The Case of Angelina v. Euclid: A Study in Procedural Entanglements

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"IGNORANCE," remarked Mr. Justice Holmes, "is the best of law reformers." ¹ He was, of course, referring to the fact that often in the past the simplification of legal procedure grew out of the inability of lawyers to master its complexities. But even under our very much heralded simplified procedure there is ample room for lawyers to be caught in a procedural labyrinth from which at times the only escape is to sacrifice the cause. So let it be with the case of Angelina v. Euclid.²

To the people who were parties to this cause, as well as to all non-lawyers who knew about it, it must have seemed very odd that so much could happen which involved so little. For here was a case in which the plaintiff claimed that the defendant owed him some $35,000.00, and yet some two years and nine months after the suit was started the cause was—to borrow a World War I phrase—spurlos versenkt, and it never was ascertained whether the plaintiff really had a claim against the defendant, or had merely dreamed it up.

During the course of this proceeding no less than thirty-two motions were made by one party or the other; four appeals were taken to two Departments of the Appellate Divi-

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* This is the third in a series of case histories designed to study the actual process of litigation through the courts. The first one was published sub nomine, The Case of the Beverly Hotel—A Study of the Judicial Process, 27 St. John's L. Rev. 261 (1953); the second sub nomine, The Case of the Broker's Commission, 28 St. John's L. Rev. 220 (1954).

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¹ HOLMES, THE COMMON LAW 78 (1881).


36
sion, and one to the Court of Appeals. More than thirty-seven judicial decisions were made with respect to the problems raised by these motions and appeals. On a very small branch of the case, there was even a full dress trial before a court and jury, which resulted in a directed verdict for the plaintiff in the sum of $210.00, on motion made by the defendants after the close of the trial.

This miniature Jarndyce case arose out of events which occurred in April, 1950. The defendant, Euclid, was then about to obtain a contract to build additions to a hospital in Brooklyn. The project was an elaborate and costly one, and the defendant engaged the services of the plaintiff to supervise the masonry work involved in the construction. To this end, a contract in writing was entered into between Euclid and the plaintiff, wherein the duties and rights of the parties were extensively set forth. This agreement was prepared by defendant's lawyer and throughout the plaintiff claimed to have signed the contract without reading it, and that it did not contain the real agreement he had negotiated with the defendant. Yet it was the only written document in the case.

3 The number of judges who participated in these decisions was, perhaps, somewhat larger. In the Court of Appeals there were two judicial determinations. In one of them seven judges participated and in the other six judges participated. Four appeals were taken to the Appellate Division and five motions were made of which only two were reported officially. As five justices participated in each of these judicial determinations, there were forty-five individual judgments involved. But, of course, some of the justices acted more than once. The various appellate reports can be found in: 306 N.Y. 605, 115 N.E.2d 831 (1953); 305 N.Y. 557, 111 N.E.2d 435 (1953); 281 App. Div. 659, 117 N.Y.S.2d 854 (1st Dep't 1952); 280 App. Div. 918, 115 N.Y.S.2d 921 (1st Dep't 1952); 280 App. Div. 890, 115 N.Y.S.2d 523 (1st Dep't 1952); 280 App. Div. 405, 113 N.Y.S.2d 537 (1st Dep't 1952); 279 App. Div. 789, 110 N.Y.S.2d 183 (1st Dep't 1952); 279 App. Div. 594, 107 N.Y.S.2d 237 (2d Dep't 1951). These do not include three determinations by the Appellate Division, not reported officially: (1) Order granting motion for a stay of trial pending an appeal from Justice Corcoran's order dismissing the fourth cause of action. 127 N.Y.L.J. 1934, col. 6 (App. Div. 1st Dep't May 14, 1952); (2) Order of Appellate Division denying appellant's motion to consolidate two appeals. 127 N.Y.L.J. 2117, col. 3 (App. Div. 1st Dep't May 27, 1952); (3) Order conditionally denying respondent's motion to dismiss appeal from Justice Frank's order. 129 N.Y.L.J. 2131, col. 5 (App. Div. 1st Dep't June 26, 1953).
The written agreement, in addition to the usual provisions contained some harsh provisions. *Inter alia*, it provided:

1. That the plaintiff was to receive $150.00 per week as a fixed stipend.

2. In addition, plaintiff was to receive as additional compensation, one-half of the amount by which the cost of the masonry work fell below $158,000.00.

3. The plaintiff was to be bound by a certificate issued by defendant's accountant as to any figures or accounting.

4. Plaintiff was never to have right to examine defendant's books or records.

5. Plaintiff could be dismissed at any time by defendant if his work was, in the opinion of defendant, unsatisfactory.

6. If plaintiff was dismissed or if he was incapacitated, he would lose his rights to any portion of his additional compensation, provided for in "2" above.

Some time in April, 1950, the plaintiff entered upon his duties. So far no serious disputes as to the facts appear. But from this point, the parties give widely different versions of what happened. The plaintiff claimed that he performed his work in a workmanlike and expert manner and the defendant, on the other hand, asserted that plaintiff's work was from the beginning slipshod, careless, and completely unsatisfactory, and that plaintiff was warned from time to time that he was not living up to his contract. Since these issues, basic to a valuation of the justice of the cause, were never tried out, the truth is unknown. But it is a fact that on January 16, 1951, plaintiff was dismissed by the defendant on the alleged ground that his work was unsatisfactory. Except for $210.00, the plaintiff's fixed stipend of $150.00 per week had been fully paid. But no part of the additional compensation referred to in the written contract was ever paid to the plaintiff, and the defendant denied any obligation to make such payment.

Under the express terms of the written agreement, the plaintiff would seem to have had no claim against the defen-
dant, except for the sum of $210.00. But the plaintiff did not feel he was bound by the written agreement. It was, in the first place, prepared by defendant's attorney; the plaintiff claimed that he had signed it without reading it; plaintiff alleged that his signature to the contract was obtained by fraud; and plaintiff also alleged the written contract was quite different in its terms from that which the parties had agreed upon. Moreover, the plaintiff averred that he was dismissed, not because his work was unsatisfactory, as defendant stated, but because it became apparent that a large sum would be due to the plaintiff for additional compensation, and that only by dismissing the plaintiff could the defendant keep for itself this large sum and thus be unjustly enriched.

Throughout this long litigation, which is hereinafter described in detail, not one of these claims, thus asserted by the plaintiff, was ever passed upon. Instead, a vast forest of legal problems—mostly of a very technical procedural variety—luxuriantly grew into a huge record. And in the end, the entire cause, as we earlier stated, vanished.

The proceedings were initiated by two separate steps. The first was the filing on March 2, 1951, by the plaintiff, of a mechanic's lien against the property under construction, in Kings County, in the sum of $77,000.00. The second step was the issuance by the plaintiff on March 5, 1951, of a summons and complaint against the Euclid corporation and its president in an action at law in New York County, demanding damages.

It will, perhaps, simplify matters if the vicissitudes of the mechanic's lien proceeding are first followed, at least until that proceeding merged with the proceeding in New York County, in May, 1952.

