to whether they can do it in advance, particularly in a contract, with respect to any future litigation which might arise. The new procedural code adopted in section 3033 the simplified-procedure concept added to the CPA in 1961 (sections 218-a and 218-b of the CPA). The innovation provides that by any written contract the parties may submit any existing or future controversy to the Supreme Court of New York and that such a contract shall be construed as an implied consent of the parties to the jurisdiction of that court. The contract is enforceable. If for instance the non-resident party fails to perform the contract and the other party moves for settlement of the terms of the statement presenting claims and defenses, and for determination of the controversy, the former party will be served in such manner as the court may direct.[15]

Among the practical considerations which argue strongly for the inclusion of such a jurisdictional clause in a business contract, the following calls for attention. One of the important innovations of the CPLR is section 302. According to this provision, personal jurisdiction over any non-domiciliary or his executor or

14. N.Y. CPA § 59.
15. N.Y. CPLR § 3033, R. 3034(2).

administrator can be exercised as to a cause of action arising from any business transacted within New York. This spatial requirement ("within New York") might become, as the experience with the Illinois model of section 302 shows, an ample source of disputes. The "grouping of contacts" approach suffers undoubtedly from a lack of "certainty and predictability."[16] Would not a contractual clause referring any controversies arising out of the given contract to a New York court offer the cheapest and fastest guaranty against future controversies on the jurisdictional point? Contractual clauses concerning the choice of the applicable law are frequently used; the use of jurisdictional clauses should follow suit.

The "localization" of a single act *to* New York is one prerequisite for the exercise of the judicial power of the state under section 302. However, the characterization of a single act as "business" constitutes another prerequisite for such exercise. Naturally in the case of a commercial contract which would include a "forum-New York clause" and which has in addition some contacts with New York, no serious doubt could be raised. It is mentioned in paragraph 105.08 of the book that, concerning jurisdiction over foreign corporations, the new statutory test of transacting any business within the state is much broader than the "doing-business test" of former case law. On the other hand, it is properly stated in paragraph 301.14 of the book that the new test could apply only to litigations arising out of the contract in point, while a foreign corporation engaged in continuous dealings in New York is subject to jurisdiction there even where the cause of action sued upon did not originate in a New York transaction. This aspect of the scope of jurisdiction to a non-New York cause of action is consistent with the due-process clause as the U.S. Supreme Court recently affirmed.[17]

It would not be entirely correct to say that the authors have wasted time on the question of what characterizes a single activity as a "transaction of business." The short discussion, mostly referring to Illinois cases, in paragraph 302.06 show that the authors took into consideration only commercial activities in the narrow sense, such as the solicitation of a single order or an employment contract with a furniture company. Is union activity or advertising in New York not a transaction of business there? Or does a physician called to New York from Boston for a consultation concerning a patient in Olean, New York, transact business there? The same question may be asked with respect to an Ohioan journalist who during his two-week vacation in a fashionable Long Island sea resort interviewed "very important" persons there. Concerning union activities, this paper will come back to the question very soon. Some reluctance to answer Yes to those questions can be seen from reading single-act statutes of other states. Thus, *e.g.*, Alabama mentions in her Code Title 7 section 199(1), side by side with "doing of any business," the "performing of any work or

16. Auten v. Auten, 308 N.Y. 155, 161, 123 N.E.2d 99, 102 (1954).
17. *Cf.* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

services within the state." It is interesting to note that also the UIPA, to which the book so frequently refers, felt it necessary in section 103(a)(1) to include "contracting to supply services or things in this state" besides the reference to "transacting any business in this state."

The views of New York courts with respect to statutory provisions based on similar terms in defining jurisdiction are divided. The Buffalo City Court Act extends, in section 21-a, the territorial jurisdiction to actions in which one of the parties, although not a resident of the City, has "an office for the regular transaction of business within the city." Quite recently in *Orlikowski v. Strash*, the City Court had set aside the service of summons on the ground that the jurisdictional requirements were not met by the plaintiff who was employed as a factory worker in a Buffalo plant. Special Term affirmed. However, the Appellate Division reversed; it regarded it as irrelevant whether "employment is physically carried on in the office portion of the building or in the factory area."[18] This demonstrates again that only decisional law, by trial and error, can develop the directives indicated in rather broad terms of a statute.

