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Section 203(e): An Expansion of the Types of Amendments that "Relate Back" and Thereby Avoid Bar of Statute of Limitations

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That is, where the counterclaim is untimely under the foregoing measure but is connected with the plaintiff's claim, it is allowed to the extent of neutralizing plaintiff's claim; but no affirmative judgment may be given on it for the defendant. If, measured by the time plaintiff's cause of action was interposed, the counterclaim would have been timely, such an affirmative judgment could be granted on it. So it is with the "recoupment" counterclaim. Where the counterclaim has no relationship to the plaintiff's claim, on the other hand, it is not a "recoupment"; such a counterclaim must be timely as measured by the time of plaintiff's interposition of the main claim or defendant cannot use it for *any* purpose.

Section 203(e): An expansion of the types of amendments that "relate back" and thereby avoid bar of statute of limitations.

In *Rice v. Spencer*[13] plaintiff moved to amend his complaint from one alleging defendant's liability by virtue of Section 388 of the Vehicle and Traffic Law, to one alleging liability based on common-law negligence. Defendant contended that the amendment was untimely, since the statute of limitations had run. The court held that it may "allow the amendment of a complaint by even allowing a cause of action barred by the Statute of Limitations. But in such a case, the defendant must not be deprived of his defense of the statute." [14] The court cited *Harriss v. Tams* [15] in support of that conclusion. It appears that the court's attention was not called to CPLR 203(e).

Prior to CPLR 203(e) the rule in New York, as to the relation back of amendments to complaints, was indeed based upon the *Harriss v. Tams* case, wherein the plaintiff moved to amend his complaint to add a ground alleging liability due to breach of implied warranty. The amendment was permitted, but the court indicated that "the defendant must not be deprived of his defense of the statute." [16] In *Harriss* the court held that the type of amendment that relates back to the time the complaint was interposed was one that merely expands or amplifies the allegations and not one "on a different obligation or liability."

CPLR 203(e) is intended to "overcome the effect of *Harriss v. Tams*." [17] It achieves this end by permitting amendments to relate back unless the pleading did not give notice of the "transac-

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[13] 43 Misc. 2d 331, 250 N.Y.S.2d 620 (Sup. Ct. 1963).
[14] *Id.* at 333, 250 N.Y.S.2d at 622.
[15] 258 N.Y. 229, 179 N.E. 476 (1932).
[16] *Id.* at 240-41, 179 N.E. at 481.
[17] SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 51 (1958) [herein cited as SECOND REP.]

tions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." [18] It is clear that, in considering whether an amendment relates back to the time of the original complaint, the facts that formed the basis of the original action are the determinants of whether the amendment now sought is to be allowed.

Although the statute of limitations will still be a defense to many amendments, the types of amendment subject to the defense are greatly diminished. What the court must do under CPLR 203(e) is look at the original pleading and determine from it whether it gives notice to the defendant broad enough to embrace the matter sought now to be added by way of amendment. If the amendment even purports to add a "cause of action," it will often be doing no more than adding an additional theory of liability the facts of which would be the same as, or very similar to, those which would establish the originally pleaded theory of liability. In such instance, CPLR 203(e) seeks to immunize the amended pleading from attack on the ground of the statute of limitations if the originally pleaded theory was timely. That may well have been the situation in the *Rice* case. Counsel there overlooked that CPLR 203(e) is designed to *overrule* the *Harriss* case which, paradoxically, the court cites as if it were still law.

The CPLR 203(e) measure should be whether or not defendant is prejudiced by the amendment. "Prejudice" here relates to, *e.g.*, whether the amendment introduces a transaction or occurrence *different* from that on which the original pleading is based. An amendment which, in essence, does no more than change the theory of liability, or add an additional ground of liability to the one initially pleaded, does *not* so prejudice the defendant. Essentially the same facts as would establish the initial ground would also establish the amended one. One or two factual differences would not bring the case beyond CPLR 203(e). A cause of action arising out of a single transaction would, when pleaded, most often afford defendant sufficient notice, under CPLR 203(e), to embrace any later pleaded "causes of action" arising out of the same transaction.

Impleader cause of action is interposed before it accrues.

In *Hansen v. City of New York*,[19] the third party plaintiffs, who were defendants in a negligence action, moved for a judgment dismissing the affirmative defense of the statute of limitations interposed by the third party defendants, alleging that they were passive tort-feasors, while the third party defendants were active tort-feasors. Thus, they claimed, they were entitled to indemnification. The third party defendants contended that the three-year period of

[18] CPLR 203(e).
[19] 252 N.Y.S.2d 695 (Sup. Ct. 1964).