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Appellate Practice, Winning Residential Appeals

Gerald Lebovits

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Appellate Practice:
Winning Residential Appeals

By Gerald Lebovits, Esq.
and Deborah E. Fisher, Esq.

***Editors' Note**: We present this article in three installments. Part I examines preliminary considerations, including the types of adverse decisions that are appealable and applicable standards of review. Part II, which will appear in our May 2000 issue, will explain how to draft and file a notice of appeal and to cross-appeal. The final installment, to be published in June, will provide invaluable advice on perfecting and orally arguing an appeal.*

Attorneys who prosecute or defend residential landlord-tenant appeals encounter a thicket of rules along the way to affirmance, reversal, or modification. Some rules apply uniquely to appeals to the Appellate Terms for the First and Second Departments. Other rules apply to all appeals in New York State. This article is designed to move practitioners through that thicket, from deciding whether to appeal, to exhausting appellate remedies, to winning a residential landlord-tenant appeal. *(continued on page 2)*

Nonpayment Stipulations:
A Review of the Essentials

A vast majority of nonpayment cases are settled by an agreement known as a "stipulation of settlement." Entering into a stipulation can be an expedient and effective way to resolve a nonpayment proceeding. All too often, stipulations are handwritten on forms available in the court house. Unfortunately, this practice can result in "stips" that omit key terms and later backfire, landing you back in court fighting for the very relief you thought you had already secured.

To be sure that you've covered all the bases, make sure your agreement incorporates the following six essential elements. Our ***LTPR*** Practice Form, at page 10, illustrates how these points may be incorporated into a nonpayment stipulation.

1) Statement of Rent Due

Your stipulation should contain a provision which amends the nonpayment petition to include all rent due through the date of the agreement and should specify:
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Appealable Judgments or Orders

When a Housing Judge renders an adverse decision, the practitioner's first step, after consoling the client, is to decide whether the decision constitutes an appealable order or judgment. If not, the practitioner must first exhaust Civil Court remedies by making the appropriate motion in the Housing Part. That way the practitioner will seek the relief the client needs and create an appealable order. It is often necessary to file a notice of appeal concurrently with a Housing Part motion to preserve appellate remedies. On the other hand, if the order is appealable directly, a notice of appeal must first be filed if there is any possibility that the client will appeal or if, having failed to console the client, the client will no longer be using the practitioner's services.

It is for the client, not the lawyer, to decide whether to appeal.[1] But spending the $25 fee to file the notice of appeal will bring peace of mind to both practitioner and client.

A. CPLR 5501: The Court's Jurisdiction

A final judgment is always appealable.[2] When a final judgment is appealed, any non-final judgment or order that affects the final judgment may be reviewed during the appeal.[3] The Appellate Term reviews both law and fact,[4] and the Housing Part's exercises of discretion.[5] The Appellate Division reviews Appellate Term decisions on the law and facts, while the Court of Appeals reviews only questions of law, unless the Appellate Division has found new facts.[6]

B. CPLR 5501: Interlocutory Appeals

Before a final judgment is rendered, an appellant may appeal as of right non-final judgments or orders, called interlocutory orders.[7] Non-final orders that affect a final judgment include orders adverse to the prevailing party below, orders denying a new trial or hearing, rulings to which an appellant objected or had no opportunity to object, and a Judge's remark to which the appellant objected.[8] Only an interlocutory order that "necessarily affects the final judgment" may be appealed.[9]

To determine whether an intermediate order or interlocutory judgment "necessarily affects the final judgment," the practitioner should ask whether, assuming that the interlocutory judgment is erroneous, its reversal would overturn the final judgment. If it would, "it is a reviewable item; if it would not, and the judgment can stand despite it, it is not reviewable."[10]

Although interlocutory Housing Part orders may be appealed immediately, a direct appeal from an interlocutory order terminates when a final judgment is entered.[11]

After a final judgment is entered, an appeal must be taken from it, although a non-final order that affects the final judgment can be reviewed *(continued on page 3)*

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at that time.[12] Moreover, the right to appeal a pretrial order ends if no appeal is taken within 30 days after a final judgment is entered.[13]