There is another important feature of single-act statutes. Very often a claim of such jurisdiction is challenged on the preliminary issue whether, *e.g.*, the act charged can be characterized as "tort" or, as we saw, "business." Where jurisdiction is asserted under section 302(a)(2), *i.e.*, the commission of a tortious act, the characterization of the act constitutes a preliminary issue. Naturally, this problem has not escaped the attention of scholars such as the authors. See the excellent discussion in paragraph 302.09. Jurisdiction, as they say, does not depend upon an ultimate finding after trial on the merits that defendant is liable to the plaintiff; for jurisdiction may be determined as a preliminary matter by the court without a full hearing on the merits. Similarly, as we believe, the determination by the court on the preliminary question whether there was some transaction of business, settles the question of jurisdiction; but does not prejudge that after the trial of the merits the court might come to the result that the transaction was null and void and that the action must be dismissed.

One of the most confusing jurisdictional problems concerns the localization of unincorporated associations. As for partnerships, a New York court obtains jurisdiction by personal service on any partner within the State of New York.[19] The book in its paragraph 310.02 uses the term "local" and "foreign" or "non-resident" partnerships; and it speaks in paragraph 311.14 of "foreign" unincorporated associations and of "non-domiciliary" unions. Has such a distinction any foundation? The authors do not inform us about any criteria by which the "local" or the "foreign" character of a partnership or union should be determined. Federal courts confronted with the problem under the aspect of diversity jurisdiction, held that since, unlike a corporation, a partnership lacks

18. Orlikowski v. Strash, 16 A.D.2d 873, 228 N.Y.S.2d 497, 498 (1962); this decision was followed in Landt v. Stark, 33 Misc. 2d 963, 227 N.Y.S.2d 932 (1962); but there the activity of the person in question was that of the manager of the General Adjustment Bureau.

19. *Cf.* N.Y. CPLR § 310.

the quality of a legal entity, diversity jurisdiction depends upon the citizenship, *i.e.*—under the Fourteenth Amendment—upon the domicile of each individual partner.[20] On the other hand, Judge Learned Hand would consider the place of the principal activities of such associations as the test applicable for service of process and venue.[21] But this is the federal view.

As long as New York courts will not regard the principal place of business of a partnership as criterion for its "presence"—and "heretofore" (section 301),[22] they have refused to do so, as one can see from paragraph 301.15—personal jurisdiction over a partnership will, regardless of whether the cause of action is "local" or "foreign," rest on service on a partner in New York whether or not he has a domicile there, or it will rest on service, wheresoever had, on a partner who is domiciled in New York.[23]

However, service abroad will be sufficient where the partnership transacts business in New York; for with respect to a cause of action arising from such a business, the partnership is subject to New York jurisdiction under the rule of section 302. Thus, the result is almost the same as under the CPA section 229-b; but under the CPA, delivery of the summons to the agent in charge of the local business was sufficient.

Concerning jurisdiction over labor unions, the Labor Management Relations Act section 301(c)[24] uses both the place of the principal office of the union and the place of the representative activities of its officers, as jurisdictional basis as for the most important actions, namely suits for violation of collective contracts and for damages resulting from certain unfair labor practices.

Turning to New York law, we see that the 1961 amendment to section 13 of the General Association Law provides that the service of summons upon any officer or a business agent shall constitute service upon the labor organization. The section goes on to say: "Such service shall be made in the manner provided by law for the service of summons on a natural person." Even prior to the amendment, it was held that there was "no requirement in section 13 that the individuals sued in their representative capacities must be residents of this State or that the association which they represent must be doing business in this State."[25] Accordingly, CPLR section 301 ("heretofore") applies. Thus, New York has full jurisdiction over a labor union where service is had there upon one of its officers or its business agent, regardless where the main office of the union is. However, even if such service cannot be had, jurisdiction can be ob-

20. See, *e.g.*, Great Southern Fireproof Hotel Co. v. Jones, 177 U.S. 449 (1900); Eastern Metals Corp. v. Martin, 191 F. Supp. 245 (S.D.N.Y. 1960).

