Fordham Law Review

Volume 24 | Issue 3 Article 10

1955

Legislation

LEGISLATION

NEW YORK CIVIL PRACTICE ACT, SECTION 992—ACTIONS CANNOT BE MAINTAINED IN CERTAIN CASES.—Chapter 491 of the Sessions Laws of 1955 amends section 992 of the Civil Practice Act relating to encroachments of abutting walls so as to extend the applicability of the section.

Since 1898 it has been the law of New York that where a building in a city encroaches six inches or less onto an adjoining lot and abuts a building thereon, the property owner whose land has been encroached upon, has one year from the time of the completion of the encroaching wall to bring an action for its removal and an additional year to bring an action for damages.[1] The legislature in its 1955 Session extended the law so that it now applies to all communities in the state.

Prior to the amendment of section 1499 of the Code of Civil Procedure,[2] which was the forerunner of the newly amended section, there was a need for a solution to the problem of encroachment of abutting walls. This need was primarily caused by the tremendous increase of the population in the cities, between 1890 and 1900, with its resultant increase in tenement building, especially in New York City.

In *Baldwin v. Brown*[3] the plaintiff and the defendant had mutually agreed on using a fence as a practical line of demarcation for their adjoining land. Forty years after the agreement, the plaintiff had his land surveyed and it was discovered that the fence cut off a strip of land about "a chains length." The plaintiff brought an action to recover this strip, and in upholding title in the defendant the Court of Appeals held that practical location and long acquiescence in a boundary line are conclusive, not upon the notion that they are evidence of a parol agreement establishing the line, but because they are of themselves proof that the location is correct, of so controlling a nature as to preclude evidence to the contrary.

The doctrine of practical location was revived as a method of determining title to land on which there had been a slight encroachment by the adjoining landowner in the dissenting opinion of *Wilhelm v. Federgreen*.[4] The plaintiff in that case brought an action against the defendant for failing to pass legal title to a certain lot. A building on the lot extended onto the adjoining lot a distance of two and one-half inches and had been standing for twenty-five years. The plaintiff's right to recover was upheld on the ground that, though the defendant was in possession of the land in question for twenty-five years, the parties having title to the land when there was adverse possession were infants and the statutory period did not run against them. However, in his dissenting opinion, Justice Barret wrote, "To condemn a title upon such facts would be a serious inroad upon the rule of repose, and would limit the practical location doctrine to the strict conditions attaching to adverse possession. The former doctrine is quite as important to the quieting of city titles as it is with regard to farm lands. It has been applied in the country where the practical location has been fixed by a hedge, fence, or row of trees. It may well be applied with equal liberality where the boundary was originally fixed by the solid wall of a four-story house."[5]

In 1898, by the amendment of section 1499 of the Code of Civil Procedure,[6] the

1. N.Y. Civ. Prac. Act § 992 (1939).
2. N.Y. Laws c. 517 (1898).
3. 16 N.Y. 359 (1857).
4. 2 App. Div. 483, 38 N.Y. Supp. 8 (1st Dep't 1896), aff'd, 157 N.Y. 713, 53 N.E. 1133 (1899).
5. Id. at 489, 38 N.Y. Supp. at 13.
6. See note 2 supra.

theory underlying the practical location doctrine was embodied in the statute. The relationship between section 1499 of the Code of Civil Procedure and the practical location doctrine was pointed out in *Volz v. Steiner*.[7] It was there stated that when the owner, whose land has been encroached upon, subsequently erects a building thereon, he has practically located the line between the two adjoining lots. This relationship was again expressed in *Bergman v. Klein*.[8]

The statute (section 1499) narrowed the practical location doctrine by limiting its application. It was held, for example, in *Bergman v. Klein* that the section was applicable only where the owners of both pieces of land had bought buildings whose walls abut one on the other. The section was further limited to instances where buildings, whose walls abut one on the other, had been erected subsequent to the purchase by the adjoining landowners.[9] Where the owner of the land encroached upon has not erected a building abutting the defendant's wall, the section does not apply.[10] For the section to be applicable the abutting wall need not extend the same depth, but it is sufficient that there is an encroachment of six inches or less.[11]

Actually the statute functions as a statute of limitation. It was so stated in *Volz v. Steiner*, saying, ". . . this provision is in the nature of a limitation of the right to commence an action. It limits the time within which a purely technical right to recover possession of a small strip of land upon which an adjoining building encroached, and I can see no reason why such a provision is not valid. No property is taken and no right is destroyed, except so far as all statutes of limitations destroy a right of recovery where an action to enforce the right is not commenced within a specified time."[12]

Today the population trend is away from urban living. In 1920 it was estimated that approximately four-fifths of our non-farm housing was constructed in urban areas. However, by 1947 this estimate dropped to less than three-fifths and the trend away from urban centers is apparently still continuing.[13] With this shift to suburban living it became quite apparent that it would be appropriate to broaden the scope of section 992 by making it applicable to all minor encroachments by abutting walls whether such violation occurs in a city or in smaller communities.

NEW YORK CIVIL PRACTICE ACT, SECTION 189—CHANGE OF PLACE OF TRIAL OF ACTIONS PENDING IN OTHER COURTS; SECTION 110-B—REMOVAL ON CONSENT TO COURTS OF LIMITED JURISDICTION.—Chapters 613 and 717 of the Session Laws of 1955 amend sections 189 and 110-b of the Civil Practice Act effecting practice procedures in the removal of actions from one court to another.

Chapter 613 eliminates the exception, imposed by the Laws of 1925, upon the City Court of New York, which exempted the City Court from a privilege enjoyed by other courts of record.[1] This privilege enabled a party bringing an action in one court under

7. 67 App. Div. 504, 73 N.Y. Supp. 1006 (1st Dep't 1902).

8. 97 App. Div. 15, 89 N.Y. Supp. 624 (2d Dep't 1904).

9. Jacobus v. Willis, 74 Misc. 591, 134 N.Y. Supp. 455 (Sup. Ct. 1911).

10. Goldbacher v. Eggers, 38 Misc. 36, 76 N.Y. Supp. 881 (Sup. Ct. 1902), aff'd, 82 App. Div. 637, 84 N.Y. Supp. 1127 (2d Dep't 1903).

11. Feingold v. Marx Co., 191 Misc. 42, 74 N.Y.S. 2d 869 (Sup. Ct. 1947).

12. 67 App. Div. at 511, 73 N.Y. Supp. at 1011.

13. U.S. Housing And Home Finance Agency, The Housing Situation 18 (1949)

1. N.Y. Sess. Laws 1955, c. 613 amends section 189 of the Civil Practice Act to read as follows: "Change of place of trial of actions pending in other courts. The supreme court upon the application of either party may, and in a proper case must, make an order directing

certain circumstances, i.e., the inaccessibility of a material witness[2] who could not be subpoenaed by the court of limited jurisdiction, or in a situation wherein a party could not receive a fair and just trial in a given court, to make an application for a change of venue to the Supreme Court for a trial in another county.

Historically, it was never the intent of the legislature to exclude the City Court of New York from the Supreme Court's right of removal. Section 189 originally existed as section 218 of the Code of Civil Procedure,[3] but this exclusion was merely illusory for section 319 of the Code of Civil Procedure vested the Supreme Court with the power, denied in section 218 of the Code of Civil Procedure, to remove actions from the City Court to other county courts.[4] With the adoption of the Civil Practice Act in 1920, section 319 became section 22 of the New York City Court Act. This latter act was repealed in 1926 and the substance of section 22 was omitted from the new City Court Act adopted that same year.[5] The failure to include the equivalent of section 22 in the new act did not immediately raise problems. The problem of the inaccessibility of material witnesses was met by other sections of the New York City Court Act, which dealt with the service of subpoenas by the City Court outside the City of New York. Principally the need was met by section 27 of the newly enacted New York City Court Act which provided: "All process and mandates of the court may be executed in any part of the state."[6] This rule evolved originally from section 40 of the Marine Court Act.[7] Section 40 of the latter act limited the execution of mandates to the City of New York which was the county of New York. An exception did exist, however, which permitted the service of subpoenas of that court in the counties of Richmond, Kings, Queens, and Westchester.[8] Section 40 of the Marine Court Act was substantially enacted into section 37 of the New York City Court Act.[9] Through

---

that an issue of fact joined in an action or special proceeding pending in any other court of record, except an action in a county court relating to real property, be tried at a term of the supreme court in another county on such terms and under such regulations as it deems just. After the trial the clerk of the county in which it has taken place must certify the minutes thereof, which must be filed with the clerk of the court in which the action or special proceeding is pending. The subsequent proceeding in the last mentioned court must be the same as if the issue had been tried therein."

