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Failure to Contest the Form of Litigation (Here a Special Proceeding Which Should Have Been a Plenary Action) at Trial Is Deemed a Waiver of Objection to Form

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THE BIANNUAL SURVEY OF NEW YORK PRACTICE: PART III

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Introduction

This is the third installment of "The Biannual Survey" which was commenced in December of 1963. The Survey sets forth in this installment those cases which are deemed to make the most significant contributions to New York's procedural law under the new provisions of the New York Civil Practice Law and Rules and other practice and procedure provisions which have been recently enacted.[1] Many additional cases might have been treated —the cases chosen are surely not the only cases of significance— but limitations of space require resort to the difficult process of selection. The treatment has been of reported cases only, since unreported cases are generally unavailable to the practitioner.

The Table of Contents is designed to key the reader quickly to the specific areas of procedural law which are treated in this Survey in order that he may, by just a glance, note such areas of treatment as may be of importance to him without having to wade through matter that does not particularly affect his practice.

ARTICLE 1 — SHORT TITLE; APPLICABILITY AND DEFINITIONS

Failure to contest the form of litigation (here a special proceeding which should have been a plenary action) at trial is deemed a waiver of objection to form.

Petitioner moved to enforce by contempt a judgment granted in a special proceeding for money wrongfully withheld under an

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[1] For the purposes of the Survey, the New York Civil Practice Law and Rules will be referred to and cited as CPLR, the Civil Practice Act as CPA, the Rules of Civil Practice as RCP, the New York City Civil Court Act as CCA, the Uniform District Court Act as UDCA, the Uniform City Court Act as UCCA, and the Real Property Actions and Proceedings Law as RPAPL.

escrow agreement. Respondent defended on the ground that the relief could be sought only in a plenary action and that a special proceeding would not lie. The supreme court, special term, held that the respondent had waived his right to object as to form by not raising an objection to the form of the procedure at trial;[2] that the objection could not be raised initially on a motion for leave to re-argue. Because of the procedural distinctions that existed between actions and special proceedings, applications brought in the wrong form under prior law were dismissed on that ground alone. Application of this rule became "absurd when made in a case in which the court could dispose of the issues equally well, and without prejudice to the rights of the respondent . . . ."[3] In the enactment of CPLR 103(c), the CPLR recognizes that fact and changes that prior law rule. Under CPLR 103(c), if a court obtains "jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form. . . ." The court is directed instead to make whatever order is required for its prosecution. The instant decision further indicates that whatever defense is left to defendants (or respondents) under this liberal CPLR provision may be lost by an untimely objection to form.

The court, in its opinion, indicated that because there was no attorney-client relationship between petitioner and respondent a plenary action and not a special proceeding would have been appropriate. But since the respondent did not raise the objection to form in the original special proceeding, he was held to have waived it. The court noted that under CPLR 103 the distinction between an action and a proceeding is not a jurisdictional one.

The implications of CPLR 103 carry even further. The practitioner should note that even if the respondent *had* raised the objection timely (*i.e.*, in the proceeding itself and prior to disposition of it), the result would not have been a dismissal. It would have been, at most, a *conversion* of the special proceeding into an action with pleadings and time periods adjusted accordingly.[4]

ARTICLE 2 — LIMITATIONS OF TIME

Court of Appeals confirms that recoupment counterclaim against assignee is valid although arising after assignment and notice thereof.

In an action by an assignee of a claim arising out of a contract between defendant and plaintiff's assignor, defendant, after he had

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[2] Avalon E., Inc. v. Monaghan, 43 Misc. 2d 401, 251 N.Y.S.2d 290 (Sup. Ct. 1964).

[3] 3 N.Y. JUD. COUNCIL REP. 129, 145 (1937).

[4] See the initial installment of the *Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 190, 197-98 (1963).