21. Sperry Products, Inc. v. Ass'n of Am. R.R., 132 F.2d 408 (2d Ar. 1942). Fed. R. Civ. P. 17(b) deals with suability of such associations.

22. See, *e.g.*, Williams v. Hartshorn, 296 N.Y. 49, 69 N.E.2d 557 (1946). When first New York allowed action against the partnership under its name, this was restricted to partnerships "carrying on busines in New York." N.Y. Sess. Laws 1938, ch. 576, enacting N.Y. CPA § 229-a; but this limitation was repealed by N.Y. Sess. Laws 1945, ch. 842, adding § 222-a to the CPA.

23. See N.Y. CPLR §§ 310, 313.

24. 61 Stat. 156 (1947), 29 U.S.C. § 185(c) (1952).

25. Gross v. Gross, 28 Misc. 2d 375, 377, 211 N.Y.S.2d 279, 281 (Sup. Ct. 1961).

tained under section 302 of CPLR but is limited to a cause of action arising from "transaction of business." Campaigning in New York or picketing there are examples of the "transaction of business."

Assaying such a great law book, the reviewer could find only a very few matters which seem debatable to him. Jurisdiction is a word with a variety of meanings and the same is true of the term "immunity." No wonder that their interplay must at times lead to confusion.

A few words may, therefore, be in order to put a few things straight. Neither the immunity of diplomatic representatives of a foreign state which rests on rules of international law, nor the restricted immunity of a foreign country represented by its government from the jurisdiction of the courts—not a matter of international law but solely one of *lex fori*—can be identified with or analogized to a lack of subject-matter jurisdiction. But see paragraph 301.02 of the book. The raising of the question of whether a New York court has power over the subject matter is a question of the competence of the given court and presupposes, therefore, that the state has jurisdiction.[26] The immunity of a state or its agencies or subdivisions from the exercise of the judicial authority by its own courts is a consequence of the delimitation placed by the state itself on its judicial power, and is not a question of its distribution of the judicial business among its courts.

In a federated state such as the United States, the question of whether a member state is shielded by the Tenth Amendment from the exercise of federal power goes to the legislative and judicial power of the Union;[27] and in turn, the boundaries of such power of a member state are, subject to the limits of the federal Constitution, determined by the member state. In the same vein, the law of the member state may or may not restrict the exercise of its judicial power over a foreign state. As indicated previously, such a restriction does not fall under the rules concerning the competence of the courts of the state in both personal and subject matter. It may be noted that the authors themselves, in paragraph 320.15, show that the failure of a foreign state to raise an objection at the time of appearance does not confer jurisdiction over the state.

This is not the place to elaborate on the subject of immunity of states. It may only be added that as the domestic state so a foreign state may waive its immunity from the jurisdictional power of the forum. It is very questionable whether such a waiver can be implied in an appearance to answer the complaint on its merits.

There is no conceptual relationship between such an immunity on the one hand, and, on the other, exemption from service granted by American case law

26. For this point, see the clarifying discussion in Restatement (Second), Conflict of Laws, Explanatory Notes at 37-40 (Tent. Draft No. 3, 1956).

27. The case involving the federal decision cited in page 3-89, footnote 39—Parden v. Terminal Ry., 311 F.2d 727 (5th Cir. 1963)—concerned the question whether a state operating a railroad is subject to the Federal Employees Liability Act. Compare the negative answer given there with United States v. California, 297 U.S. 175 (1936).

to residents of a member state whose presence in the forum results from their attendance in proceedings there. Such exemption from service in state or federal proceedings is restricted to actions unrelated to those proceedings. Accordingly, it is not an immunity from the exercise of the judicial power of the state or the Union. If the non-resident does not raise an objection in time,[28] such an exemption has spent its force. This reviewer suggests that in order to remove any ambiguity about the meaning of jurisdictional immunity, the grouping together in the book of this immunity and of exemption from service—see paragraphs 308.05-09—should be avoided. Immunity of states should be discussed in connection with section 301 and not in comments on section 308 dealing with service.