2. Matter of Hancock Mutual Life Ins. Co., 250 App. Div. 879, 295 N.Y. Supp. 152 (2d Dep't 1937). It was held here that the denial of an application for the removal of an action from the City Court of Yonkers to the Supreme Court, New York County, was an improper exercise of discretion where all but one of defendant's necessary and material witnesses were residents of New York County and the City Court of Yonkers was without power to issue its subpoena for service outside Westchester County.

3. Code of Civ. Proc. § 218 (1876).

4. Code of Civ. Proc. § 319 stated that: "Removal of action to supreme court from city court. The supreme court, at a term held in the first judicial district, may, by an order made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action brought in the marine court, for the purpose of changing the place of trial thereof. Where an order for removal is made, as prescribed in this section, the place of trial must be changed by the same order to another county, and the subsequent proceedings therein must be the same as if the action had been originally brought in the supreme court. . . ." N.Y. Laws c. 448 (1876).

5. N.Y. City Ct. Act (1926).

6. Former N.Y. City Ct. Act § 27 (1926).

7. Name changed to the City Court of New York by N.Y. Laws c. 26 (1883).

8. Marine Ct. Act § 40 (1875).

9. Former N.Y. City Ct. Act § 37 (1920).

section 37 subpoenas continued to emanate from the City Court of New York to the counties of Richmond, Kings, Queens, Westchester, Bronx, and New York.

The New York City Court Act of 1920 was repealed and a new court act was passed in 1926.[10] Section 37 was replaced by section 27 (quoted above) which conferred broad powers upon the City Court, allowing its mandates to be executed in any part of the state. This principle was challenged the year after it was established in the case of the *American Historical Society v. Glenn*.[11] It was held that sections 15 and 18 of article VI of the New York Constitution would not permit personal service of a City Court summons outside the City of New York.[12] In substance, the court held that sections 15 and 18 of article VI limit the City Court's jurisdiction to the City of New York, and that concurrent jurisdiction with the Supreme Court exists only within the City of New York. The determination of the *Glenn* case evoked the 1933 amendment of section 27 which provided that ". . . all process and mandates of the court may be executed in any part of the City of New York."[13]

The omission of section 319 (later section 22 of the New York City Court Act) and the amendment of section 27 of the New York City Court Act left section 189 of the Civil Practice Act as the sole controlling statute effecting change of venue actions and as such, a removal for change of trial from the City Court of New York was effectively precluded. With the amendment of section 27, the City Court being thus barred from further issuance of subpoenas for needed material witnesses, it became imperative that the exception in section 189 of the Civil Practice Act be deleted.

The amendment as it now stands rectifies the situation and establishes a uniformity which it was never the manifest intent of the legislature to deny. The amendment allows the Supreme Court, without exception, to order a change of trial, though the county designated in the complaint is proper, if an impartial trial cannot be had in the designated county, or if the convenience of material witnesses and the ends of justice will be promoted by the change.[14]

Chapter 717 amends section 110-b of the Civil Practice Act.[15] The amendment accords the plaintiff the right, in the absence of any counterclaim asserted by the defendant, to transfer his action initiated in the Supreme Court, or a County Court outside New York City, to a lower court, when it has been discovered that the damages

10. N.Y. City Ct. Act § 27 (1926).

11. 248 N.Y. 445, 162 N.E. 481 (1928).

12. N.Y. Const. art. VI, § 15 (1925) and § 18 (1925).

13. N.Y. City Ct. Act § 27 (1933).

14. 21st N.Y. Jud. Council Rep., at 171-175 (1955).

15. N.Y. Sess. Laws 1955 c. 717 amends subdivision one of § 110-b of the Civ. Prac. Act to read as follows: "1. Whenever in any action in the supreme court or in a county court in a county outside the city of New York, or in the city court of the city of New York it shall appear that the damages sustained are less in amount than originally alleged, claimed or prayed for in any pleading so that but for amount demanded said action could have been brought in a lower court, such action may be transferred to a lower court having jurisdiction thereof by order of a justice or judge of the court in which such action is pending upon the written consent of all parties to such action to said transfer and to the reduction of the amount of damages demanded in any pleading to a sum within the jurisdictional limits of such lower court; provided, however, that the consent of a defendant shall not be required in any action, otherwise transferable under this section, in which such defendant has interposed no counterclaim and in which such court to which the transfer is to be made would have had jurisdiction of the action and over such defendant if such action had originally been instituted in such court."

sustained are less than originally pleaded.[16] The purpose of the amendment is to encourage and facilitate appropriate transfers from higher courts to lower courts and thus relieve the more crowded calendars of the higher courts.

Section 110-b as originally drafted in the Laws of 1949 required the consent of both plaintiff and defendant prior to the transfer of any action. The need for the amendment was cited in such cases as *Berossey v. Kleiner*,[17] where it was held that the Supreme Court lacked the power to transfer the case to the City Court without the defendant's consent.

Under the new amendment if a defendant has asserted a counterclaim the transfer cannot be made without the consent of all parties. Consent alone, of all the parties involved will not be competent to dispel jurisdictional requirements when the court to which the transfer is sought lacks jurisdiction. The rule, therefore, of such cases as *Friedman v. Strand*[18] would not be changed by the amendment. In that case plaintiff moved for the transfer of a negligence action from the Supreme Court, Bronx County. The defendants were residents of, and were served in Nassau County. Plaintiff's motion to remove the action to the Municipal Court, Borough of the Bronx, which would not have had jurisdiction of the case if its process had been served initially in Nassau, was denied. Thus the amendment does not allow the plaintiff to do indirectly what is forbidden to him directly. Jurisdictional requirements cannot be circumvented.

The amendment fulfills a definite need. It presents a moderate and reasonable solution to the problem of crowded calendars. Through it, transfers will be facilitated and congestion in the courts partially alleviated.[19]

NEW YORK CIVIL PRACTICE ACT, SECTIONS 49 AND 1139. MARRIAGE—ANNULMENT FOR FRAUD—LIMITATION.—Chapter 257 of the Session Laws of 1955 amends sections 49 and 1139 of the Civil Practice Act so as to provide a statute of limitations in actions to annul a marriage on the ground of fraud.

Section 49 sets forth those actions which must be commenced within three years after the cause of action has accrued. It is amended by adding thereto an action to annul a marriage on the ground of fraud.

Section 1139 of the Civil Practice Act provides a cause of action for the annulment of a marriage on the grounds that it was contracted as a result of force, duress or fraud. The section as amended incorporates by reference the section 49 limitation of three years from the discovery of the fraud by the defrauded spouse. The action may be maintained by the defrauded spouse or by the parent or guardian of the person whose consent was obtained by fraud or by any relative of the defrauded party who has an interest to avoid the marriage.

Section 1139 was derived without change from section 1750 of the Code of Civil Procedure which was originally taken from sections 30 and 31 of the Revised Statutes.[1]

In 1848 *Montgomery v. Montgomery*,[2] interpreting sections 30 and 31, held that since an annulment action was an equitable action, it was subject to the statutory

16. An added factor encouraging the plaintiff in moving for a transfer is the fact that the county courts outside the City of New York have a raised jurisdiction of $6,000 as of January 1, 1954. N.Y. Laws c. 3 (1954).

17. 197 Misc. 407, 95 N.Y.S. 2d 22 (Sup. Ct. 1950).