Because the Housing Part handles summary proceedings with relative speed, it is unlikely that the Appellate Term will decide an interlocutory appeal before the Housing Part renders a final judgment. As a result, many appeals from interlocutory orders are accompanied by a request to stay the summary proceeding pending the appeal.[14] But there is no right to a stay while an appeal is pending. Absent special circumstances the Housing Part and the Appellate Term are reluctant to grant a stay pending an appeal of an interlocutory order. Therefore, by the time the Appellate Term considers an interlocutory order, the Housing Part will likely render *(continued on page 4)*

FROM THE APPELLATE TERM TO THE COURT OF APPEALS

After the practitioner obtains a Housing Part order or final judgment under Article 7 of the Real Property Actions and Proceedings Law ("RPAPL"), the first appeal is to the appropriate Appellate Term of the Supreme Court. That appeal is as of right. [Civ. Ct. Act § 1702(a); CPLR 5515(1), 5703(a).] The term "as of right" distinguishes an appeal authorized by the Constitution or a statute from one that must be undertaken by permission, or by leave to appeal. Appeals then go from the Appellate Term by leave to the Appellate Division, and from there, by leave again, to the Court of Appeals.

Each Appellate Division may create an Appellate Term. [N.Y. Const. art. VI, § 8; Civ. Ct. Act § 1701.] Only the Appellate Divisions for the First and Second Departments have done so.

The Appellate Term for the First Department covers New York and Bronx Counties. Housing Part judgments and orders from Manhattan and the Bronx go to the Appellate Term, First Department, which is located at 60 Centre Street, 4th Floor, in Manhattan. [22 NYCRR 640.1.] The telephone number of the clerk's office is (212) 374-8500.

There are two Appellate Terms in the Second Department, one for the Second and Eleventh Judicial Districts, which cover Kings, Richmond (Second Judicial District), and Queens (Eleventh Judicial District) Counties, and one for the Ninth and Tenth Judicial Districts, which cover Dutchess, Nassau, Putnam, Rockland, Suffolk (Tenth Judicial District), Orange, and Westchester (Ninth Judicial District) Counties. Housing Part judgments and orders from Brooklyn, Queens, and Staten Island are argued in the Appellate Term, Second Department, Second and Eleventh Districts, which is located at 111 Livingston Street, courtroom 1902, in Brooklyn, and at 88-11 Sutphin Boulevard in Queens. [22 NYCRR 730.1(a)(1), (f).] The central clerk's office for both Appellate Terms in the Second Department is located at 111 Livingston Street. The telephone number is (718) 643-5730.

Every Appellate Term Justice is an elected Supreme Court Justice chosen by the Chief Administrator of the Courts with the approval of the Presiding Justice of the respective Department of the Appellate Division. [N.Y. Const. art. VI, § 8(a); 22 NYCRR 1.1(f), 730.1(c)(2).] A maximum of three Justices serve on each panel. Two Justices constitute a quorum to render a final order and opinion. Both must concur to render any final order and opinion. [N.Y. Const. art. VI, § 8(c).]

To appeal an order from the Appellate Term, it is necessary to seek and obtain permission from the Appellate Term and, if the Appellate Term denies that application, from the Appellate Division. CPLR 5703(a). The Appellate Division will hear only Appellate Term orders that decide an appeal. To appeal from an order granting a new trial or hearing, the appellant must stipulate that judgment absolute will be entered if the Appellate Division affirms the Appellate Term's judgment. *Id.*

Motions to reargue Appellate Term orders must be made within 30 days, except for good cause shown. [22 NYCRR 640.9(a)(1) (First Department), 731.11(a), 732.11(a) (Second Department).] Motions to reargue are rarely granted. Leave to appeal must be sought within 30 days after service of the appellate order with notice of entry. [CPLR 5513(b), 5703(a), 5516; 22 NYCRR 640.9(b), 731.11, 732.11.] Appeals to the Appellate Division are governed by CPLR Art. 57.

