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the complaint without using the language "hereby appears" in conjunction with the demand.[93]

When supreme court retains jurisdiction of family court matter it must apply procedures of Family Court Act.

The apparent conflict between two provisions of the recent court reorganization amendment to the New York State Constitution[94] has recently been treated by the appellate division, fourth department. In *People v. DeJesus*,[95] the defendant-husband was indicted in the supreme court for assaulting his wife by cutting her face with a razor blade. Thereafter, the proceeding was transferred to the county court where defendant was arraigned. Upon arraignment, the court granted defendant's motion to transfer the proceeding to the family court[96] pursuant to Section 813 of the Family Court Act.[97] An appeal by the District Attorney was dismissed on the ground that the order of transfer was not appealable because not final. But the court took the occasion to treat the merits of the appeal because of the confusion existing in this important area of jurisdiction.

In its opinion, the fourth department discussed at length the principles concerning the jurisdiction of the supreme court with respect to family court matters. The court indicated that if a petition were presented to the supreme court on a matter which should have been initiated in the family court, the supreme court could retain the matter, but would be required to act as a family court and follow the processes and procedures of the Family Court Act.[98]

Section 13(b) of Article 6 of the New York Constitution directs that proceedings arising from crimes and offenses between

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[93] An extensive treatment of appearance under the CPLR and the impact of the 1964 Amendment of CPLR 320(b) appears in 7B McKINNEY's CPLR 3211, supp. commentary 49-55 (1964).

[94] The court reorganization amendment is the new N.Y. CONST. art. 6, which became effective September 1, 1962.

[95] 21 App. Div. 2d 236, 250 N.Y.S.2d 317 (4th Dep't 1964).

[96] "The Family Court is a unique court. . . . It is primarily a social court designed to handle the complex problems of family life. . . . The court was set up in such a way so that it would best serve the needs of the public without the complexities and entanglements of technical requirements. It is a court to which a layman may come for the purpose of seeking relief without counsel." Matter of Anonymous, 37 Misc. 2d 827, 831, 238 N.Y.S.2d 792, 796 (Family Ct. 1962).

[97] Section 813 provides in part: "any criminal complaint charging disorderly conduct or an assault between spouses . . . shall be transferred by the criminal court in which complaint was made to the family court in the county in which the criminal court is located. . . ."

[98] People v. DeJesus, 21 App. Div. 2d 236, 239, 250 N.Y.S.2d 317, 321 (4th Dep't 1964).

spouses "shall be originated"[99] in the family court. In addition, Section 812 of the Family Court Act provides that the family court has "exclusive original jurisdiction" over any proceeding arising out of assaults between spouses. When read together, the constitutional provision and the statute appear to mandate that spouse assaults and other enumerated family proceedings originate *exclusively* in the family court. However, N.Y. State Const. art. 6, § 7(c) provides that the supreme court shall have jurisdiction over any new classes of actions and proceedings created by the legislature. It is also provided by the Constitution that the supreme court "shall have general original jurisdiction in law and equity . . . ."[100] which jurisdiction neither the legislature nor the courts have power to limit.[101] Thus, the question arises as to what happens when a matter which should have been initiated in the family court is commenced, rather, in the supreme court. The ordinary procedure is for the supreme court to transfer such matter to the appropriate family court.[102] But what happens if the supreme court chooses to retain the matter? In this situation there exists an apparent conflict among the relevant constitutional provisions and statutes.

The appellate division directed its attention to this conflict and stated that sections 7(c) and 13 of article 6 must "of necessity be construed together."[103] Thus, if the supreme court chooses to retain subject matter which should preferably have been brought in the family court it must then *act* as a family court and utilize the procedures of the Family Court Act. By such a conclusion, the appellate division was able to effectuate the salutary purpose of applying the specially devised procedures of the family court to any court in which a family court matter may technically be brought, while preserving the Constitution's aim of keeping omnibus jurisdiction in the supreme court. While this may appear to weaken the traditionally strong attitude against a whittling away of the supreme court's general jurisdiction, as expressed in many prior cases,[104] the opinion must be recognized as giving to the

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[99] Courts have held that the word "shall" is mandatory language—and not permissive—when the interpretation of a constitutional provision is involved. See People v. DeJesus, *supra* note 98, at 239, 250 N.Y.S.2d at 322 and cases cited therein.