18. 203 Misc. 170, 115 N.Y.S. 2d 266 (Sup. Ct. 1952).

19. See note 14 supra.

1. 2 N.Y. Rev. Stat. 143, § 30, 31 (1832).

2. 3 Barb. Ch. 132 (1848).

limitation of section 51[3] of the Revised Statutes, which provided that all equitable actions based on fraud must be instituted within six years after the discovery of such fraud. Substantially, sections 30 and 31 remained unchanged until 1880, when they were replaced by section 1750 of the Code of Civil Practice.

Section 1750 changed the law by providing that an annulment action based on fraud could be brought at any time.[4] Thus annulment actions for fraud were excluded from the statutory time limitations applicable to other actions based on fraud.

In 1920, with the repeal of the Code of Civil Procedure, section 1750 was substituted without change by section 1139 of the Civil Practice Act. The most definitive statement of the law on section 1139 is found in *Campbell v. Campbell.*[5] The court struck out a defense based on section 53 of the Civil Practice Act,[6] which provides that where no specific time limit has been established by the Civil Practice Act, the action, must be brought within ten years. Nor did the court recognize the defense based on section 48,[7] which sets out the actions that are barred, if not brought within the statutory limitation of six years. The court held that the construction of section 1139 was such that it precluded all affirmative defenses (including the defense of laches) based upon a period of time, regardless of how they may be denominated. The section thus limited the defendant to a general denial of the alleged fraud and to the one affirmative defense stated, namely, that the parties voluntarily cohabitated as husband and wife with full knowledge of the facts constituting the fraud.

The reasoning of the *Campbell* decision was followed in *Gilels v. Gilels,*[8] which also held that neither time limitation nor laches was a valid defense.

The defense of laches again was raised in the case of *Vonbiroganis v. Von Brack.*[9] There the court denied the defense of statute of limitations and of laches, but indicated that a long delay in bringing the suit, while not an absolute bar, may justify the refusal of the annulment, especially where the case is not a strong one or not clearly proved or where it may be taken as evidence of waiver or acquiescence or as indicating an ulterior motive.

The law on the question of time limitation in an annulment action was, until now, essentially that of the *Campbell* case, i.e., that the action could be brought at any time. However, there had been legislative activity to modify the case law.

In 1947 a bill was introduced to amend section 1139 by providing a five year limitation in instituting the action, the time to run from the date of marriage. Criticism of the bill was expressed by the Committee on State Legislation of the Bar Association of the City of New York. The Commission felt that "the courts have ample power to deny an annulment where there is proof of long delay or acquiescence. No statutory authority is required for the exercise of that power."[10]

A similar bill was again introduced in the 1954 Session. It would have amended section 49 of the Civil Practice Act, so that an annulment action for fraud would have to be brought within three years of discovery of the fraud. Governor Dewey vetoed the bill and, in quoting the Committee on State Legislation of the Bar Association of the

3. 2 N.Y. Rev. Stat. 301, § 51 (1832).

4. N.Y. Code Civ. Proc. § 1750 (1880).

5. 239 App. Div. 682, 268 N.Y. Supp. 789 (1st Dep't), aff'd, 264 N.Y. 616, 191 N.E. 592 (1934).

6. N.Y. Civ. Prac. Act § 53 (1920).

7. N.Y. Civ. Prac. Act § 48 (1921).

8. 159 Misc. 31, 287 N.Y. Supp. 5 (Sup. Ct. 1935), aff'd 247 App. Div. 922, 288 N.Y. Supp. 882 (4th Dep't 1936).

9. 64 N.Y. Supp. 2d 885 (Sup. Ct. 1946).

10. N.Y. County Lawyers Ass'n. Report, No. 74, Feb. 17, 1947.

City of New York, said, "this amendment would work a significant change in the law as set down in the *Campbell* case, which result was based on the construction of Section 1139 . . . . As the bill would change the present rule without amending Section 1139 an inconsistency could arise."[11] It would have been possible for a relative or guardian to bring an action for annulment which could have been denied by the statute of limitations to the deceased defrauded spouse. Thus the bill's purpose would not be accomplished, without amending section 1139 at the same time. This technical objection was cured in the present amendment but the Committee of the Bar Association of the City of New York stated, "the purpose of the bill, to bar such actions where the fraud had been known to the other party for many years, is commendable. However, if the bill is also intended to discourage *collusive* annulment actions, it is not well calculated to achieve that end . . . for the statute of limitations is a defense which need not be asserted, and, presumably, a collusive defendant would not assert it."[12]

There is no doubt the amendment attempts to block collusive annulment actions, by limiting the time within which the action may be brought. The criticism of the Bar Committee is a valid one. The bill would have been more effective, if, as a matter of evidence, it required the plaintiff to prove that the time limitation had not run. Such a provision would make consideration of the time period mandatory upon the court and would not have left it to the discretion of the defendant.

Thus, as the bill stands, it will do little more than to prevent stale actions. Reform is needed to prevent collusive actions but can it be achieved through stopgap legislation?

NEW YORK CIVIL PRACTICE ACT, SECTION 354.—PRIVILEGED COMMUNICATIONS.—Chapter 466 of the Session Laws of 1955 amends the Civil Practice Act by clarifying the application of sections relating to confidential communications.

At common law, communications made by a patient to his physician for the purpose of receiving medical treatment, even though made in the strictest confidence, were not privileged.[1] The privilege was first established in New York in 1828 by statute which read: "No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."[2] In 1876, the rule was embodied in the Code of Civil Procedure.[3] The rule was later incorporated in the Civil Practice Act.[4]

The Court of Appeals held that the prohibition against a physician's disclosure of information acquired while attending a patient ". . . means not only communications received from the lips of the patient but such knowledge as may be acquired . . . from the statement of others who may surround him at the time, or from observation of his appearance and symptoms . . . . Information thus acquired is clearly within the scope and meaning of the statute."[5]

In 1891, the Code of Civil Procedure was amended so as to provide for two types of waiver of the privilege. One type permitted waiver at the trial by the patient himself.

11. Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 415-16 (April 5, 1954).
12. Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 218 (March 7, 1955).

1. Edington v. Aetna Life Ins. Co., 77 N.Y. 564 (1879).
2. 2 N.Y. Rev. Stat. 406 (1828).
3. Code of Civ. Proc. § 834 (1876).
4. N.Y. Civ. Prac. Act § 352 (1920).
5. Edington v. Mutual Life Ins. Co., 67 N.Y. 185, 194 (1876).

The other type permitted waiver by the executor of a deceased patient. This allowed the physician to reveal any information acquired while attending the deceased patient ". . . except confidential communications and such facts as would tend to disgrace the memory of the patient . . . ."[6] Later, an amendment extended the right of waiver to the surviving spouse or any other party in interest.[7] In 1904, "a professional or registered nurse" was included in the privilege and in the waiver.[8]

The question as to what the legislature meant by confidential communications arose in *Matter of Cashman*.[9] Here the question, "at that time in 1932, what did you find in connection with her condition?" was excluded on the grounds that it was too broad and all inclusive, and in violation of section 354 of the Civil Practice Act. Also excluded was, "doctor, based upon your experience and observation of her and your treatment of her . . . in your opinion . . . was she of sound and disposing mind and memory?" The Surrogate ruled that this question also was too broad and permitted the witness to base his answer upon confidential communications made to him by the decedent. "By 'observation' the witness might very well have based his opinion upon not only his observation by his sense of sight but have supplemented this means of acquiring knowledge by questions to or voluntary oral statements by the decedent."[10] When the Surrogate's decision was affirmed without opinion by both the Appellate Division and the Court of Appeals,[11] it became the controlling precedent in New York.

Matter of Cashman did not give any iron-clad rule as to what would be considered a confidential communication. Such a rule was given in 1954 in *Matter of Coddington*.[12] In this case the Court of Appeals ruled that physicians be permitted to testify in such cases, in event of waiver, to only such matters as they could have noticed and described as laymen. This interpretation seemed to nullify the provision for waiver. Furthermore, this meant that the physician could not testify as freely as a layman, in view of the limitation that no facts could be admitted which would tend to disgrace the memory of the deceased patient. This was a restriction which did not apply to laymen. Thus, in this type of case, a physician lost his value not only for expert testimony, but for any testimony at all.