Appeals to the Court of Appeals can be as of right or by permission. If the decision below involves only the constitutionality of a statutory provision under the New York or U.S. Constitutions, an appeal may be taken of right directly from the court that issued the decision. [CPLR 5601(b).] Otherwise, permission—in the form of a leave application—from the Appellate Division is required to appeal from the Appellate Division to the Court of Appeals. [CPLR 5602(5)(b).] CPLR Art. 56 governs appeals to the Court of Appeals. ◆

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a final judgment if the case is not stayed and if the order is not merged into the judgment. That alone makes it inefficacious to commence most interlocutory appeals from orders entered during summary proceedings.

The right to perfect an appeal from an interlocutory order is therefore typically exercised at the end of the summary proceeding. This strategy is sound because an appeal from a final judgment brings up for review all prior orders and decisions.[15] Nevertheless, if the practitioner appeals an interlocutory order and a final Housing Part judgment is rendered while the appeal is pending, the Appellate Term has the discretion under CPLR 5520(c) to treat the notice of appeal from the non-final order as a notice of appeal from the judgment.[16]

Nonappealable Paper

Many Housing Part outcomes are not appealable. Not merely the appellant but also the respondent must know what is appealable. A respondent faced with an appeal over something not appealable can move to dismiss the appeal after the appellant files a notice of appeal or wait to raise the point in the respondent's brief.

The following list illustrates Housing Part outcomes that may not be appealed without further motion practice.

✓ **Stipulations**. Stipulations of settlement or consent judgments are not appealable.[17] Litigants often stipulate to judgments in the Housing Part. A stipulation will be strictly enforced.[18] A stipulation negotiated by represented litigants is difficult to vacate unless a party committed fraud, illegality, or overreaching, or unless the stipulation is unconscionable.[19] Only the resulting order denying or granting the motion to vacate the stipulation of settlement is appealable.

✓ **Orders on default**. An order or judgment entered on default is not appealable.[20] The party against whom a default is entered must move the Housing Part to set aside the default pursuant to CPLR 5015. The resulting order may be appealed.

Tenant-respondents typically use orders to show cause to set aside the default. Doing so affords them an interim stay that prevents an eviction before the tenant's order to show cause is heard and resolved. If obtaining a stay is not at issue, a practitioner who seeks to vacate a default may move by regular motion to vacate the default order or judgment.[21] The resulting order, from an order to show cause or a motion, is appealable directly or on appeal from a final judgment.[22]

✓ **Reargument.** An order denying reargument is not appealable.[23] Litigants may, however, appeal orders that deny reargument but which expand on the court's original reasoning. In addition, litigants may appeal an order entered after a Judge agrees to hear reargument but then denies the motion. If the order determining reargument is appealed, or if the Judge grants a motion to renew, CPLR 5517 triggers extended time limits to appeal.[24]

Before bringing a motion for reargument, the practitioner should file a notice to appeal the underlying judgment or order. If reargument is granted, that order is appealable, even if the Housing Part adhered to its decision in the prior order and even if no appeal is taken from the prior order.[25]

✓ ***Ex Parte* Orders.** A denial of an *ex parte* order, such as a Housing Judge's refusal to sign an order to show cause, is not appealable.[26] For example, no appealable issue arises if a Housing Judge denies an *ex parte* subpoena in a nonprimary-residence holdover proceeding. If the Judge rules against a litigant at the end of the case, however, the final judgment may be appealed on the ground that an earlier ruling, such as the court's failure to sign a subpoena, affected the judgment.[27]

✓ **Orders to Show Cause**. The court's refusal to sign an order to show cause containing a stay is not appealable.[28] If a Housing Judge does not sign an ex parte order to show cause, however, the practitioner may seek a stay from the Appellate Term under the *ex parte* procedures in CPLR 5704(b). If the court signs an order to show cause with a stay, the opposing party, ex parte, may either seek to vacate the stay or use the *ex parte* procedures of CPLR 5704(b) to vacate the order. Once the court determines the order to show cause, which may or may not contain a stay, the order the court issues is appealable.