The plaintiff voluntarily cancelled the mechanic's lien for $77,000.00 and in its place filed a new one for only $34,000.00. In order to release the real property from the burden of the lien, the defendant filed a bond by a duly accredited bonding company. At this point, the plaintiff was willing to permit the mechanic's lien to lie fallow and to press for a trial before a court and jury in New York County. The defendant, however, in no mood for a jury trial, sought
to litigate the issues in Kings County in the mechanic's lien proceeding. But in this effort the defendant failed.

The first step taken by the defendant in Kings County was to serve a notice pursuant to the lien law requiring Angelina, the plaintiff, to commence foreclosure of his mechanic's lien within thirty days. This notice is provided for in Section 59 of the Lien Law which states that the notice shall require the lienor to commence an action to foreclose the lien "... or show cause at a special term of a court of record, ... at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled ..." 5

The first quite futile legal battle took place over this notice. The plaintiff, not having commenced a suit in foreclosure, the defendant moved at Special Term to vacate the lien or to cancel the bond which had been filed in lieu thereof. The application was bottomed on an affidavit made by the president of the defendant corporation which stated simply that (1) a lien had been filed, (2) that a notice pursuant to Section 59 of the Lien Law had been served on the lienor, and (3) that no action to enforce the lien had been commenced within the thirty-day period provided in the notice. In opposition to this motion, the attorney for the plaintiff filed an affidavit which made three points: (1) that the action pending in New York County was sufficient compliance with Section 59 of the Lien Law; (2) that the application could not be granted because the lien had been bonded; (3) that the owner of the real property had not been made party to the motion. On oral argument, at Special Term, before Mr. Justice Baar, the plaintiff relied on two cases: (1) Drake Construction Corp. v. Kenn Equipment Co., 6 which held a notice was defective if it did not in terms require the lienor to show cause at Special Term at a time and place specified therein, why the lien should not be vacated; and (2) on Uris v. The Brackett Realty Co., 7 which

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4 An action to foreclose a mechanic's lien is a proceeding in equity, hence triable by a court without a jury.
5 N.Y. LIEN LAW § 59.
held that Section 59 did not apply to a case where the lien had been bonded. The defendant's counsel answered both cases. The *Drake Construction* case was distinguished on the ground (somewhat specious) that the notice in that case was fatally defective, whereas here the plaintiff had had both his notice and his application to vacate; that the mere fact that the direction to show cause was not contained in the notice was, therefore, a mere technicality. The *Uris* case was obviously not in point. It was decided in 1906 when the statute did not extend to bonded liens. In 1929, the statute had been amended to extend its provisions to bonded liens.8

On this record the motion was granted and the lien and the bond given in lieu thereof were directed to be cancelled. Justice Baar disposed of all the plaintiff's points as follows: 9 In re Euclid Concrete Corp'n (Angelina)—This is an application by a contractor for an order discharging a mechanic's lien filed by Louis Angelina, a subcontractor, against Beth-El Hospital, Inc., as owner of property in the County of Kings and against Euclid Concrete Corporation, as contractor. After the filing of the lien in Kings County the contractor served on the subcontractor lienor a notice pursuant to section 59 of the Lien Law, demanding that he commence an action to enforce the lien within thirty days from the date of service of the notice. The contractor bonded the lien and filed an undertaking in support thereof. The lienor took no action in Kings County to enforce the lien and the contractor brought on the within application to vacate the lien. Contrary to the lienor's contention, section 59 of the Lien Law applies regardless of whether the mechanic's lien on real property has been bonded or otherwise. The case of *Uris v. Brackett Realty Company* (114 App. Div., 29), which appears to limit an application to vacate a lien solely to an unbonded lien was decided before the enactment of the present provisions of section 59 of the Lien Law, which specifically provides for the vacating and canceling of a bond given to discharge a lien. The subcontractor has an action pending in New York County against the contractor herein based on breach of contract arising out of the same transactions which are the basis for the filing of the lien herein; it is not an action to foreclose the lien on real property in Kings County. Furthermore, the foreclosure of a lien must be litigated in the county in which the

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8 Laws of N.Y. 1929, c. 515, § 37.
9 126 N.Y.L.J. 181, col. 6 (Sup. Ct. Aug. 1, 1951).
real estate against which the lien has been filed is located. Since the subcontractor has elected to start an action in New York County to enforce his rights which had arisen out of the transactions which constitute the basis for the filing of the mechanic's lien in Kings County, he may not bring another action on the same facts in Kings County to enforce the lien herein. While the thirty-day notice served on the lienor by the contractor does not in so many words require that the lienor show cause why the notice of lien should not be vacated, that lack is supplied by the within notice of motion. No adequate explanation has been given for the failure to institute the action to foreclose the lien. The motion to vacate and cancel the mechanic's lien and the undertaking thereafter furnished in connection with same is granted. Settle order on notice.

The plaintiff promptly appealed. In the Appellate Division, the plaintiff abandoned the *Uris* case, but relied strongly on the *Drake* case. The big point was that the notice to foreclose the lien was defective in that it failed to require the plaintiff to show cause at a specified time and place why the lien should not be vacated for failure to foreclose. The Appellate Division followed the *Drake* case, reversed Justice Baar, and granted permission to the defendant to proceed anew on a proper notice. The court said:

In the Matter of Euclid Concrete Corp., Respondent. Louis Angelina, Appellant.—Appeal by the lienor from an order which granted an application to vacate and cancel a mechanic's lien and an undertaking furnished in connection therewith, and to discharge the surety thereunder, for failure to commence an action to foreclose the lien. Order reversed on the law, with $10 costs and disbursements, and the application denied, without costs and without prejudice to the making of a new application for the same relief on proper notice. The notice served by respondent failed to comply substantially with the requirements of section 59 of the Lien Law. It failed to require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service of the notice and to require the lienor to show cause at Special Term at a time and place specified therein, why the notice of lien should not be vacated. (*Matter of Drake Constr. Corp.* [Kenn Equipment Co.], 274 App. Div. 809).

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Accordingly, the defendant served a new notice to compel foreclosure of the lien. This time the notice was correctly drawn and complied meticulously with the requirements of Section 59 of the Lien Law.

But the struggle to bring the mechanic's lien before the bar of the court was not yet over. Instead, the attorney for the plaintiff allowed the thirty-day period to expire and moved the court for an extension of time to serve a complaint. The motion was first denied because the papers in its support did not contain an affidavit of merits. But on the reargument, Mr. Justice Keogh granted the motion:

Angelina v. Beth-El Hospital, Inc.—In an action to foreclose a mechanic's lien plaintiff seeks permission to serve the complaint, although his statutory time so to do has expired for the reason that illness of his attorney had prevented the drawing and serving of said complaint. Although defendants' attorney strongly opposes such relief, he indicated that he would consent to such on condition that plaintiff post security because of defendants' possible recovery on a counterclaim. Under the facts and circumstances and mindful of the interests of all parties and attorneys in the action, the court, in its discretion, grants the motion; complaint to be served on or before January 21, 1952; no security to be posted. Settle order on notice.