The Civil Practice Act has now been amended, eliminating the exception for confidential communications. Now, upon waiver, a physician may disclose any information except such confidential communications as would tend to disgrace the memory of the deceased patient.[13]

Now the courts of New York are faced with the task of determining what facts tend to disgrace the memory of the deceased patient. There are not many cases touching upon this point since most cases have been decided on the confidential communication aspect of the statute. It has been held that testimony stating that the deceased had been suffering from tuberculosis[14] or that the decedent died as the result of a mouth infection[15] do not tend to disgrace his memory.

6. N.Y. Laws c. 381 (1891).

7. N.Y. Laws c. 295 (1893).

8. N.Y. Laws c. 331 (1904).

9. 159 Misc. 881, 289 N.Y. Supp. 328 (Surr. Ct. 1936), aff'd, 250 App. Div. 871, 297 N.Y. Supp. 150 (2d Dep't 1937), aff'd, 280 N.Y. 681, 21 N.E. 2d 193 (1939).

10. 159 Misc. at 885, 289 N.Y. Supp. at 333.

11. See note 9 supra.

12. 307 N.Y. 181, 120 N.E. 2d 777 (1954).

13. N.Y. Sess. Laws c. 466 (1955).

14. Murray v. Physical Culture Hotel, 258 App. Div. 334, 16 N.Y.S. 2d 978 (4th Dep't 1939).

15. Waldron v. State, 193 Misc. 113, 82 N.Y.S. 2d 822 (Ct. of Claims 1948).

There is a split of authority as to whether or not testimony concerning suicide tends to disgrace the patient's memory. In a recent case, the Appellate Division ruled that testimony that the deceased had suicidal tendencies tended to disgrace the decedent's memory.[16] It does disgrace the decedent's memory if a physician testifies that the decedent admitted attempting suicide.[17] However, another New York court has held that, unless the circumstances leading to suicide are in themselves immoral or disgraceful, the mere act of self-destruction does not tend to disgrace the memory of the decedent.[18]

Undoubtedly, the present amendment, which was approved by the Association of the Bar of the City of New York,[19] is a step in the right direction. For is there any valid reason for the physician-patient privilege to exist? In very few cases are communications to a physician intended to be confidential. On the contrary, innumerable people are eager to speak at great length concerning their various ailments. It is not essential to the existence of the physician-patient relationship that the communications be regarded as confidential. People would still consult physicians even if there were no guarantee that facts which might disgrace their memories would be legally suppressed. It is also thought that the injury caused to the relationship by disclosure of all the facts is not as great as the benefit thereby gained for the correct disposal of the litigation.[20]

Perhaps it is not yet time to abolish completely the physician-patient privilege. However, it is certainly proper to allow a physician to reveal all the facts when the privilege is waived. In probate litigation, why should a party be deprived of what should be rightfully his, merely to preserve the memory of the decedent?

For those who are still convinced that the reputation of the decedent must be protected at all costs, a similar situation can be found in the field of defamation. Libel or slander upon the memory of a deceased person gives his relatives no cause of action.[21] If the law allows one to defame a decedent, without liability, why should it prevent a physician from telling the truth about him?

NEW YORK CIVIL PRACTICE ACT, SECTION 1296.—PROCEEDING AGAINST BODY OR OFFICER.—Chapter 661 of the Session Laws of 1955, effective September 1, 1955, amends section 1296 of the Civil Practice Act so as to permit the courts to review the measure of punishment, penalty or discipline imposed by administrative agencies.

Section 1296 limited the judicial review of an administrative determination to seven questions only. The amendment adds a new subdivision to section 1296, to be subdivision 5-a, so as to specify an additional question which may be considered in reviewing the validity of an administrative determination: "5-a. Whether the respondent abused his discretion in imposing the measure of punishment or penalty or discipline involved in the determination."[1] Subdivision 5-a was added on recommendation of the Committee on Administrative Law of the New York State Bar Association to counteract case law which consistently refused such judicial review.[2] The change was also

16. Eder v. Cashin, 281 App. Div. 456, 120 N.Y.S. 2d 165 (3d Dep't 1953).
17. Meyer v. Knights of Pythias, 178 N.Y. 63, 70 N.E. 111 (1904).
18. Bolts v. Union Central Life Ins. Co., 20 N.Y.S. 2d 675 (City Ct. of N.Y. 1940).
19. Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 431 (April 21, 1955).
20. 8 Wigmore, Evidence § 2285, (3d ed. 1940).
21. Rose v. Daily Mirror, Inc., 284 N.Y. 335, 31 N.E. 2d 182 (1940).

1. N.Y. Sess. Laws 1955, c. 661.
2. N.Y. State Bar Bulletin, June 1955, at 172; see also N.Y. State Bar Ass'n, Comm. on Administrative Law, at 200-04 (1955).

recommended by The Committee on State Legislation of The Association of the Bar of the City of New York.[3] This same amendment of 1296 was passed by the legislature in 1954 but was vetoed by Governor Dewey. In the veto message Governor Dewey said that the courts ". . . have declined in most instances to consider matters relating to the punishment or penalty imposed. Nevertheless, where excessive penalties have been imposed, means for judicial rectification have not been found entirely lacking."[4] The statement in the veto message that "means for judicial rectification have not been found entirely lacking" apparently has reference to the case of *Tompkins v. Board of Regents*,[5] but in view of subsequent treatment of the *Tompkins* case by the Court of Appeals (especially in *Barsky v. Board of Regents*[6]) it was practically unavailing as a precedent.

Most of the early cases which refused to review the extent of the punishment imposed by administrative bodies were concerned with disciplinary action imposed on firemen and policemen for breaches of duty or departmental regulation. In *People ex rel. Kent v. Board of Fire Commissioners*[7] the relator was dismissed from service as a fireman for being intoxicated. General Term reduced the commissioners' dismissal order to a six months' suspension. The Court of Appeals reversed, asserting that General Term had no power to review the commissioners' discretion with respect to the punishment imposed. The same reasoning prevailed in *People ex rel. Masterson v. French*[8] and *People ex rel. McAleer v. French*.[9] In the latter case the court noted that the dismissal from the police force seemed to be a very harsh punishment but stated that ". . . the extent of the punishment rested entirely in the discretion of the commissioners, and neither the Supreme Court nor this court has any jurisdiction to interfere therewith."[10] In *People ex rel. Morrissey v. Waldo*[11] Judge Cardozo speaking for the court said, "In our opinion, the ruling of the Appellate Division is not to be sustained. We have nothing to do with the measure of the punishment inflicted on the relator. That is a matter for the commissioner."[12] In *People ex rel. Regan v. Enright*[13] the commissioner imposed a fine on relator for carelessly discharging his revolver and thereby injuring an innocent bystander. The Court of Appeals again reversed the Appellate Division's attempt to modify the penalty imposed.

These are but instances of the numerous cases in which the same principle was applied. However, appeals from the punishment or discipline imposed by administrative agencies continued.

The rule forbidding review of the penalty imposed has been followed in cases other than those involved with the disciplining of policemen and firemen. Notably and most recently it was applied in *Sagos v. O'Connell*[14] and *Barsky v. Board of Regents*.[15] In the *Sagos* case, appellant suspended respondent's liquor license for twenty days. The

3. Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 299-301 (March 15, 1954); at 359-62 (March 14, 1955).

4. McKinney, Session Laws of State of New York 1954, at 1423.

5. 299 N.Y. 469, 87 N.E. 2d 517 (1949); see note 2 supra.

6. 305 N.Y. 89, 111 N.E. 2d 222 (1953).

7. 100 N.Y. 82, 2 N.E. 613 (1885).

8. 110 N.Y. 494, 18 N.E. 133 (1888).

9. 119 N.Y. 502, 23 N.E. 1061 (1890).