[100] N.Y. CONST. art. 6, § 7(a).

[101] 3505 Realty Corp. v. Weinberger, 41 Misc. 2d 254, 245 N.Y.S.2d 150 (Sup. Ct. 1963).

[102] See People v. DeJesus, *supra* note 98, at 239-40, 250 N.Y.S.2d at 322. The supreme court is authorized constitutionally and by statute to transfer such cases. See, *e.g.*, N.Y. CONST. art. 6, § 19(a); N.Y. FAMILY CT. ACT § 813.

[103] People v. DeJesus, *supra* note 98, at 239, 250 N.Y.S.2d at 321.

[104] See, *e.g.*, N.Y. CONST. art 6, §§ 7(a), 13(d); N.Y. JUDICIARY LAW § 140-b; Barone v. Aetna Life Ins. Co., 260 N.Y. 410, 414, 183 N.E. 900, 901 (1933); Alexander v. Bennett, 60 N.Y. 204 (1875); Decker v. Canzoneri,

family court the due that the Constitution had in mind for it. The family court emerges wholly new from the recent constitutional article, and the Joint Legislative Committee on Court Reorganization was at pains to implement the article to effectuate the broad purposes it had in mind for the family court. It did this in the Family Court Act. Should the supreme court retain jurisdiction of a matter cognizable in the family court, the fourth department opinion states the supreme court would be required *constitutionally* to follow the procedures of the Family Court Act. This appears to compromise the apparent conflict without upsetting the principle of broad jurisdiction inherent in the supreme court.

ARTICLE 10 — PARTIES GENERALLY

Judgment against non-appealing third party plaintiff reversed on appeal taken by third party defendant.

In *Rome Cable Corp. v. Tanney*,[105] an employer commenced an action against its employee to recover the amount it had paid a third person in settlement of a claim arising out of the employee's alleged negligence. The employee impleaded[106] the third person's employer, who became the third party defendant in the action. The trial court rendered a judgment for the employer against the employee, and for the employee against the third party defendant. The third party defendant was the only one to appeal. The appellate division, fourth department, reversed, and held that the third party defendant could challenge infirmities of plaintiff's judgment against the third party plaintiff in the main action, even though the third party plaintiff had not appealed from the judgment against him. Furthermore, since the plaintiff in the main action had failed to make out a prima facie case with respect to its right to indemnity from the defendant (third party plaintiff), the judgment against the latter would also be reversed.

Under CPA § 193-a(2) the third party defendant had the right to appeal from the judgment in the main action, even though the defendant in the main action had not appealed. Today, the essence of CPA § 193-a(2) is incorporated into CPLR 1008.

The interesting aspect of the *Rome* case is that the judgment was reversed as to the third party plaintiff, who had not appealed from the judgment entered against him. The *Rome* case is in

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256 App. Div. 68, 72, 9 N.Y.S.2d 210, 215 (3d Dep't 1939). *But see* Jones v. Reilly, 68 App. Div. 116, 74 N.Y. Supp. 243 (1st Dep't 1902) and Janks v. Braveman, 188 Misc. 373, 67 N.Y.S.2d 825 (Sup. Ct. 1947).

[105] 21 App. Div. 2d 342, 250 N.Y.S.2d 304 (4th Dep't 1964).

[106] CPLR 1007 gives the defendant the right to proceed against a person who is not a party in the action, when the party "may be liable to him for all or part of the plaintiff's claim against him. . . ."