Thus a total of nine months and nine days was required to elapse between the filing of the mechanic's lien and the service of the complaint in foreclosure.

At long last, on January 18, 1952, the complaint in the action to foreclose the mechanic's lien was served. The complaint required some analysis. In the first place, it took no notice of the fact that the lien had been bonded. In the second place, it described the contract between Angelina and Euclid in terms that did not at all resemble the written agreement. The claim was generally made that plaintiff and Euclid had entered into an agreement to share profits on the masonry work, that plaintiff had fully performed, that plaintiff's share of the profits was about $3,000.00 and a demand was made for a strict foreclosure of the lien to enable the plaintiff to recover the amount due him. The answer served

by the defendant denied the essential allegations of the complaint; set forth the written contract between the parties; and pleaded two counterclaims. Then followed a brief struggle for a bill of particulars, which, when it arrived, contained the allegation that the plaintiff's cause of action was based on an alleged oral contract, although a written contract between the parties was extant. The defendant thereupon noticed the case for trial. But the trial was delayed as the plaintiff, on February 26, 1952, amended his complaint. The amended complaint did not alter plaintiff's theory of his cause, but took into account the fact that the lien had been bonded and asked for judgment against the Maryland Casualty Co., upon whom also a supplemental summons was served.

The action was now ripe for trial. All that remained was the difficulty of being reached on the equity calendar in Kings County. Long, long afterward, in October of 1953, it became apparent during an argument in the Court of Appeals that the action to foreclose the mechanic's lien, based as it was on a count to recover damages for breach of contract, did not lie. Probably, therefore, the action in Kings County could have been dismissed on motion. But the defendant, eager for a trial without a jury in Kings County, did not make such a motion.

But there was to be no trial in Kings County, although the case appeared on the Reserve Calendar on March 24, 1952. The court was tied up with other causes, the plaintiff was not ready, the New York County action was being pressed. In addition, as will be hereinafter related, a cause of action identical with the one pending in Kings County, was dismissed by Mr. Justice Rabin in the New York County case. Inasmuch as plaintiff had appealed Justice Rabin's decision

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12 The dispute about this bill of particulars was a nominal one. A demand was made for the bill. But no bill was served pursuant to the demand. A formal motion was then made for a bill. In the meantime, the plaintiff had amended his complaint and argued that the items sought in the motion for the bill were not applicable to the amended complaint. But as the amendment to the complaint was not substantial, Justice Murphy directed a bill to be served (127 N.Y.L.J. 855, col. 5 [Sup. Ct. March 3, 1952]), and it was timely served.

13 This is a well settled point of law. See BLANC, MECHANICS' LIENS 88, 89 (1949) and cases there cited.
rendered on May 1, 1952, the court agreed to a protracted postponement of the Kings County action.

Finally, the entire proceeding in Kings County disappeared when Mr. Justice Cohalan, on May 6, 1952, granted plaintiff's motion to consolidate the Kings County action with the New York County action. One year and two months had passed and nothing had been decided. The log of these proceedings in Kings County as set forth in the lawyers' records is impressive for its bulk, but devastating in its implications of procedural futility. It is instructive to reproduce it:

March  2, 1951. Mechanic's lien filed for $77,530.05.
         7, 1951. A demand for an itemized statement pursuant to Section 38 Lien Law served by Euclid on lienor.¹⁴
         15, 1951. Plaintiff voluntarily cancels mechanic's lien for $77,530.05.

April  9, 1951. Plaintiff files new mechanic's lien for $34,320.35.
         12, 1951. Defendant serves notice on lienor to compel enforcement of lien pursuant to Section 59 of Lien Law.
         21, 1951. Ex parte order signed fixing amount of bond to be filed to release lien at $36,500.00.

May    3, 1951. Notice to plaintiff of application to approve bond.
         16, 1951. Notice of motion to vacate lien for failure to prosecute pursuant to notice.

August 1, 1951. Decision by Justice Baar vacating lien and cancelling bond.

¹⁴ Laws of N.Y. 1929, c. 515, § 38, as amended, Laws of N.Y. 1930, c. 859, § 19. The notice of lien merely gives totals of materials furnished and labor performed. Hence, this section enables the lienee to obtain details in advance of the trial.
16, 1951. Appellate Division in Second Department grants stay of Justice Baar’s order.

October 9, 1951. Appellate Division in Second Department reverses order of Justice Baar vacating lien.

23, 1951. Served new notice to compel enforcement of mechanic’s lien.

23, 1951. Served motion to compel lienor to furnish statement of labor and materials.

November 2, 1951. Justice Nova grants motion to compel lienor to serve statement of labor and materials.

26, 1951. Lienor serves summons in action to foreclose mechanic’s lien.

28, 1951. Lienor serves verified statement with respect to labor and materials.

December 4, 1951. Defendant serves notice of appearance and demand.

21, 1951. Motion for extension of time to serve complaint.

24, 1951. Motion to extend time to serve complaint heard by Mr. Justice Keogh and plaintiff directed to serve complaint by December 27, 1951.


18, 1952. Plaintiff serves complaint.


19, 1952. Motion by defendant for bill of particulars.
Supplemental summons and amended complaint served.  
17, 1952. Answer served on behalf of Maryland Casualty Co. 
24, 1952. Action is called on reserve calendar. 
31, 1952. Received plaintiff's bill of particulars. 
April 8, 1952. Received plaintiff's reply. 
8, 1952. Plaintiff moves to dismiss first affirmative defense and counterclaim. 
May 6, 1952. Order consolidating Kings County case into New York County cause granted by Justice Cohalan.

In the meantime, while all this futility was going on in Kings County, a much more complicated series of events was taking place in New York County. But to understand this we must go back and study the action in New York County.

The first complaint served in the New York County action was amended as of right. But the complaint thus amended was in part dismissed on motion of the defendants pursuant to Rule 106 of the Rules of Civil Practice. As

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16 125 N.Y.L.J. 1705, col. 5 (Sup. Ct. May 9, 1951). Justice Breitel (then sitting in Special Term) wrote as follows:

"Angelina v. Euclid Concrete Corp'n—Motion by defendant to dismiss the second, third, fourth and fifth causes of action in the complaint under R.C.P. 106 for legal insufficiency is denied as to the third [fourth] and fourth [fifth] causes of action, the motion having been withdrawn with respect thereto, and granted as to the second and third causes of action with leave to the plaintiff to serve a further amended complaint within ten days after service of the order herein, with notice of entry thereof.

"The second cause of action is deficient. In considering this cause of action the court is limited to scanning its allegations and may not make reference to any writing not incorporated therein directly or by reference."
the issues thus early raised on this motion were ultimately dispositive of the entire case, it will serve to describe the amended complaint and the problems it raised in some detail.

This amended complaint contained five causes of action. Of these the first, fourth and fifth were legally unobjectionable. The first cause of action sought merely to recover $210.00 for unpaid but earned wages; the fourth and fifth causes of action sought to recover several thousand dollars for rent for the use by the defendants of certain tools and a motor truck which were alleged to have been owned by the plaintiff.