✓ **Moot Issues**. An appeal will be dismissed if the issue on which the appeal is based becomes academic.[29]

✓ **Decisions**. A trial court's decision is not appealable unless it is reduced to an order or a judgment.[30] The order must constitute a final determination of an issue.[31] But an order that does not accurately incorporate a decision may not be appealed directly.[32] An order that does not reflect the decision should be resettled.

Housing Judges typically issue one-paper opinions that combine the decision and order and which merge the decision into the order as an appealable document. The decision and order will usually call for the issuance of a judgment. The judgment becomes *(continued on page 5)*

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the appealable paper.

Sometimes a Judge will decide a case orally from the bench and issue an order written as an abbreviation on the front page of the court file or court papers. If so, the practitioner will need to transcribe the tape to appeal the order successfully. Orders and oral rulings, even when transcribed, are not appealable unless the Judge signs the transcript and the order is entered.[33] A clerk's extract of trial minutes may not serve as an appealable order.[34]

If a Judge delivers an order from the bench but does not reduce it to writing, the practitioner must prepare an order for the Judge's signature.[35] The Appellate Term, however, accepts a file notation if the court signs and dates it.

Practitioners who wonder whether their order is appealable should attach the Judge's memorandum writing to their notice of appeal and then obtain a written order. This situation, though, will occur only if the court dismisses the proceeding. Any other outcome will involve a judgment the clerk writes and the Judge signs. That judgment is an appealable paper. Signing a judgment is a ministerial act that can, if necessary, be compelled by an Article 78 petition.[36]

Standards of Appellate Review

A. Appealing Findings of Fact and Credibility Determinations

An appeal may be predicated on the Housing Part's findings of fact, including credibility determinations. But these appeals are often unsuccessful. Appellate courts are loath to substitute their own findings on a cold record. By deferring to the Housing Part's findings of fact, appellate courts strengthen the power of the Housing Part, which sees and hears witnesses, and limit appellate review.[37]

Thus, courts of intermediate appellate jurisdiction, such as the Appellate Term, will not ordinarily vacate findings of fact unless the record clearly does not support them.[38] A trial court's credibility determinations are entitled to "great respect" and will not be disturbed if they are reached by "any fair interpretation of the evidence."[39]

In the end, however, the scope of review of a court of intermediate appellate jurisdiction over a nonjury-trial determination is as broad as that of the trial judge's and allows the appellate court to substitute its judgment if the evidence fails to support the trial court's findings.[40]

B. Appealing Discretionary Determinations

Courts of intermediate appellate jurisdiction, such as the Appellate Term or the Appellate Division, are vested with "broad equity powers" to "review a determination for abuse of discretion or substitute its own discretion."[41] The practitioner must always consider whether the ruling appealed from was initially subject to the Housing Part's discretion. If it was, the Appellate Term may reverse by invoking its own discretion in the court's interest-of-justice prerogative or by finding that the Housing Judge committed an abuse of discretion.

In this sense, "the appellate court shall have full power to review any exercise of discretion by the court or judge below."[42] Some Housing Part issues, though, such as whether the court should have permitted an adjournment to allow a party to obtain counsel, lend themselves to reversal only if the Appellate Term finds not merely an abuse of discretion, but a clear abuse of discretion.[43]

C. Appealing Unpreserved Issues

Countless cases hold that an appellate court may not consider for the first time on appeal legal issues unpreserved below. [44] The justification is that defects and errors should be pointed out to the court below to give the court an opportunity to correct them. But courts of intermediate appellate jurisdiction, such as the Appellate Term, may exercise their interest-of-justice prerogative to consider legal issues not raised below. To do so, however, the Appellate Term will require the advocate to advance a strong reason.

***Gerald Lebovits** is a principal court attorney in Supreme Court, New York County, and an adjunct professor at New York Law School.*

***Deborah E. Fisher**, formerly a court attorney in Housing Court, is the senior court attorney to Civil Court Judge Cynthia S. Kern.*

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Endnotes:

1. *See, e.g., In re Judicial Settlement of Account of Proceedings of McGinty*, 129 Misc.2d 56, 59, 492 N.Y.S.2d 349, 352 (Sur.Ct. 1985).
2. Civ. Ct. Act § 1702(a)(1)-(3).
3. CPLR 5501(a)(1).
4. CPLR 5501(d).
5. Civ. Ct. Act § 1702(d).
6. CPLR 5501(c).
7. Civ. Ct. Act § 1702(a)(1).