10. Id. at 507, 23 N.E. at 1062.

11. 212 N.Y. 174, 105 N.E. 829 (1914).

12. Id. at 177, 105 N.E. at 829.

13. 240 N.Y. 194, 148 N.E. 187 (1925).

14. 301 N.Y. 212, 93 N.E. 2d 644 (1950).

15. 305 N.Y. 89, 111 N.E. 2d 222 (1953).

Court of Appeals denied the Appellate Division authority to review the measure of punishment imposed, stating, ". . . we find no provision for the judicial review of the measure of punishment imposed as an incident to disciplinary action ordered by an administrative board. . . ."[16] In the *Barsky* case where respondent had suspended the licenses of two physicians and reprimanded another, the court said, "As to the assertions, by appellants, that the Regents dealt too severely with them, or that the Regents, in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration, it is enough to say that we are wholly without jurisdiction to review such questions. . . ."[17] However, in this latter case, Judge Fuld in a strongly worded dissent attacked the precedents and underscored the need for the present amendment. Said he, "This court has heretofore declined, in most instances, to consider the measure of discipline imposed by an administrative agency . . . . That is a subject, we have concluded, that rests in the discretion of the agency. However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious."[18]

Judge Fuld's argument is a sound one. The penalty imposed of itself, as well as the finding of guilty conduct, might very well result from an arbitrary determination. It is no answer to say, as do some critics of the amendment, that it will encourage ". . . every single litigant to raise the question of penalty and, pointing to this provision, to attempt to inveigle the court to change it."[19] The amendment does not abolish penalties; it merely gives a power to review an abuse of discretion in administering penalties. The courts have not been deluged by petitioners seeking to change administrative determinations under the seven subdivisions of section 1296 as it existed prior to this amendment, and there is no reason to believe that such will now occur.

NEW YORK CIVIL PRACTICE ACT, SECTIONS 290, 291, 296, 299 AND 405.—PRODUCTION OF BOOKS AND PAPERS—NOTICE.—Chapter 497 of the Session Laws of 1955 amends the Civil Practice Act relating to notice to require a party to produce books and papers upon the taking of a deposition.

Section 290 of the Civil Practice Act, which prescribes the contents of a notice for the taking of testimony, is amended by the addition of a new subdivision, which eliminates the necessity for an order or subpoena duces tecum formerly required to obtain the production of books and papers at a pre-trial examination.

The amendment to section 291 permits a party to raise a question as to the right to have books and papers produced, by moving to vacate or modify the notice given under section 290.

Amended section 299 imposes the penalty of striking out a party's pleading where there is a wilful failure to produce the books and papers required either by an order or notice. This extends the remedy which previously existed only for failure of a party to appear for examination.

An amendment to section 405, a general provision relating to penalties, including contempt, conforms its provisions with those of the amended section 299.

The practice of permitting pre-trial use of books and papers has evolved gradually

16. 301 N.Y. at 215, 93 N.E. at 645.

17. 305 N.Y. at 99, 111 N.E. 2d at 226.

18. Id. at 107-08, 111 N.E. 2d at 231-32.

19. McKinney, Session Laws of State of New York 1955, Memorandum of State Education Department, at 1786.

in New York over a period of more than seventy-five years. The practice under the Code of Civil Procedure was similar to the examination which may be held pursuant to a notice or order today. Such production of books and papers could be obtained only with a subpoena duces tecum[1] and their evidential use was limited to refreshing the recollection of a witness. If the records did not refresh the recollection of the witness, they could not be introduced separately as evidence. An amendment was made to the Code in 1880,[2] whereby a court could compel the production of the books and papers of a corporation or association but their use was restricted to refreshing the recollection of a witness.[3] An amendment to the Code in 1911 provided for the introduction into evidence of the books and papers of a corporation if the examination was obtained pursuant to an order.[4] In 1921, the Civil Practice Act extended this provision to any party or person, corporate or otherwise.[5]

Prior to 1953, an examination before trial could be initiated by an order[6] or notice.[7] The production of books and papers, however, could be compelled only by means of a subpoena duces tecum or an order.[8] Books and papers produced after service of an order were subject to examination and inspection and could be received in evidence as to specific entries and accounts, while those produced after a subpoena duces tecum were not subject to such usage.[9] When the examination was obtained pursuant to a notice, the books and papers could be obtained only if the notice was accompanied by service of a subpoena duces tecum.[10] The use of the papers produced was then limited to refreshing the recollection of the witness.[11] If the witness claimed that the papers did not, in fact, refresh his recollection, the examining party was precluded from any further inspection of such books and papers unless it should appear from the testimony that the entry is in the handwriting of the witness.[12] If the books and papers did refresh the recollection of the witness, such books and papers could then be marked for identification.

Where the examination was initiated by an order and a request was made for the production of books and papers, such papers were subject to a limited inspection as to specific entries and could be introduced into evidence whether or not they did refresh the recollection of the witness.[13] By the addition of a new subdivision to section 296 in 1953, the legislature removed the distinction in the use to which books and papers produced pursuant to a subpoena duces tecum could be put and those which were produced in response to an order.[14]

1. Rheims v. Bender, 185 App. Div. 61, 172 N.Y. Supp. 543 (2d Dep't 1918); In re Sands, 98 App. Div. 148, 90 N.Y. Supp. 749 (1st Dep't 1904).

2. N.Y. Laws c. 536 adding subdiv. 7 to § 872 (1880).

3. Duffy v. Consolidated Gas Co., 59 App. Div. 580, 69 N.Y. Supp. 635 (1st Dep't 1901).

4. N.Y. Laws c. 781, N.Y. Code Civ. Proc. § 872 (7) (1911).

5. N.Y. Civ. Prac. Act § 296 (1921); Fey v. Wisser, 206 App. Div. 520, 202 N.Y. Supp. 30 (2d Dep't 1923).

6. N.Y. Civ. Prac. Act § 293 (1895).

7. N.Y. Civ. Prac. Act § 290 (1923), later amended by N.Y. Sess. Laws c. 497 (1955).

8. N.Y. City Car Advertising Co. v. Regensburg & Sons, Inc., 205 App. Div. 705, 200 N.Y. Supp. 152 (1st Dep't 1923).

9. N.Y. Civ. Prac. Act § 296 (1921), later amended by N.Y. Sess. Laws c. 497 (1955); N.Y. City Car Advertising Co. v. Regensburg & Sons, Inc., 205 App. Div. 705, 200 N.Y. Supp. 152 (1st Dep't 1923).

10. Soehner v. Aplo Clothing Co., 251 App. Div. 793, 296 N.Y. Supp. 701 (4th Dep't 1937).

11. Klapp v. Merwin, 122 Misc. 708, 203 N.Y. Supp. 694 (Sup. Ct. 1924).

12. Bigio v. Zaike, 102 Misc. 561, 170 N.Y. Supp. 90 (Sup. Ct. 1918).

13. Schulz v. Agfa Ansco Corp., 149 Misc. 821, 269 N.Y. Supp. 300 (Sup. Ct. 1933).

14. N.Y. Laws c. 49 (1953).

The present amendments eliminate the requirements for an order or subpoena duces tecum. The books and papers can now be obtained pursuant to a simple notice, thus following the trend in New York toward more liberal pre-trial examination rules.[15]

NEW YORK CIVIL PRACTICE ACT, SECTION 573—STAY OF PROCEEDINGS ON APPEAL.—Chapter 654 of the Session Laws of 1955 amends section 573 of the Civil Practice Act[1] so as to allow a lower court to retain jurisdiction of a motion for a new trial made under sections 549 and 552 of this act for a period of twenty days from the filing of a notice of appeal.

Prior to the enactment of this amendment, which was effective September 1, 1955, there was a possibility that the very wording of section 573 might frustrate in part the historical privilege of a lower court to retain jurisdiction of a motion for a new trial while its judgment was being appealed. This situation arose from the section's provision for a five day extension of the stay of execution after affirmance or modification by the appellate court.[2] This five day period was subject to interpretation as a time during which no motion for a new trial could be made in the lower court.