As mentioned previously, only little opposition can be raised to the authors' carefully considered comments. Statutory innovations of significance such as the abolition of special appearance will for some time invite difference of opinion. Let us assume that the defendant-vendor of land situated in New York, a resident of Connecticut, was served there according to section 314(2) in a suit for specific performance and for damages. Does his timely objection to jurisdiction, presented by motion, under section 3211(a)(8), *i.e.*, denying that the court has personal jurisdiction over him, subject him nevertheless to full personal jurisdiction of the court? If the judge by order has sustained his objection, I cannot see any reason why the judge, who may—see section 2218—separately try first his objection, could not proceed then to a trial restricted to the in rem aspect of the action. The defendant may, under Rule 3211(f), within 10 days after service of that order serve his answer to the claim for specific performance, which permits the plaintiff to lodge, without leave—within the time provided for in Rule 3025(a)—an amended pleading, *e.g.*, for reformation of the land contract. Did the fact that the non-resident defendant successfully restricted the cause to an in rem (*i.e.*, quasi in rem) proceeding, subject him to in personam jurisdiction? Furthermore, we may ask why should the fact that the defendant argues on the merits of the in rem demand, subject him, despite his timely and successful objection to the in personam demand, to full personal jurisdiction. Yet the authors seem (in paragraphs 320.18 and 1314.13) to advance the view that a defendant, if he proceeds to defend after making the objection as to the personal jurisdiction, is then subject to full personal jurisdiction in the action. Also, the wording of section 320(c) does not lend support to the authors' interpretation of that subsection.

The book takes the position that the jurisdiction in rem as defined in section 314(2) extends to intangibles with which "the state has sufficient contact." See paragraph 314.15. This seems to be a very broad proposition.

The basis of jurisdiction established by section 314(2) is, like the wording of that subsection, identical with that of its forerunners, namely section 232(2) in the 1936 numeration and section 232(6) in the 1921 numeration. According to all these sections, jurisdiction in rem is established as for actions concerning

28. N.Y. CPLR §§ 320(b), 3211(e).

title, rights, or interests in "specific property within the state." Concerning intangibles, New York courts have denied jurisdiction claimed under that statutory provision, for example in actions demanding the exclusion of a non-resident from an interest in an insurance transaction although the policy was issued and payable in New York. The same view was held with respect to an action for specific performance of an agreement to assign a patent the use of which required patterns and tools located in New York.[29] A different approach was taken by New York courts where the proceeding concerned a specific interest in the capital stock of a domestic corporation. Thus, jurisdiction in rem was properly asserted for an action against directors who in breach of trust and by fraud had made transfers to themselves of stock in a New York corporation.[30] The thing required by the old and the new statutory provision for their application is the specificity of the intangible and the possibility of its localization, the latter being made possible by the former. Accordingly, where intangibles can be specified and situs in New York can, therefore, be established as to them, jurisdiction in rem has a sound basis. This explains the exercise of jurisdiction in cases concerning manipulation with stock in a New York corporation, as indicated previously.

The authors base their much broader proposition on *Mullane v. Central Hanover Bank & Trust Co.*[31] However, there the proceeding was for a judicial settlement of accounts of a common trust authorized and regulated exclusively by New York legislation according to which the fund assets had to be held separately from the assets of the trust company. Consequently, the requirements for specificity and localization were met. In addition, the statute established exclusive jurisdiction in New York for the settlement of the trust accounts.[32] The controversy did not turn on the question of jurisdiction in rem but on that of the sufficiency of notice by publication to all beneficiaries—from the standpoint of due process. The court found that as to beneficiaries whose whereabouts could not with due diligence be ascertained, the statutory notice was sufficient; only as to known beneficiaries of known places of residence, due process required, as the court held, that notice must be such as is reasonably calculated to reach them. In the view of the court this aim could be achieved by using ordinary mail to the record addresses. Needless to say, the decision lends no support at all to an inference that wherever the foreign address of a potential defendant is known, jurisdiction over intangibles which lack most substantial ties with New York, could properly be asserted.