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8. CPLR 5501(a)(2-4).

9. CPLR 5501(a).

10. David D. Siegal, *New York Practice*, § 530, at 872 (3d ed. 1999).

11. Civ. Ct. Act § 1702; CPLR 5501; *Nivens v. NYCHA*, 246 A.D.2d 520, 421, 667 N.Y.S.2d 415, 417 (2d Dep't) (mem.), lv. denied, 92 N.Y.2d 805, 677 N.Y.S.2d 780 (1998); *Essex v. Newman*, 237 A.D.2d 486, 486, 655 N.Y.S.2d 595, 596 (2d Dep't 1997) (mem.).

12. CPLR 5501(a)(1); *Wolf v. Rand*, 258 A.D.2d 401, 404, 685 N.Y.S.2d 708, 711 (1st Dep't 1999) (mem.); *Charchan v. Wilkins*, 231 A.D.2d 668, 669, 647 N.Y.S.2d 550, 551 (2d Dep't 1996) (mem.); *McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135, 136 (1st Dep't 1995) (mem.).

13. *In re Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 289 (1976).

14. CPLR 5519.

15. CPLR 5501(a); *Smith v. Maya*, 27 H.C.R. 415B, 416-17, N.Y.L.J., 7/23/99, p. 30, col. 5 (App.Term 2d and 11th Jud.Dists.) (mem.).

16. *Eighty-First Assocs. v. Morell*, 27 H.C.R. 350A, N.Y.L.J., 6/23/99, p. 26, col. 1 (App.Term 1st Dep't) (per curiam).

17. *Roberson v. Morris*, 22 H.C.R. 292C, N.Y.L.J., 5/18/94, p. 23, col. 3 (App.Term 2d and 11th Jud.Dists.) (mem.).

18. *130 West 57 Co. v. Farley*, 27 H.C.R. 82A, N.Y.L.J., 2/16/99, p. 29, col. 1 (App.Term 1st Dep't) (per curiam).

19. *Merwest Realty Corp. v. Prager*, 694 N.Y.S.2d 38, 39 (1st Dep't 1999) (mem.); *Knickerbocker Village v. Doe*, N.Y.L.J., 1/5/94, p. 21, col. 2 (App.Term 1st Dep't) (per curiam).

20. CPLR 5511; *Abboud v. Abuhegazy*, 243 A.D.2d 519, 519, 663 N.Y.S.2d 96, 97 (2d Dep't 1997) (mem.); *In re Spedicato v. DHCR*, 241 A.D.2d 343, 344, 660 N.Y.S.2d 970, 970 (1st Dep't 1997) (mem.); *Blackman v. Powell*, 19 H.C.R. 698B, N.Y.L.J., 12/3/91, p. 30, col. 6 (App.Term 2d and 11th Jud.Dists.) (mem.).

21. CPLR 5015.

22. CPLR 5501(a)(1).

23. *Deshler v. East West Renovators, Inc.*, 259 A.D.2d 351, 351, 687 N.Y.S.2d 65, 66 (1st Dep't 1999) (mem.); *Bossio v. Fiorillo*, 222 A.D.2d 476, 477, 635 N.Y.S.2d 59, 60 (2d Dep't 1995) (mem.); *615 Co. v. Axelrod*, 24 H.C.R. 32A, N.Y.L.J., 1/17/96, p. 29, col. 2 (App.Term 1st Dep't) (per curiam).

24. David D. Siegal, *McKinney's Commentaries to CPLR 5517.*

25. *Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 197-98, 669 N.Y.S.2d 585, 588 (1st Dep't 1998) (mem.); cf. CPLR 2221, 5701(a)(2)(viii) (Appellate Division) (both eff. July 20, 1999).

26. *In re Spedicato*, 241 A.D.2d at 344, 660 N.Y.S.2d at 970; *Violante v. Berkowitz*, 90 A.D.2d 837, 837, 456 N.Y.S.2d 78, 79 (2d Dep't 1982) (mem.).