The New York courts have not considered the perfecting of an appeal and the resulting stay as precluding the making of a motion for a new trial either at trial or special term. Indeed, in a proper case, the time to make such a motion has been extended even past the execution of judgment.[3]

Consequently, the present amendment to section 573 will clarify this section to the extent that the special five day stay therein provided will not be regarded as a period "in vacuo" for the granting of motions for a new trial under sections 549[4] and 552.[5]

Section 573 of the Civil Practice Act is derived substantially from section 1310 of the Code of Civil Procedure[6] which in turn was a consolidation of sections 339 and 342 of the old Code of Procedure.[7] The section's inherent purpose was to protect the party appealing from having the judgment enforced while the controversy was pending.

It is well settled in New York that unless the appeal is being taken on behalf of the people or a domestic municipal corporation, the perfecting of an appeal does not, in itself, stay execution of the judgment.[8] Where an appellant neglects to obtain a stay of

15. See Rules Civ. Proc. 121-a (1952), which permits all four departments to have examinations before trial regardless of the burden of proof. It also permits such examinations in personal injury actions.

1. N.Y. Civ. Prac. Act § 573 (1945).

2. Ibid.

3. "The correct rule appears to be that a motion for a new trial may be entertained not only after the entry of judgment, but during the pendency of an appeal therefrom and even subsequent to the collection of the judgment." Gentile v. Marcus, 55 N.Y. Supp. 2d 901, 903 (Sup. Ct. 1945); accord, Tracey v. Altmyer, 46 N.Y. 598 (1871); Scott v. Town of North Salem, 138 App. Div. 25, 122 N.Y. Supp. 497 (2d Dep't 1910); James McCreery Realty Corp. v. Equitable National Bank, 52 Misc. 300, 102 N.Y. Supp. 975 (N.Y. City Court 1907), aff'd 54 Misc. 508, 104 N.Y. Supp. 959 (App. T. 1st Dep't 1907), aff'd, 123 App. Div. 358, 107 N.Y. Supp. 1080 (1st Dep't 1908); Smith v. Lidgerwood Mfg. Co., 60 App. Div. 467, 69 N.Y. Supp. 975 (2d Dep't 1901).

4. N.Y. Civ. Prac. Act § 549 (1951).

5. N.Y. Civ. Prac. Act § 552 (1890).

6. N.Y. Code of Civ. Proc. § 1310 (1917).

7. N.Y. Code of Proc. §§ 339 (1895), 339a (1912), 340 (1910), 341 (1914), 342 (1877).

8. Thorne v. Thorne, 210 App. Div. 55, 205 N.Y. Supp. 284 (1st Dep't 1924); Steinback

proceedings, even though he has perfected his appeal, section 573 will not save him from having the judgment executed and he may ultimately have to resort to restitution.[9] In a recent case it was held that section 573 must be read in conjunction with section 614,[10] with the result that perfecting an appeal does not result in staying proceedings unless a statute explicitly so provides.[11] Hence, where there is no provision in the Civil Practice Act for a specific type of undertaking, the appellant must also get an order granting a stay of execution or he may well find himself, though successful in his appeal, being obliged to seek restitution.

Only minor changes in wording were made in section 573 prior to 1945.[12] Section 573, in conjunction with sections 614, 615, and 593-601[13] codified the procedures surrounding the staying of execution pending appeal. In 1945 this section as well as all others having a bearing on this general subject, underwent a thorough re-evaluation by the Judicial Council, whose recommendations were subsequently enacted into law.[14]

In the Judicial Council's Eleventh Annual Report the words, "if any," after the phrase, "and the other acts," in section 573 were proposed to be deleted, thereby removing once and for all any possible implication that the stay would automatically result from merely perfecting the appeal.[15]

Another recommendation in this report, which was likewise subsequently incorporated in section 573,[16] concerned the protection of the appellant who had a right of further appeal. This action gave rise to the insertion of the five day stay of execution heretofore mentioned. As the law stood prior to this enactment, there was a possibility that upon affirmance, the respondent could at once enter judgment in the court below, without notice to the appellant, thereby terminating the stay and allowing execution even though a further appeal could be taken. Such a possibility was contrary to the whole purpose of the section. As recommended and subsequently amended, the section provides that a five day stay results after affirmance or modification, from the time respondent serves written notice of the entry of judgment on appellant's attorney. This gives the appellant time to carry his appeal further and make whatever overtures are necessary to the court to stay execution pending the determination of the new appeal. Thus the section's basic aim was implemented. But it was this five day period during which procedures were stayed that gave rise to the amendment here under discussion.

As can be seen from the language of section 573, the stay only applies to ordinary proceedings in the action which may be taken by the respondent to enforce the action.[17] The court below is specifically empowered to proceed in any matter included in the action or special proceeding and not affected by the order or judgment appealed from. Such matters have been held to include the appointment of a receiver to replace one

v. Diepenbrock, 5 App. Div. 208, 39 N.Y. Supp. 137 (1st Dep't 1896); Taft v. Marsily, 49 Hun 163 (N.Y. Sup. Ct., Gen. T. 1st Dep't 1888).

9. The old § 1310 omitted a specific way to stay by suppling security and merely said the judgment or order was not to be stayed by a perfected appeal unless the "other acts, if any, required to be done have been done." These acts are to include statutory requirements and those required by the practice of the court. Ex parte Meyer, 209 N.Y. 59, 102 N.E. 606 (1913).

10. N.Y. Civ. Prac. Act § 614 (1945).

11. In re Bologna, 199 Misc. 705, 102 N.Y. Supp. 2d 420 (N.Y. Dom. Rel. Ct. 1950).

12. N.Y. Laws c. 4 (1893); N.Y. Laws c. 946 (1895); N.Y. Laws c. 29 (1898); N.Y. Laws c. 293 (1917).

13. N.Y. Civ. Prac. Act §§ 593-601 (1945), 615 (1945).

14. N.Y. Laws c. 841 (1945).

15. Eleventh N.Y. Jud. Council Rep. at 284 (1945).

16. See note 14 supra.

17. Seeman v. Reich, N.Y. Daily Reg. (June 23, 1882).

who declined to serve before the judgment,[18] entertaining a motion for alimony pendente lite,[19] or allowing the institution of a new action against joint debtors not served in the action in which the judgment appealed from was obtained.[20]

One of the matters included in the action, "not affected by the judgment or order appealed from," and over which the court from whose determination the appeal is taken retains jurisdiction, is a motion for a new trial. It is well established by a long line of cases that in New York the pendency of an appeal should not operate to bar a motion in the court below for a new trial.[21]

While a court has inherent power to direct a new trial where the circumstances are proper[22] and may do so on its own motion,[23] a trial judge may decline to hear the motion and forward it to special term.[24]

What matters may be grounds for a new trial and before whom the motions may be made are covered in sections 549 to 552 of the Civil Practice Act. Section 549 provides for the motion for a new trial on the minutes of the trial judge, such motion to be made at trial term within a specified period.[25] Grounds include exceptions, excessive or insufficient verdicts for damages, or where the verdict or decision is contrary to the evidence or the law.[26] Where the grounds are surprise,[27] newly discovered evidence,[28] failure to render a decision,[29] or misconduct of a party to the action[30] or counsel[31] the motion is properly made at special term—though a motion on the grounds included under section 549 may also be made at special term.

Though a number of jurisdictions do not allow a trial court to keep jurisdiction over

18. MacKellar v. Farrell, 29 N.Y.S.R. 350, 8 N.Y. Supp. 307 (Gen. T. N.Y. Ct. 1890), aff'd, 134 N.Y. 597, 31 N.E. 629 (1892).

