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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).

limitations for negligence actions[20] was applicable and had already run. The court held that an "action for indemnity is based upon principles of a quasi contract and is governed by the six-year period of limitations . . . as distinguished from the 'action to recover damages for a personal injury.'"[21] This holding is in accord with and reaffirms prior case law.[22] It has always been the rule, in the impleader context, that the indemnity cause of action does not "accrue" until the actual payment by the third party plaintiff of a judgment recovered against it on the cause of action stated in the complaint.[23] Thus, under Section 1007 of the CPLR,[24] a third party complaint is actually served even before the cause of action it pleads (indemnity) accrues. This carries forward the prior impleader practice, which is designed to avoid a multiplicity of actions.

Statute of limitations continues to run as to co-partner who has not been personally served.

First Nat'l City Bank v. Cervera[25] involved an action against co-partner Cervera on a note executed by him and the partnership as co-makers.[26] In January 1954, there was a default on a payment, and the entire note immediately became due and payable. In May 1954, co-partner Pedretti was personally served, and in July 1954, a judgment by default was entered against him and the partnership for the entire outstanding obligation. However, only a small sum was collected on that judgment. In July 1963, approximately nine years after the cause of action had accrued, defendant Cervera was properly served. Defendant pleaded the statute of limitations under CPLR 213, claiming that the six years had run. The civil court[27] granted defendant's motion for summary judgment,[28] pointing out that the defendant could raise every defense that he could have asserted in the first action on the note, as well as any that may have arisen since the judgment against the partnership had been entered.[29] Since the present action had not been

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[20] CPLR 214(5).

[21] Hansen v. City of New York, *supra* note 19, at 696.

[22] *E.g.*, Sheftman v. Balfour Housing Corp., 219 N.Y.S.2d 461 (Sup. Ct. 1961); Smith v. Smucker, 100 N.Y.S.2d 35 (Sup. Ct. 1950).

[23] Satta v. City of New York, 272 App. Div. 782, 69 N.Y.S.2d 653 (2d Dep't 1947).

[24] This was also the practice under § 193-a(1) of the CPA.

[25] 252 N.Y.S.2d 537 (N.Y. Munic. Ct. 1964).

[26] Section 26 of the Partnership Law makes each partner jointly and severally liable, while the note in question does the same.

[27] The advance sheet (252 N.Y.S.2d 537), in which the case appears, erroneously states that it was rendered by the "Municipal Court." This court was abolished on September 1, 1962.

[28] CPLR 3212.

[29] CPLR 1502.