But the second and third causes of action were vigorously challenged by the defendants on the ground that they were legally insufficient. The second cause of action was held to be defective because it joined a cause of action for quantum meruit with a cause of action for a breach of contract in the same count; the third cause of action was held to be premature and deficient in that it failed to connect the damages alleged to have been suffered with the fraud alleged to have been committed. The dismissal of the second and

Completion of the main contract is not alleged. Nor is any resulting profit as defined alleged to have occurred, nor for that matter neither the actual final cost of the masonry work or the amount received from the hospital. The paragraph numbered third of the complaint refers to difference between actual cost and 'contract price or sums obtained therefor.' The cause of action may not be considered in quantum meruit since it expressly pleads and makes demand pursuant to the alleged expressed contract.

"The third cause of action is likewise deficient. The injury alleged to have been sustained as a result of the charges of fraud is the execution of a written agreement and that event is never properly related to the sums of money claimed to be the amount of damages. Again, too, the allegations of final cost of the work and receipt by defendant corporation of the main contract price and the extras are omitted, although this time the complaint in paragraph numbered eleventh refers to the amount the defendant corporation 'was to receive for the masonry work,' rather than as above quoted from paragraph numbered third.

"The test of the pleading's weakness is that the masonry may never have been completed, so far as the allegations are concerned, and defendant corporation may not have been paid for the work. Under the first circumstance the final cost of the work may not yet be ascertainable. Under the second circumstance no profit as defined has accrued under the second cause of action. In neither connection may the court construe the written agreement, attached as an exhibit but intentionally not incorporated directly or by reference to supply the pleading omissions. Order signed."

(Bracketed words supplied by court in republication.)

16 Ibid.
third causes of action of the amended complaint led to a new complaint which divided the second cause of action into two counts, one in *quantum meruit* (the new second cause of action), and the other for breach of contract (the new third cause of action); and the third cause of action which became in the second amended complaint the fourth, was essentially left unchanged.

At this point, the defendants began what might be termed the struggle for the bill of particulars. The steps taken illustrate the cumbrous procedure made necessary by the rules—a procedure which steadily worsened the plight of the plaintiff and heightened the difficulty under which he labored in his effort to get a hearing on the merits.

**First:** An order of the court was secured by the defendants directing plaintiff to serve a bill of particulars on the attorneys for the defendants. This order directed the plaintiff to state whether or not the contract alleged in the third cause of action was oral or in writing and also to itemize the particulars of the fraud alleged in the fourth cause of action and the damages alleged to have been suffered thereby.17

**Second:** The bill of particulars not having arrived on time, a motion was made to preclude the plaintiff from giving testimony at the trial with respect to the items in the complaint concerning which the particulars had been demanded.

**Third:** The bill of particulars arrived before the return day of the motion, but because it was not satisfactory to the attorney for the defendants, the motion to preclude was pressed.

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17 126 N.Y.L.J. 3, col. 3 (Sup. Ct. July 2, 1951), per Mr. Justice Schreiber, who wrote the following brief memo:

"Angelina v. Euclid Concrete Corp'n—Motion is granted to the extent of eliminating items 8, 12 and 14 from the demand and otherwise denied. Let a bill accordingly be served within thirty days from the service of a copy of this order, with notice of entry."
Fourth: The court found that the bill of particulars was insufficient in some respects, and afforded the plaintiff an opportunity to serve a further bill.\textsuperscript{18}

Fifth: The plaintiff served a further bill of particulars and the defendants' attorney found this new bill also deficient, at least in so far as the fourth cause of action was concerned.

Sixth: The defendants then moved again to preclude and the court erroneously granted a blanket order precluding the plaintiff from giving any testimony at the trial.\textsuperscript{19}

Seventh: The plaintiff appealed and the Appellate Division, while holding the bill inadequate, nevertheless, afforded the plaintiff a further opportunity to serve a still further bill of particulars.\textsuperscript{20}

Eighth: The plaintiff served a new bill of particulars, but inasmuch as the new bill was thought to suffer from the same defects as the old one, a new motion to preclude was made by the defendants; but this time the motion was denied.\textsuperscript{21}

\textsuperscript{18} Justice Rabin in 126 N.Y.L.J. 669, col. 2 (Sup. Ct. Sept. 28, 1951), wrote:

"Angelina v. Euclid Concrete Corp'n—Motion to preclude is granted unless plaintiff serves a further bill of particulars as to items 3, 9 and 10 within five days after service of a copy of this order, together with notice of entry thereof."

\textsuperscript{19} Justice Walter in 126 N.Y.L.J. 1307, col. 6 (Sup. Ct. Nov. 20, 1951), wrote:

"Angelina v. Euclid Concrete Corp'n—Motion to preclude is granted. The bill served sets forth the total damages claimed but does not state the items thereof as required by the order."

\textsuperscript{20} 279 App. Div. 789, 110 N.Y.S.2d 183 (1st Dep't 1952). It was there stated:

"Louis Angelina, Appellant, v. Euclid Concrete Corp. \textit{et al}., Respondents.—Order unanimously modified by limiting the preclusion of plaintiff to evidence of the alleged damage in the sum of $34,320.35 set forth in paragraph 20 of the complaint unless, within ten days after service of a copy of the order to be entered herein, with notice of entry thereof, plaintiff shall serve a supplemental bill of particulars setting forth in detail how it is claimed that said amount of damage arose and, as so modified, affirmed, with $20 costs and disbursements to the appellant. Settle order on notice."

\textsuperscript{21} Justice Dineen in 127 N.Y.L.J. 1724, col. 6 (Sup. Ct. April 30, 1952), wrote as follows:

"Angelina v. Euclid Concrete Corporation—Motion by defendant to pre-
The issues involved in this struggle for a bill of particulars concerned largely the fourth cause of action. In that cause of action the plaintiff sought to recover damages for alleged fraud practiced upon him by the defendants, Euclid Concrete Corp. and its president. It was alleged generally that in order to induce the plaintiff to sign the written agreement of April 6, 1950, the defendants represented to the plaintiff that the agreement between the defendants and the hospital involved an allowance for masonry work of approximately $158,000, and that the job would require 200,000 face brick and 40,000 common brick. It was further alleged that the defendants fraudulently represented that the plaintiff would receive 50% of the amount by which the total final cost of masonry work was exceeded by the sum that Euclid was to receive for the said masonry work from the hospital. It was then alleged that as a matter of fact the signed agreement of April 6, 1950, did not contain the terms orally agreed upon between the parties and that the job, in fact, required 242,000 face brick and 100,000 common brick, and that Euclid had actually contracted to receive $213,000 for the masonry work rather than $158,000 as had originally been misrepresented. For these misrepresentations which induced the signing of the contract by the plaintiff, as here alleged, the plaintiff demanded damages in the sum of $35,000.