19. Di Lorenzo v. Di Lorenzo, 78 App. Div. 577, 79 N.Y. Supp. 566 (2d Dep't 1903).

20. Morey v. Tracey, 92 N.Y. 581 (1883).

21. Kleinman v. Metropolitan Life Ins. Co., 298 N.Y. 217, 81 N.E. 2d 818 (1948); Waldo v. Schmidt, 200 N.Y. 199, 93 N.E. 477 (1910); Henry v. Allen, 147 N.Y. 346, 41 N.E. 694 (1895); City of Beacon v. Asher Bernstein Realty Corp., 270 App. Div. 852, 60 N.Y. Supp. 2d 616 (2d Dep't 1946); Jennings v. Doyle, 263 App. Div. 488, 33 N.Y. Supp. 2d 695 (3d Dep't 1942); Liesney v. Metropolitan Life Ins. Co., 166 App. Div. 625, 151 N.Y. Supp. 1034 (4th Dep't 1915); Bulkley v. Whiting Mfg. Co., 136 App. Div. 479, 121 N.Y. Supp. 159 (1st Dep't 1910); Buffalo Cold Storage Co. v. Bacon, 136 App. Div. 263, 120 N.Y. Supp. 960 (4th Dep't 1910); Smith v. Lidgerwood Mfg. Co., 60 App. Div. 467, 69 N.Y. Supp. 975 (2d Dep't 1901); Vernier v. Knauth, 7 App. Div. 57, 39 N.Y. Supp. 784 (1st Dep't 1896).

22. Stoddard v. Stoddard, 37 N.Y. Supp. 2d 605 (Sup. Ct. 1942), aff'd, sub nom. Re Acker, 264 App. Div. 980, 37 N.Y. Supp. 2d 488 (3d Dep't 1942).

23. Schmidt v. Brown, 80 Hun 183, 30 N.Y. Supp. 68 (Gen. T. 3d Dep't 1894).

24. Stern v. Wabash Ry. Co., 52 Misc. 12, 101 N.Y. Supp. 181 (Sp. T. N.Y. Co. 1906).

25. Weaver v. Scripture, 125 Misc. 741, 211 N.Y. Supp. 593 (Sup. Ct. Sp. T. 1925), aff'd, 214 App. Div. 852, 211 N.Y. Supp. 940 (4th Dep't 1925); Rules of Civ. Prac. § 60-a (1951).

26. Hummel v. L. S. Fischl's Son, Inc., 175 App. Div. 489, 162 N.Y. Supp. 150 (1st Dep't 1916); Magnus v. Buffalo Ry. Co., 24 App. Div. 449, 48 N.Y. Supp. 490 (4th Dep't 1897).

27. Stoddard v. Stoddard, 37 N.Y. Supp. 2d 605 (Sup. Ct. 1942), aff'd, sub nom. Re Acker, 264 App. Div. 980, 37 N.Y. Supp. 2d 488 (3d Dep't 1942).

28. Tavitsky v. Schamroth, 277 App. Div. 1018, 100 N.Y. Supp. 2d 317 (1st Dep't 1950); Oakdale Contracting Co. v. City of New York, 262 App. Div. 494, 30 N.Y. Supp. 2d 545 (1st Dep't 1941).

29. Hodecker v. Hodecker, 39 App. Div. 353, 56 N.Y. Supp. 954 (4th Dep't 1899).

30. Corley v. New York and Harlem Ry. Co., 12 App. Div. 409, 42 N.Y. Supp. 941 (1st Dep't 1896).

31. Cosselmon v. Dunfee, 172 N.Y. 507, 65 N.E. 494 (1902).

a motion for a new trial while an appeal is pending,[32] it is firmly established in New York that such jurisdiction is retained.[33] Any possibility of circumvention, however remote, would therefore, of necessity, have to be promptly obviated.

There is no trend evident in this state towards an attenuation of this judicial prerogative. On the contrary, it was obviously not the purpose of the five day extension of stay incorporated in the section in 1945 to operate as a forbidden zone as far as the judicial power of the lower court to grant a new trial goes. The amendment under discussion here clearly spells out that the lower court's jurisdiction to entertain such a motion shall be retained during this five day period. It operates as a further clarification of the state's basic procedural theory and is therefore beneficial in every respect.

NEW YORK DECEDENT ESTATE LAW, SECTION 26.—CHILD BORN AFTER MAKING OF WILL.—Chapter 225 of the Session Laws of 1955 amends section 26 of the Decedent Estate Law so as to render the right of a child born after the making of a will, subject to a valid power of sale.

Former section 26 of the Decedent Estate Law grants to a child born after the making of a will, either in the lifetime or after the death of the testator, a share in such parent's estate as would have descended to the child had the testator died intestate, when such child is neither provided for nor in any way mentioned in the will.[1] Section 28 of the same law[2] empowers such after-born child to maintain an action against the legatees or devisees to recover his share of the estate to which he is entitled to succeed. Under this statute, adopted children have all of the rights of a natural child[3] and it has been held that a foster child, adopted subsequent to the execution of the foster parent's will, has a right, as an after-born child, to an intestate share of his parent's estate under the provisions of this enactment.[4] Section 26 had been embodied in the Revised Statutes[5] and, as originally enacted, did not affect a will executed by the mother but only a will of the father.[6] The laws of 1869 amended this section so that it would apply to mothers as well as to fathers.[7]

At common law the disposition of a parent's estate was not affected by a child born after the making of a will, but a subsequent marriage and birth of issue generally effected a revocation of a prior will.[8] However, under the civil law a subsequent birth of a child effected a nullification of a will even where there was no subsequent mar-

32. Midland Terminal Ry. Co. v. Warinner, 294 F. 185 (8th Cir. 1923); MacMahon v. Dozier, 237 Ala. 574, 187 So. 710 (1939); Great American Ins. Co. v. Suarez, 107 Fla. 705, 146 So. 644 (1932); Edwards v. State, 125 Ga. 5, 53 S.E. 579 (1906); Elgin Lumber Co. v. Langmon, 23 Ill. App. 250 (1887); State v. Sangster, 196 Iowa 495, 192 N.W. 155 (1923); State v. Alvarez, 182 La. 905, 162 So. 725 (1935); Hughes v. Richter, 239 Mich. 110, 214 N.W. 175 (1927); Samples v. State, 80 Tex. Crim. Rep. 418, 190 S.W. 486 (1916).

33. See note 21 supra.

1. N.Y. Decedent Estate Law § 26.

2. N.Y. Decedent Estate Law § 28 (1931) was formerly § 1868 of the Code of Civil Procedure.

3. Matter of Guilmartin, 277 N.Y. 689, 14 N.E. 2d 627 (1938); In re Meng's Will, 201 Misc. 589, 110 N.Y.S. 2d 263, (Surr. Ct. 1952).

4. In re Upjohn's Will, 304 N.Y. 366, 107 N.E. 2d 492 (1952).

5. 2 N.Y. Rev. Stat. 65, § 49 (1828).

6. Cotheal v. Cotheal, 40 N.Y. 405 (1869).

7. N.Y. Laws c. 22, § 1 (1869).

8. Wormer v. Crose, 120 App. Div. 287, 104 N.Y. Supp. 1090 (1st Dep't 1907).

riage.[9] The object of the civil law rule was ". . . not to secure equality of distribution but to guard against inadvertent or unintentional disinheritance."[10] The present statutory provision, as derived from civil law position, is directed toward providing against testamentary thoughtlessness of the possibility of after-born children, and providing a scheme for the disposition of the testator's property when such thoughtlessness occurs.[11]

Section 26 becomes operative when an after-born child is ". . . unprovided for by any settlement, nor in any way mentioned in such will."[12] The legislature has not specified the character or content of a settlement and it has been stated that such a determination in each case presents a fact situation in which the character and size of the provision for the after-born child, the circumstances under which it was made, and the value of the entire estate are considered with a view to determining whether the parent's intent was directed toward an out-of-will provision to fill the office of a settlement.[13] In such a consideration, the parent's intent, rather than form or method, is the all-important issue[14] and ". . . any act of the testator indicating an intention to make future provision would fulfill the requirement . . ." for a settlement.[15] Such a settlement may be effected prior, simultaneously, or subsequent to the execution of a will.[16] Where there is no such settlement the courts will then seek to determine if the child was provided for or mentioned in some way in the will. To preclude an after-born child from succession by virtue of this statute, by reason of his being mentioned in the will, it would seemingly be necessary that the will explicitly dispose of property in favor of such child or manifest an intention to omit any dispository provision for him.[17]

