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. . . ."

conflict with *Frankel v. Berman*,[107] a first department case. In *Frankel*, the court reversed a judgment against the third-party defendant who had appealed, but declined to disturb the judgment against the defendant in the main action, who had not appealed, even though the court found that the plaintiff had failed to establish a cause of action.

The CPLR,[108] like its prior law counterpart,[109] appears to support the determination of the *Rome* case by giving the third party defendant all the rights "of a party adverse to the other parties," expressly including the right of appeal.

Motion papers to substitute parties must be served on them in manner of summons.

In *Lewis v. Lewis*[110] the defendant died after commencement of the action. Plaintiff moved for an order, pursuant to CPLR 1015(a), to continue the action against the executrices of the estate. Defendant was a resident of Florida and the executrices were appointed in that state.

The court denied the motion, noting that service on the executrices must be given in the appropriate manner. The court stated that "if notice is given to a non-party to be substituted, it is served in the same way as a summons pursuant to Article 3 of the CPLR. . . ." [111] The court cited as well CPLR 1921, which provides that a person may be made a party defendant if he does not voluntarily appear. The word "defendant" was a change in language from a prior draft which read "by service of a summons" and, as indicated in the Revisers' notes, no change in meaning was intended.[112]

The practitioner's attention is called to the fact that, although the papers must be served as a summons, there is no need to start over. When a substitution is required, the action continues "in all respects as if the substituted party had been in the action from the beginning 'and all prior proceedings are valid and operative.' "[113] In other words, once substitution of the appropriate party is accomplished, the litigation continues from the point it had reached at the time the event requiring substitution took place.

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[107] 10 App. Div. 2d 838, 199 N.Y.S.2d 261 (1st Dep't 1960).
[108] See the last sentence of CPLR 1008.
[109] CPA § 193-a(2).
[110] 43 Misc. 2d 349, 250 N.Y.S. 2d 984 (Sup. Ct. 1964).
[111] Lewis v. Lewis, 43 Misc. 2d 349, 349-50, 250 N.Y.S.2d 984, 986 (Sup. Ct. 1964).
[112] FIFTH REP. 323-24.
[113] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1021.08 (1964).