In the request for a bill of particulars the defendants demanded as follows: "State what are the items of damage resulting from the alleged fraud as alleged in paragraph 'Twentieth' of the plaintiff's second amended complaint." The response to this demand, which was ordered by the court, was contained in a bill of particulars as Item 10 thereof and read as follows:

The damages arising from the said fraud are claimed in the alternative, so that if the plaintiff is prevented from recovering on the causes of action other than the acts of action for fraud set forth in his com-

clude plaintiff from giving any testimony with regard to matters set forth in paragraph 'Twentieth' is denied. The bill served in accordance with the order of the Appellate Division is a substantial compliance therewith." In view of the subsequent history of this fourth cause of action, the opinion of the court on this application can only be ascribed to judicial ennui.
plaint by reason of the terms and conditions of the writing dated April 5, 1950, which writing the plaintiff was fraudulently induced to execute, then and in that event he will have been damaged to the extent that he is prevented from recovering on the acts of action in question. In the event that the plaintiff has been, or will be prevented, by reason of his having executed the said writing, from proving his first cause of action, he shall have been damaged in the sum of $210. In the event that the plaintiff is prevented from proving his second cause of action by reason of his having executed the said writing, he shall have been damaged in the sum of $34,320.35. In the event that the plaintiff has been, or will be prevented from proving his third cause of action by reason of the execution of the aforesaid document, then the plaintiff has been damaged in the sum of $34,320.35. In the event that the plaintiff is prevented from proving his fifth cause of action by reason of his having executed the said document, then he shall have been damaged in the sum of $600. In the event that the plaintiff is prevented from proving his sixth cause of action, then he shall have been damaged in the sum of $2,385, all by reason of the fraudulent statements.

This allegation of damage, as indicated above, did not satisfy the defendants and resulted in the order to preclude made by Mr. Justice Walter, mentioned above, which was modified in the Appellate Division. The Appellate Division, however, in modifying the order, directed the service of a bill of particulars with respect to the damages for fraud and, pursuant thereto, the plaintiff served a further bill of particulars. The new bill of particulars, in alleging the damages suffered for fraud, stated as follows:

Upon information and belief, the defendant Euclid Concrete Corp. received the sum of $213,876 plus the cost of extras amounting to the sum of $4,764.71 making a total sum of $218,640.71 from the Beth-El Hospital for masonry work done (see Exhibit A of plaintiff's bill of particulars, dated August 27, 1951). Upon information and belief the cost to the Euclid Concrete Corp. of all the masonry work already done, together with additional costs, it would have incurred had the plaintiff been permitted to continue his contract to its completion by the said defendant corporation, would have been approximately $150,000. The difference between the two sums is $64,640.70, one-half of the said sum is $32,320.35. The said amount is what the plaintiff is seeking to recover under the other causes of action in his complaint, and it has been previously stated in the bill of particulars
served heretofore that the cause of action for fraud is stated in the alternative.

The defendants again moved to preclude and this time the motion to preclude was ultimately denied by Mr. Justice Dineen.\textsuperscript{22}

The defendants, however, were still of the opinion that neither the complaint in its fourth cause of action nor the three bills of particulars, which were served with respect thereto, set forth adequately any damages which could be recovered in an action for fraud and accordingly the defendants moved to dismiss the second, third and fourth causes of action on the grounds that they did not state facts sufficient to constitute causes of action. The motion came on to be heard before Mr. Justice Corcoran and while the second and third causes of action were allowed to stand, the fourth cause of action was dismissed. The learned Justice, in disposing of it, said as follows: \textsuperscript{23}

\textsuperscript{22}Ibid. A similar bit of procedural futility surrounded the various applications for examinations before trial. Plaintiff procured an order to examine defendants before trial. (See opinion of Justice Nathan, 126 N.Y.L.J. 403, col. 5 [Sup. Ct. Sept. 7, 1951] as expanded on reargument, 126 N.Y.L.J. 1131, col. 6 [Sup. Ct. Nov. 5, 1951].) Defendant then sought to examine plaintiff before trial and also sought to inspect plaintiff’s books and records. These applications are provided for in § 296 of the Civil Practice Act and Rule 140 of the Rules of Civil Practice. This application was countered by the plaintiff by a cross-motion to inspect defendant’s books. The motion and cross-motion were disposed of by Justice Hofstadter as follows (127 N.Y.L.J. 244, col. 3 [Sup. Ct. Jan. 18, 1952]):

“Angelina v. Euclid Concrete Corporation—Motion for examination before trial is granted. The plaintiff will appear for examination five days after completion of the examination of the defendant and signing of the same. Pertinent books, records and documents are to be produced for use pursuant to section 296, C.P.A. That branch of the motion and the cross-motion for a discovery and inspection is denied, without prejudice to a renewal of motion after completion of the examinations and the showing of the necessity at that time for the relief sought.”

This opinion did not tend to speed things up. The examinations of both plaintiff and defendant proceeded and revealed but few facts of importance. At one point defendant refused to go on with the examination and plaintiff promptly moved to strike out defendant’s answer. Whatever the right or wrong of it, Justice Levey refused to strike out the answer and ordered the examination to proceed. 126 N.Y.L.J. 1707, col. 1 (Sup. Ct. Dec. 19, 1951):

“Angelina v. Euclid Concrete Corp’n—Motion to strike out the answer is denied upon condition that the examination is continued at Special Term, Part II, of this court, on December 26, 1951, at 11 A.M.”

\textsuperscript{23}127 N.Y.L.J. 1079, col. 4 (Sup. Ct. March 18, 1952).
The fourth cause of action is dismissed. It is substantially the same as the cause of action which was in the previous complaint as the third cause of action and which was dismissed on motion. I certainly have no intention of passing upon the decision of another justice in dismissing this cause. It is enough to warrant dismissal that the plaintiff, although granted leave to amend, did not amend to correct the defects pointed out in the decision dismissing the cause. Paragraph twentieth which is the only new allegation in this cause of action, as amended, adds nothing to it. In effect, it alleges that the plaintiff has suffered no damage as result of the alleged fraud but might suffer damages "in the event" certain contingencies occur.

This decision of Mr. Justice Corcoran was appealed to the Appellate Division by the plaintiff and the decision of Justice Corcoran was upheld by a divided court, Mr. Justice Dore writing a dissenting opinion. The majority summarized the allegations of fraud in the fourth cause of action and the damages alleged therein as follows: 24

Following the allegations of fraud leading to plaintiff's inducement to sign the written agreement, as pleaded in the fourth cause, it is alleged that "in the event the plaintiff is held by any Court of competent jurisdiction to be bound by and to" the written contract, he will be damaged in the sum of $35,000.

This is merely saying that if a court holds the agreement good plaintiff will be damaged by its terms. But if the contract is a good contract, in the legal sense, that would be the end of the matter and the enforcement of the writing according to its terms would not be actionable.

Parties often sustain damage by their valid contractual undertakings, but it has never been supposed that damage lies against the other party to the contracts in consequence of this; and what is a "valid" contract in the event of controversy is what a court acting with jurisdiction says it is. The theory tendered by the plaintiff is not a cause for which relief at law exists.