Chapter 225 of the Session Laws of 1955 amended section 26 so as to render this right of an after-born child subject to a valid power of sale expressed in the will or implied pursuant to the provisions of section 13 of the same law.[18] This amendment was precipitated by a conflict of decisions concerning this question. In 1882, the Court of Appeals, in the case of *Smith v. Robertson*,[19] was presented with a situation wherein an after-born child who, by reason of the statutory forerunner of section 26 as contained in the Revised Statutes,[20] sought to recover possession of real property which an executor, by a power of sale expressed in the will, had sold to defendant. The court held that the real property descended to the child, under the stated statutory provision, in the same manner as it would have descended if the father had died intestate, and that the child did not take under the will, or subject to any of its provisions. Thus, the sale of the real property by the executor did not confine the remedy of the child

9. Brush v. Wilkins, 4 Johns. Ch. 506 (1820).

10. See note 8 supra.

11. McLean v. McLean, 207 N.Y. 365, 101 N.E. 178 (1913); Tavshanjian v. Abbott, 200 N.Y. 374, 93 N.E. 978 (1911).

12. See note 1 supra.

13. Matter of Faber, 305 N.Y. 200, 111 N.E. 2d 883 (1953).

14. In re Sorensen's Will, 205 Misc. 26, 128 N.Y.S. 2d 837 (Surr. Ct. 1954).

15. Matter of Brant, 121 Misc. 102, 104, 201 N.Y. Supp. 60, 61 (Surr. Ct. 1923).

16. In re Anderson's Will, 205 Misc. 151, 131 N.Y.S. 2d 163 (Surr. Ct. 1954).

17. Bourne v. Dorney, 184 App. Div. 476, 171 N.Y. Supp. 264, (2d Dep't 1918), aff'd, 227 N.Y. 641, 126 N.E. 901 (1918).

18. N.Y. Decedent Estate Law § 13 (1947). This section provides the statutory power of an executor or trustee to take possession, sell, mortgage or lease real property owned by the decedent at the time of his death when such power is not contained in the will.

19. 89 N.Y. 555 (1882).

20. See note 5 supra.

to a pursuit of the proceeds of the sale but permitted said child to maintain an action in ejectment.

The apparent settled law as expressed in the *Smith v. Robertson* decision, that the right of an after-born child was not subject to a valid power of sale, was invaded by the comparatively recent holding of *In re Smith's Will*.[21] There, a testator survived by his widow who was named in the will as his sole legatee and devisee, and by an after born child who qualified to succeed to her intestate share under section 26, gave to his executrix a general power of sale and disposition over his real and personal property. In a proceeding brought for an order for the sale of real property of which decedent died seized, a motion by the special guardian of the after-born child to dismiss the proceeding for want of jurisdiction was granted. This motion was based upon the provisions of the Surrogate's Court Act[22] which in effect provide that the proceeding to sell real property, with which the court was then concerned, cannot be maintained where there is a valid power of sale expressed in the will of the decedent. The court recognized the right of the after-born child to her intestate share of the decedent's estate but, in granting the motion to dismiss, ruled that such right was subject to a valid power of sale which was expressed in the will. The court was of the opinion that the rule as stated in *Smith v. Robertson* was authority only for the conceivable case where a decedent's estate, contrary to the provisions of his will, devolved solely to an after-born child; however, when the after-born child is entitled to only a portion of the estate, his right is subject to a power of sale contained in the will. Although the rule set forth in *Smith v. Robertson* did not contain this qualification, and although the facts in that case are not distinguishable from *In re Smith's Will,* the court stated that were the present case carried to the Court of Appeals it would receive an affirmance. This opinion was based upon what the court termed a distinction in law, i.e., subsequent to the *Smith v. Robertson* decision, sections 83[23] and 47-c[24] of the Decedent Estate Law were enacted so that in cases where there is a surviving spouse real property no longer descends solely to an after-born, or any other, child of the decedent.

Whatever the merits of these two conflicting theories, the legislature by the enactment of this chapter amending this statutory provision has settled the question in this state. It may now be definitely stated that the right of an after-born child taking pursuant to section 26 is subject to a valid power of sale contained, either expressly or impliedly, in the will.

NEW YORK REAL PROPERTY LAW, SECTION 294—RECORDING OPTIONS TO PURCHASE OR LEASE.—Chapter 552 of the Session Laws of 1955 amends section 294 of the Real Property Law so as to classify options to purchase or lease real property as executory contracts within the meaning of said section, except that the recording of the option agreement shall be effective only up to and including the last day fixed by the agreement for the exercise of the option.

This amendment nullifies *Davidson v. Fox*[1] which limited instruments recordable under section 294 to executory contracts for the sale or purchase of land and to powers of attorney authorizing the sale of land.

Early cases held that the only purpose for recording a contract of sale was to

21. 107 N.Y.S. 2d 993, 202 Misc. 64 (Surr. Ct. 1951).
22. N.Y. Surrogate's Court Act § 233 (1935).
23. N.Y. Decedent Estate Law § 83 (1938).
24. N.Y. Decedent Estate Law § 47-c (1938).

1. 65 App. Div. 262, 73 N.Y. Supp. 533 (1st Dep't 1901).

preserve evidence and to facilitate proof.[2] It was also held that a contract of sale did not, of itself, constitute an encumbrance or lien upon real estate or a cloud upon title and the recording of it did not in any way add to its force and validity.[3] A later statute required the recording officer of each county to keep different sets of books for the recording of deeds and of mortgages and it was provided that in the deed libers there shall be recorded ". . . all executory contracts for the sale, purchase or exchange of real property, or memoranda thereof, and all instruments canceling or extending such contracts, which conveyances, contracts or instruments are delivered to him, pursuant to law, to be so recorded . . . ."[4] However in 1931, in *Schultz and Son, Inc. v. Nelson*,[5] it was held that although the statute permitted the recording of executory contracts of sale, the recording was not constructive notice to subsequent purchasers. This case pointed up the inadequacy of the existing statutory provision to afford the purchaser full protection by the recording of his executory contract. Recognizing this inadequacy, the Law Revision Commission[6] recommended an amendment to section 294.[7] In accordance therewith, the statute was amended to provide that the recording, thereunder, of a contract of sale of real property shall constitute constructive notice to all subsequent purchasers.[8]

In 1933, in *Wheeler v. Standard Oil Co. of N. Y.*,[9] the court held that a purchaser who accepts a deed with full knowledge of a lessee's option to purchase land under his lease takes the land subject to that option. Since at this time options could not be recorded under section 294,[10] the giving of constructive notice thereby was precluded. Thus, an option agreement was afforded the same inadequate recognition under the recording act as an executory contract was prior to the aforesaid amendment to section 294. It was, therefore, only consistent for the legislature again to amend section 294 to provide that the recording of option agreements should constitute constructive notice up to and including the last date upon which the option agreement may be executed.

The addition of this amendment seems to be in line with the rationale underlying the recording act, i.e., to afford complete protection to a purchaser, or prospective purchaser, against the possibility of being cut off by a subsequent purchaser, when the latter can, by the exercise of minimum diligence, have the title searched and fully protect himself. This common form of business transaction, an option agreement, would be entirely impractical without such protection.

2. Washburn v. Burnham, 63 N.Y. 132 (1875); Boyd v. Schlesinger, 59 N.Y. 301 (1874).
3. Ibid.
4. N.Y. Real Property Law § 315 (1944).
5. 256 N.Y. 473, 177 N.E. 9 (1931).
6. Reports of The Law Revision Commission, at 163 (1940).
7. N.Y. Laws c. 745 (1940).
8. N.Y. Real Property Law § 294 (1944).
9. 263 N.Y. 34, 188 N.E. 148 (1933).
10. See note 1 supra.