Grappling with the procedural problem makes it at times desirable to

29. Schoenholz v. N.Y. Life Ins. Co., 197 App. Div. 91, 188 N.Y. Supp. 596 (1st Dep't 1921), *aff'd*, 234 N.Y. 24, 136 N.E. 227 (1922) (insurance); Ebsary Gypsum Co. v. Ruby, 256 N.Y. 406, 176 N.E. 820 (1931) (patent).

30. Holmes v. Camp, 219 N.Y. 359, 114 N.E. 841 (1916). *But see* Morgenstern v. Freudenberg, 7 Misc. 2d 273, 165 N.Y.S.2d 934 (Sup. Ct. 1957).

31. 339 U.S. 306 (1950).

32. See also Hanson v. Denckla, 357 U.S. 235 (1959) (The N.Y. law was not involved in this case.).

obtain quick elucidation on questions of substantive law. Let us take a glance at section 212(c) of the CPLR. According to this section the right to redeem real property from a mortgage lapses after 10 years—not 15 years as under the section 46 of the CPA—of actual possession thereof by the mortgagee. The same limitation applies against "a purchaser of the mortgaged premises at the foreclosure sale in an action in which the mortgagor or his successors in interest were not excluded from the interest in the mortgaged premises." It would be useful, as I suggest, to give readers some hints in paragraph 212.03 as to the factual and legal reasons which might exclude a mortgagor from his interest in the property; and it would be advisable to point to the type of acts of acknowledgment of the mortgage which might take the mortgagor's right out of the statute of limitation.

Removal of a pending action from one court to another presents a topic of procedural law which is important as well as interesting and difficult. Dismissal of an action is avoided where removal is a possibility; removal is a method which saves expenses and prevents the cutting off of the cause of action by the bar of the statute of limitation which at the time when it becomes evident to the judge that his court lacks jurisdiction might have run while its period had not expired when the proceeding commenced. All this shows the social-economic advantages which the method of removal has over dismissal.

The CPLR on the whole reorganized the pertinent provisions of the CPA which were scattered throughout the code because, to quote from paragraph 325.01, they had been enacted at "different times and without consideration of their inter-relationship." However, in 1961, very important amendments to article VI, section 19(a)-(k) of the New York Constitution were enacted which substantially change the traditional structure of removal.

The reviewer fully agrees with the authors that, aside from some constitutional provisions the operation of which has to await future legislation such as subsections (c), (g), (h), (i) and (k) of section 19, all the other subsections are self-executing. As a result, at present the concurrence of the provisions of the CPLR on the one hand and of the Constitution on the other, cannot be overlooked. To illustrate, subdivision (a) of section 19 of article VI of the Constitution reads:

> The supreme court may transfer any action or proceeding, except one over which it shall have exclusive jurisdiction which does not depend upon the monetary amount sought, to any other court having jurisdiction of the subject matter within the judicial department provided that such other court has jurisdiction over the classes of persons named as parties. As may be provided by law, the supreme court may transfer to itself any action or proceeding originated or pending in another court within the judicial department other than the court of claims upon a finding that such a transfer will promote the administration of justice.

As one can see, the range of free exercise of the judicial power is much wider

where it is based on this constitutional norm than it is on the basis of CPLR section 325(a). According to the latter provision, the supreme court may remove an action—only upon motion—to the proper court, where a mistake was made in the choice of the court in which that action was commenced.[33] But according to the quoted constitutional provision, the supreme court may, on its own motion, transfer such an action to another court although the court where the action was commenced has jurisdiction.

Another illustration is supplied by section 19(d)(3) of the constitutional amendment. According to those provisions the Surrogate's Court is under the duty to remove any action or proceeding over which it has no jurisdiction to the supreme court or a county court or a family court or an inferior court unless the action was transferred to it from such a court. Similar provisions in the constitutional amendments cover such removal from a county court, family court or the civil court of New York to the supreme court. All this is as new as the discretionary power of the supreme court under section 19(a) previously quoted.