27. *McGraw*, 220 A.D.2d at 292, 632 N.Y.S.2d at 136.

28. *Paolini v. Thurston*, 25 H.C.R. 424A, N.Y.L.J., 8/7/97, p. 25, col. 1 (App.Term 1st Dep't) (per curiam).

29. *Lefkowitz v. Weis*, 261 A.D.2d 448, 448, 687 N.Y.S.2d 296, 296 (2d Dep't 1999); *Eighty-First Assocs. v. Morell*, 25 H.C.R. 179A, N.Y.L.J., 3/27/97, p. 27, col. 4 (App.Term 1st Dep't) (per curiam).

30. CPLR 5512(a); *Oppenheim & Co., P.C. v. Bernstein*, 198 A.D.2d 163, 164, 604 N.Y.S.2d 62, 63 (1st Dep't 1993) (mem.); *Schicchi v. J.A. Green Construction Corp.*, 100 A.D.2d 509, 510, 472 N.Y.S.2d 718, 719 (2d Dep't 1984) (mem.).

31. *In re Shulz v. Galgano*, 88 N.Y.2d 1015, 1015, 648 N.Y.S.2d 875, 875 (1996) (mem.).

32. *Peron Restaurant, Inc. v. Young & Rubicam, Inc.*, 179 A.D.2d 469, 470, 578 N.Y.S.2d 194, 195 (1st Dep't 1992) (mem.).

33. CPLR 2219 (b), 5512(a); *In re Commitment of Juan Alejandro R. II*, 221 A.D.2d 183, 183, 633 N.Y.S.2d 159, 159 (1st Dep't 1995) (mem.); *Blaine v. Meyer*, 126 A.D.2d 508, 508, 510 N.Y.S.2d 628, 628 (2d Dep't 1987) (mem.).

34. *Wilson v. Schindler Haughton Elevator Corp.*, 118 A.D.2d 777, 777, 500 N.Y.S.2d 310, 310 (2d Dep't 1986) (mem.).

35. CPLR 5512.

36. *Martinez v. Jacobson*, 253 A.D.2d 521, 522, 677 N.Y.S.2d 161, 162 (2d Dep't 1998) (mem.) (noting that stipulations need not be "so ordered"), lv. denied, 93 N.Y.2d 818, 697 N.Y.S.2d 566 (1999).

37. *See, e.g., Jacobs v. Rosenberg*, 20 H.C.R. 754A, N.Y.L.J., 12/21/92, p. 23, col. 2 (App.Term 1st Dep't) (per curiam).

38. *See, e.g., Charles J. Hecht, P.C. v. Clowes*, 224 A.D.2d 312, 312, 638 N.Y.S.2d 42, 43 (1st Dep't 1996) (mem.); *D'Amico v. Allstate Ins. Co.*, 194 A.D.2d 761, 761, 599 N.Y.S.2d 296, 296 (2d Dep't 1993) (mem.); *see generally Thorsen v. Penthouse Int'l*, 80 N.Y.2d 490, 495, 591 N.Y.S.2d 976, 979 (1992).

39. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 173, 451 N.Y.S.2d 658, 662 (1982); *see also Minick v. Park*, 27 H.C.R. 103A, N.Y.L.J., 2/25/99, p. 29, col. 2 (App.Term 1st Dep't) (per curiam).

40. *Northern Westchester Prof. Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 499, 470 N.Y.S.2d 350, 354 (1983).

41. *Alliance Property Manag. & Develop., Inc. v. Andrews Ave. Equities, Inc.*, 70 N.Y.2d 831, 833, 523 N.Y.S.2d 441, 442 (1987) (mem.) (reviewing CPLR 5015 motion to vacate default).

42. Civ.Ct. Act § 1702(d).

43. *See, e.g., Blunt v. Northern Oneida County Landfill*, 145 A.D.2d 913, 913-14, 536 N.Y.S.2d 295, 296 (4th Dep't 1988) (mem.).

44. *E.g., Rentways, Inc. v. O'Neill Milk & Cream Co., Inc.*, 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955). ◆