24 280 App. Div. 405, 406, 113 N.Y.S.2d 537, 538 (1st Dep't 1952). The plaintiff sought here to establish his cause of action for fraud by adopting the contract and seeking to recover damages for the fraud which he claimed had induced him to sign the agreement. But the mere signing of the contract caused plaintiff no loss, particularly since loss of profits is not an element of damages in fraud. Foster v. Di Paolo, 236 N.Y. 132, 140 N.E. 220 (1923).
Mr. Justice Dore, dissenting, assimilated the fourth cause of action to those cases in which it has been held that while the measure of damages may be improperly pleaded, the cause of action is not thereby invalidated.

Ultimately, the majority view was upheld in the Court of Appeals, but a number of procedural maneuvers took place prior thereto.

The defendant having disposed of the fourth cause of action and having failed to bring about a dismissal of the second and third causes of action, now moved at Special Term for summary judgment. The new motion, as is required, was bottomed not only on the pleadings but also on an affidavit in support of the motion. The affidavit, after describing the causes of action in the complaint, set forth the written agreement of April 5, 1950, which contained a provision that "should Angelina fail to perform the services hereunder in a manner and at a rate of progress satisfactory to Euclid, Euclid may terminate its agreement upon three days written notice to Angelina and in such event Angelina shall be entitled only to the proportionate salary provided in subparagraph (a) of Article 3 herein." The affidavit went on to say that Angelina's work was unsatisfactory to the defendants, and he was accordingly dismissed on three days notice. Furthermore, the moving papers showed that the said agreement provided that the parties were to be bound by the figures certified by a named certified public accountant and that the accountant had certified that the masonry work had resulted in a loss to the defendant. It was pointed out in the moving papers that on either of these two grounds the second and third causes of action should be dismissed. For if the plaintiff was removed because his work was unsatisfactory pursuant to the written agreement, he could not recover under the terms of the agreement, and in any event,

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25 See Angelina v. Euclid Concrete Corp., supra note 24 at 407, 113 N.Y.S.2d at 539.

26 A provision that an employee may be dismissed if his work is not "satisfactory" to the employer is operative even if the judgment of the employer is arbitrary, provided he is in fact dissatisfied. Cf. Reiss v. Arabian American Oil Co., 279 App. Div. 805, 109 N.Y.S.2d 625 (2d Dep't 1952), aff'd, 304 N.Y. 953, 110 N.E.2d 888 (1953).
this being a profit-sharing arrangement, there was nothing to recover since there was no profit in the transaction. The plaintiff, on the other hand, in an answering affidavit, claimed the right to rely on an oral agreement although a written one existed and had been entered into between the parties. This alleged oral agreement, of course, did not contain the terms and provisions of the written agreement upon which the defendants relied. Mr. Justice Rabin heard argument and received briefs on the issues presented by this motion and came to the conclusion that "[n]o triable issue is, however, presented as to the second and third causes of action and the defendants are entitled to partial summary judgment as asked for in their memorandum of law as to those causes of action." 27

It was after this motion had been granted that the order consolidating the action in Kings County with the action in New York County was made. The defendant opposed the successful effort made by the plaintiff to consolidate these causes of action and tendered the proposition to the court that the consolidation should not take place because a more speedy trial could be had in Kings County. Reliance was placed by the defendant on the decision of the Appellate Division in Tenenbaum v. Dunlop, 28 in which it was held that where two actions are pending and all the issues can be determined more speedily in one than in the other, con-

27 Justice Rabin, in 127 N.Y.L.J. 1746, col. 4 (Sup. Ct. May 1, 1952), wrote as follows:

"Angelina v. Euclid Concrete Corporation—A triable issue is presented in respect of the first cause of action in view of the statement in the answering affidavit of plaintiff that he has never been paid the $210 involved in that cause. The rights of the parties are not sufficiently clear as to the fifth and sixth causes of action to warrant the granting of summary judgment dismissing the complaint as to those causes. No triable issue is, however, presented as to the second and third causes of action and the defendants are entitled to partial summary judgment as asked for in their memorandum of law as to those causes of action. In view of the dismissal of the fourth cause of action that cause must be disregarded on the present motion notwithstanding the fact that the order of dismissal is being appealed from. The motion is granted to the extent of directing summary judgment in favor of defendants dismissing the second and third causes of action and directing the severance of the action as to the first, fifth and sixth causes. In other respects the motion is denied. Settle order."

solidation was not a sound exercise of judicial discretion. Nevertheless, the motion to consolidate was granted.\textsuperscript{29}\n
But inasmuch as summary judgment had been granted with respect to the principal causes of action in the New York County case by Mr. Justice Rabin, and inasmuch as the consolidated action in Kings County involved the very same issues disposed of by Mr. Justice Rabin, the defendant moved before Mr. Justice Rabin for an order extending and modifying Mr. Justice Rabin's prior order so that the same summary judgment could be rendered with respect to the Kings County cause of action now consolidated with the New York County action. In response to this application, the plaintiff filed an affidavit which did not raise any new issues of fact but pointed out that the original order granting the defendants' order for summary judgment in the New York County case was presently on appeal. Mr. Justice Rabin disposed of this new motion with a brief opinion as follows: \textsuperscript{30}

Motion is granted. The prior order dismissing the second and third causes of action is res adjudicata as to the complaint in the Kings County action, which has now been consolidated with the New York County action. No issue of fraud was raised in the complaint in the Kings action, the claim only being asserted by way of reply to the counterclaim. This motion is addressed solely to the complaint. The fact that an appeal is pending from the prior order granting summary judgment should not act as a bar to the relief now sought. In fact, it would seem more practical to have the record in such form as will permit of an appellate determination in both actions on a single appeal. This is particularly so since the question to be reviewed will be the same in each instance. The order hereon may provide for a stay pending application to the Appellate Division on notice for a further stay.

The two orders granting summary judgment made by Mr. Justice Rabin, the one disposing of the second and third causes of action in New York County, and the other disposing of the Kings County action, were heard on appeal together by the Appellate Division. The Appellate Division affirmed both orders, this time unanimously, but afforded the

\textsuperscript{29} 127 N.Y.L.J. 1811, col. 5 (Sup. Ct. May 6, 1952) (Justice Cohalan).

plaintiff an opportunity to get a hearing on the merits of his cause of action, an opportunity which the plaintiff never seized. The brief opinion of affirmance said as follows: 31

As the pleadings stood on the motion for summary judgment, plaintiff was bound by the written contract and summary judgment on the causes of action based on the alleged oral contract was properly granted. We affirm with leave to plaintiff to plead a cause of action for reformation or rescission.

This disposition of the second and third causes of action by Mr. Justice Rabin, as well as of the Kings County action, disposed of them completely subject, of course, to a possible review in the Court of Appeals. There was left in the case, however, three causes of action—the first, fifth and sixth. As has already been indicated, the first cause of action was for only $210.00, an amount said to be due to the plaintiff for unpaid wages; the fifth cause of action was to recover the sum of $600.00, alleged to be due to the plaintiff from the defendant for the rental of certain tools and equipment owned by the plaintiff; the sixth cause of action was to recover $2,385.00, alleged to be due to the plaintiff from the defendant for the rental of a truck owned by the plaintiff.