Now the supreme court may transfer a properly commenced litigation to a lower court, *e.g.*, for the reason that damages likely to be granted call for a reduction to an amount which falls under the authority of a court of limited jurisdiction. In contrast to the corresponding provision of the CPLR (section 325(c)) and its predecessor (CPA section 110-b), the constitutional provision does not require consent of all the parties to such a removal.

Naturally, considerations of space allow only the presentation of illustrations. The authors say that the constitutional amendment has "superseded" the provisions of CPLR section 325(a), (c) and (d). I believe that the term "superseded" is not justified. It is clear, of course, that in the case of inconsistencies between legal norms of the two groups, the constitutional provisions must prevail. However, prevalence is not pre-emption. It seems, therefore, more appropriate to say that now the New York law of removal of pending actions has a two-faceted character. To illustrate, where plaintiff instituted his personal injury action in a court of limited jurisdiction, but later realized that the damages actually suffered exceed substantially the limitation placed on the court's jurisdiction, the only way of getting the suit removed to the supreme court is that prescribed in section 325(b) of the CPLR. On pertinent motion, the supreme court may remove the action to itself. The constitutional amendment allows such a transfer by this court to itself where "it may be provided by law" and in addition where the supreme court will hold that "such a transfer will promote the administration of justice." The constitutional provision will apply where the party does not resort to section 325(b); but as one sees, the constitutional provision will, in a situation of the illustrated type, operate, if at all, only subsidiarily.

It may be added that in such situations CPLR section 325(b) has greatly

33. *In re* Garfield, 144 N.Y.S.2d 468 (Sup. Ct. 1955) (the statute does not authorize the defendant to apply for removal).

widened the possibility of removal which formerly under section 110-a of the CPA was restricted to cases of damages and of title to real property. On the other hand, courts under that section of the CPA have held that the defendant sued in an inferior court does not become entitled to apply for removal to the supreme court for interposing a counterclaim beyond the jurisdictional limits of the inferior court.[34] Whether, as the authors assume, courts under the aegis of the CPLR will stick to such narrow interpretation remains to be seen.[35] However, it is for the legislature to implement the second clause of section 19(a) of the Constitution, quoted previously. Then the supreme court could transfer such a case to itself where such a transfer "will promote the administration of justice." The latter requirement would have to be regarded as satisfied, for to deny the removal would mean to compel the defendant to institute an independent action in the supreme court; and section 19(a) is primarily intended to be used against calendar congestion.

The power of the supreme court to transfer an action to any other court which has jurisdiction of the subject matter can be analogized to the doctrine of *forum-non-conveniens* developed by New York courts over more than half a century. It remains to be seen whether the supreme court will utilize this power in due course.

This writing, based on a review of the first volume of the remarkable treatise, was almost completed when the second and third volumes were published. For this reason, the reviewer may perhaps add a supplement to this paper with emphasis on those volumes. But even a superficial look at their contents confirmed the impression which the study of the first volume made upon him, namely, that the job of working out a profound treatise on civil procedure has been extraordinarily well done by the authors. Each and every rule is given a thorough interpretation from the scholarly and, what is particularly important, from the practical angle; for the interpretation is carefully implemented with case material, thus offering splendid information on any topic. In addition, there are critical reflections upon decisions which have invited objections. The job already done by the authors, who will round out their work with future volumes, warrants the prediction that this book presents a most admirable and probably the most outstanding work offered lawyers in New York and elsewhere on the present law of New York civil procedure.

34. See, *e.g.*, Mitchell & Co. v. Allman, 17 Misc. 2d 907, 187 N.Y.S.2d 769 (Sup. Ct. 1959).

35. The 1962 amendment to the N.Y. Judiciary Law, § 190, subd. 3 provided for a party's application for removal to the supreme court from the county court where, in an action there, a counterclaim was interposed for more than $6000. However, by N.Y. Sess. Laws 1963, ch. 250, § 1, this provision was struck down.