While these causes of action involved but small amounts, it was necessary, of course, to dispose of them before the case could be closed. The defendant, moreover, had interposed certain counterclaims, and one of these counterclaims had to do with a claim made by the defendant that the plaintiff had wilfully exaggerated the amount of his lien and therefore the defendant was entitled to recover damages for such wilful exaggeration. Accordingly, the defendant moved in Special Term for a summary judgment with respect to the said coun-

31 280 App. Div. 918, 115 N.Y.S.2d 921 (1st Dep't 1952). The attorney for the plaintiff was not unaware of the fact that an oral contract cannot be proved when a written contract exists and covers the transaction. See Laskey v. Rubel Corp., 303 N.Y. 69, 71, 100 N.E.2d 140 (1951). But he sought to apply hereto the familiar rule that a contract obtained by fraud can be disregarded and need not be reformed as a condition precedent to maintaining an action on the contract as it might be reformed in equity. Restatement, Contracts § 507 (1932). But this is not intended to override the parol evidence rule and permit the proof of a contract by parol, wholly different from the written contract. To accomplish this, one would have to plead and prove fraud in the factum—a condition not claimed to be present in this case.
The amount claimed in said summary judgment was something in excess of $38,000 and therefore summary judgment was requested not only in support of the counterclaim, but also dismissing the remaining causes of action in the plaintiff's complaint because, obviously, they did not total the amount requested in the counterclaim.

In supporting this motion for summary judgment the defendant pointed out that the counterclaim in question was based on Sections 39 and 39(a) of the Lien Law which, in effect, provided that if there is a wilful exaggeration of an amount due to the lienor as set forth in the lien, the lienor is obligated to pay damages and these damages include the amount of any premium for a bond given to obtain the discharge of the lien, a reasonable sum for attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due under the lien exceeded that found to be due. In the instant case the amount of the lien was approximately $35,000 and it was shown that nothing was due thereunder since the proceeding was dismissed. Therefore, the entire amount of the lien claimed was an exaggeration. As to whether or not the exaggeration of the amount due was wilful, the defendant argued that no such lien should have been filed in the first place since the cause of action on which it was based consisted of a cause of action to recover damages for breach of contract, and this was not a proper subject of a mechanic's lien.

This was a bitterly contested motion and it was met by the plaintiff with two separate thrusts; one was a cross-motion seeking to strike out and dismiss as insufficient in law the counterclaims set up in the defendants' answer. The

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32 N.Y. Lien Law § 39 provides that if "[i]n any action or proceeding to enforce a mechanic's lien," the court shall find that the lienor has "wilfully exaggerated" the amount due on the lien, the lien shall be void. Id. § 39-a provides that "[w]here in any action or proceeding to enforce a mechanic's lien" the court has found the lien void because of wilful exaggeration of the amount due, the owner or contractor may be awarded damages against the lienor which shall include the bond premium, attorney's fees, plus the amount by which the lien was exaggerated. It will be noted that both Sections 39 and 39-a require that the exaggeration be wilful and that the finding as to wilfullness be made in the action to foreclose the lien.

33 See note 13 supra.
second was likewise a cross-motion seeking summary judgment for the plaintiff on the first, fifth and sixth causes of action. Desperate expedients were resorted to by the parties, consisting of letters to the judge after memoranda had been filed and after the argument had taken place. It was at this point that passions seemed to run high in the case. The defendants struggled to quench the last flickering flame of hope that the plaintiff had for any recovery.

Mr. Justice Gold heard the defendants' motion and the plaintiff's cross-motion and finally disposed of them all in the following opinion: 34

Triable issues are presented as to plaintiff's right to recover on the first, fifth and sixth causes of action which require denial of his cross motion for summary judgment upon these causes. Said cross motion is accordingly denied. The cross motion to dismiss as insufficient the first and second counterclaims is granted, with leave to serve an amended answer within ten days from the service of a copy of this order, with notice of entry. The first counterclaim consists of conclusions with insufficient ultimate facts to support them. The second counterclaim is insufficient for failure to allege that the court has found a "wilful" exaggeration of plaintiff's claimed lien as required by Sec. 39-a of the Lien Law. That section requires a declaration by the court deciding the foreclosure action that the lien is void "on account of wilful exaggeration." No such declaration is pleaded. The defendants' motion for summary judgment on the second counterclaim is denied in view of the dismissal of the counterclaim. Furthermore, summary judgment is not authorized upon a cause of action based

34 128 N.Y.L.J. 249, col. 2 (Sup. Ct. Aug. 14, 1952). It will be noted that the counterclaim was dismissed because Section 39-a requires a declaration "by the court deciding the foreclosure action" that the exaggeration of the lien was wilful. Here, however, there could be no such finding, since the action to foreclose the lien was dismissed for insufficiency. Upon an application for reargument, defendant's counsel pressed the court to realize that the counter-claim was not defective, inasmuch as it could hardly plead a finding in the foreclosure suit before the suit was tried. Justice Gold allowed this possibility—128 N.Y.L.J. 599, col. 3 (Sup. Ct. Sept. 25, 1952)—but insisted that the counterclaim was demurrable because it did not in haec verba allege that the exaggeration was "wilful." He said:

"Angelina v. Euclid Concrete Corporation—Motion for reargument is denied. Even if the second counterclaim need not allege a finding of wilful exaggeration, it should at least allege that there was in fact, 'wilful' exaggeration of the lien. This is required by section 39-a of the Lien Law. As the counterclaim does not allege that the exaggeration was wilful, it is insufficient."
upon a statute where the sum recovered is a penalty. (Rule 113, subdiv. 3, R.C.P.).

The effort, therefore, to dispose of the defendant's counterclaim and the first, fifth and sixth causes of action in the plaintiff's complaint failed and the only thing left was to hold a trial before a jury on the issues. The trial took place before Mr. Justice Frank and a jury. At the close of the evidence submitted on both sides, Mr. Justice Frank dismissed the fifth and sixth causes of action. He rendered an oral opinion from the bench in which he showed that no recovery could be had for rental value of tools and equipment or the truck of an employee who was engaged to do a job requiring the use of such equipment.\footnote{Coates v. Village of Nyack, 127 App. Div. 153, 157, 111 N.Y. Supp. 477, 479-480 (2d Dep't 1908).}

There was left for disposition the first cause of action in the New York County case and the defendant's counterclaims in the Kings County action. These counterclaims had also been interposed in the New York County action and had there been dismissed, as we have seen, by Justice Gold. The defendants, therefore, withdrew them at the close of the trial. But the first cause of action in the New York County case went to the plaintiff. A judgment in his favor in the sum of $210 was directed by Justice Frank on motion made by counsel for defendants.

As soon as the judgment was entered, a new struggle arose as to the form of the order to be entered by Justice Frank. The plaintiff had caused a judgment to be entered which in terms disposed of not only the trial before the court, but also the other causes of action. The judgment which had been entered covered the entire proceeding. It provided for judgment for the plaintiff in the sum of $210; it provided that the defendant have judgment against the plaintiff, dismissing the plaintiff's complaint as to the second, third, fourth, fifth and sixth causes of action, as well as to the action originally commenced in Kings County.

It will be recalled that the dismissal of the fourth cause of action by Mr. Justice Corcoran was affirmed by the Appel-
late Division by a divided court. Had a judgment been entered at that point severing the fourth cause of action and entering judgment thereon in favor of the defendant, an appeal to the Court of Appeals therefrom would have lain as of right. But no such judgment was entered. On the other hand, the second and third causes of action and the Kings County case had been dismissed by Mr. Justice Rabin and his orders had been unanimously affirmed in the Appellate Division. Had a separate judgment been entered on Justice Rabin's orders, no appeal therefrom to the Court of Appeals would lie except by permission. The plaintiff, by including the disposition of the fourth cause of action in the judgment disposing of the entire case after the trial, sought to create an avenue for an appeal on all the issues in the case to the Court of Appeals.

The defendant, therefore, moved to modify the judgment and suggested that there be two judgments—one disposing of the second, third and fourth causes of action as well as the Kings County action—and the other disposing of the first, fifth and sixth causes of action which were subjects of the trial before Mr. Justice Frank. Again the contest between the parties was bitter. The attorney for the plaintiff first opposed the motion being referred to Mr. Justice Frank. Two letters were addressed to the court by the attorney for the plaintiff. The attorney for the defendants also addressed a letter to the court. But all of this maneuvering resulted in nought because Mr. Justice Frank considered the papers before him insufficient to enable him to make a proper decision. He wrote as follows:

Motion is denied with leave to renew upon full, complete and proper papers. The contention of plaintiff that the motion should not have

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37 N.Y. Civ. Prac. Act § 589. The plaintiff applied for leave to appeal the order of the Appellate Division. But his motion was denied. 280 App. Div. 890, 115 N.Y.S.2d 523 (1st Dep't 1952). The proper procedure would have been to enter the judgment and appeal as of right. A like motion for leave to appeal to the Court of Appeals from the order of the Appellate Division unanimously affirming the orders of Justice Rabin granting defendant's several motions for summary judgment was also denied. 281 App. Div. 659, 117 N.Y.S.2d 854 (1st Dep't 1952).
38 See 129 N.Y.L.J. 752, col. 2 (Sup. Ct. March 6, 1953).
been referred to me by Special Term is without merit (Oakley v. Cokalette, 6 App. Div., 229). The statement (in the moving papers) that the Appellate Division affirmed with leave to commence an action for rescission is not borne out by the order of the Appellate Division. The judgment does not set forth the determination made by me at Trial Term. In sum, the papers submitted herein on both sides are inaccurate, inadequate and incomplete.

Attorney for defendants renewed the motion. This time, for the purpose of avoiding, if possible, a review of the whole case in the Court of Appeals, the defendants moved that the judgment be vacated and that three judgments be entered in lieu thereof. It was suggested that the proper way to dispose of the case was to enter one judgment dismissing the fourth cause of action and a second judgment granting to the defendants judgment on the second and third causes of action and on the Kings County case, and the third judgment disposing of the matters raised at the trial, to wit: the first, fifth and sixth causes of action. While these motions were pending, the defendants, of course, paid the §210 judgment and made a strenuous effort to persuade the court that justice could be done only by entering three separate judgments.

But Mr. Justice Frank did not concur in this view. Admitting that the defendants "... might have previously entered separate judgments after orders were entered dismissing the various causes of action on his motions addressed to the pleadings," 39 he, nevertheless, said that by paying the judgment on the first cause of action and by accepting a satisfaction piece thereon, the defendants may be deemed to have waived this right. Moreover, Mr. Justice Frank held that the plaintiff had lost his right to amend his pleading to state an action for reformation or rescission because he did not avail himself of that opportunity when the Appellate Division afforded it to him.

The judgment, therefore, remained a single one disposing of the entire suit in one judgment. It not only gave the plaintiff his judgment for §210; it not only dismissed the defendants' counterclaims, but it also dismissed the plain-

39 See 129 N.Y.L.J. 1191, col. 3 (Sup. Ct. April 10, 1953).
tiff's second, third, fourth, fifth and sixth causes of action and the action in Kings County.

From this judgment plaintiff appealed directly to the Court of Appeals, as of right.

The problem involved in the right to appeal to the Court of Appeals was raised timely by motion made by defendants in the Court of Appeals for an order dismissing the appeal on the ground that the same was not appealable as of right. As indicated above, the judgment, insofar as it dealt with the second and third causes of action and the Kings County action, had been unanimously affirmed in the Appellate Division and was, therefore, not appealable as of right to the Court of Appeals. On the other hand, with respect to the fourth cause of action, the Appellate Division was divided and therefore, to that extent, the judgment was appealable to the Court of Appeals as of right. Since both phases of the case were included in one judgment, the problem was to determine whether the Court of Appeals had jurisdiction to hear an appeal on the entire judgment merely because the Appellate Division had divided on one part of it. The defendants argued that it was improper for the court to hear the appeal on the entire judgment and that, therefore, the appeal should be dismissed. There was a noticeable lack of authority although the court was referred to the case of Adlerblum v. Metropolitan Life Insurance Co., but the Court of Appeals denied the motion, and at the moment one would find it difficult to venture a guess as to whether or not a judgment with respect to several causes of action, one of which is affirmed by a divided court and the other by a unanimous court, is entirely appealable as of right.

At long last the matter came before the Court of Appeals and the whole record was presented to the court and very elaborate briefs written on both sides. Oral argument lasting nearly two hours was held before the court and six judges of the Court of Appeals participated. In the end, what was

40 See note 37 supra.
41 284 N.Y. 695, 30 N.E.2d 728 (1940).
left of the case was a three-line obituary in the Law Journal reading as follows: 43

Judgment affirmed, with costs. No opinion. All concur except Van Voorhis, J., taking no part.

This was the end of the entire episode and it occurred on October 22, 1953, two years and nine months after the case had been initiated.

Unanswered questions remain. (1) Did the defendant really defraud the plaintiff? (2) Was it necessary to indulge in this elaborate procedure? (3) How much of this procrastination and multiplicity of court activity is the fault of the lawyers in the case? And (4) is there any way in which a situation of this kind can be disposed of or dealt with without permitting the procedure to run wild as it did in this case?

When one returns to fundamentals we can see that very important principles of natural justice have been here violated. The plaintiff did not have his day in court. His grievance, real or imaginary, has not been aired. Judges have been belabored, some with petty questions, some with weighty problems, only a few of which were directly involved in the plaintiff's claim. It is more than 100 years since the original Field Code was adopted by the State of New York.44 It is more than one quarter of a century since the current Civil Practice Act was adopted. Do we need a revision of our procedure to make aberrations of this kind impossible, in the future?

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44 See Found, David Dudley Field: An Appraisal in David Dudley Field Centenary Essays 3 (Reppy ed. 1949).