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## A BIANNUAL SURVEY OF NEW YORK PRACTICE

*Prepared by the St. John's Law Review Staff Under the  
Direction of DAVID D. SIEGEL †*

This is the second installment of the Biannual Survey. When the first installment appeared in December of 1963, there were not as yet sufficient cases to provide a treatment of the breadth contemplated. Between that time and the present, however, the decided cases on the CPLR and other practice and procedure<sup>1</sup> provisions have appeared in such quantity that the problem changed from one of paucity to one of overabundance.

The Survey sets forth in this installment those cases which are deemed to make the most significant contribution to the state's procedural law under the new provisions. Many additional cases might have been treated—the cases chosen are surely not the only cases of significance—but limitations of space require resort to the difficult process of selection. The exercise of that process has resulted in the selection of the cases treated herein and, despite the shortcomings of the process, the practitioner will find the choice of cases fairly close to the mark. With very few exceptions, the treatment has been of cases officially and unofficially reported. The few exceptions have mostly to do with the citation of opinions published in the *New York Law Journal*, which, though perhaps not destined to be reported, nonetheless say something that the Survey deems worth noting. Generally, however, the Survey may be regarded as a treatment of reported cases.

The table of contents is designed to key the reader quickly to the specific areas of procedural law which are treated in this Survey in order that he may, by just a glance, note such areas of treatment as may be of importance to him without having to wade through matter that does not particularly affect his practice.

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<sup>1</sup> For the purposes of this Survey the New York Civil Practice Law and Rules will be referred to and cited as CPLR, the Civil Practice Act as CPA, the Rules of Civil Practice as RCP, the New York City Civil Court Act as CCA, the Uniform District Court as UDCA, the Uniform City Court Act as UCCA, and the Real Property Actions and Proceedings Law as RPAPL.

At the end of the Survey is an Appendix of 1964 amendments affecting procedural provisions. The Survey's time of publication prevents the list of legislative changes (as approved by the Governor) from being an exhaustive one, but it does contain what is likely a substantial majority of those changes. The list of changes in such of the CPLR rules as were promulgated in 1964 by the Judicial Conference is, however, a complete one and also appears in the Appendix.

#### JURISDICTION AND SERVICE

Article 3 of the CPLR, covers jurisdiction, service and appearance. The Legislature has not only retained the bases of jurisdiction that existed under the CPA, but has also sought to take advantage of the minimum contacts doctrine of *International Shoe Co. v. Washington*<sup>2</sup> by enacting a "longarm statute" to provide yet further bases, Section 302 of the CPLR.

##### *Section 302(a)(1) — The "Transaction of Business"*

Section 302(a)(1) of the CPLR provides for the exercise of in personam jurisdiction over a non-domiciliary when a cause of action arises out of his transaction of business within the state. Any application of this subdivision necessarily presents the problem of whether a particular activity constitutes the transaction of business. In *Patrick Ellam, Inc. v. Nieves*,<sup>3</sup> the plaintiff's assignor and the defendant executed a contract in New York whereby the assignor contracted to provide a crew to take the defendant's boat to the Virgin Islands. The plaintiff commenced this action for breach of contract by serving the defendant personally in the Virgin Islands, where defendant had established a domicile (which the court termed "residence") subsequent to the making of the contract. The defendant premised his motion to set service aside (which is actually a motion to dismiss under rule 3211(a)(8)) on the theory that section 302 requires that the defendant be transacting business within the state at the time of the commencement of the suit. Since the transaction had occurred almost two years prior to the commencement of the suit, the defendant contended that the section was not applicable to him. In rejecting the defendant's position, the court held that the making of such a contract in New York was the transaction of business within the meaning of section 302. In relying on McKinney's Practice Commentary, the court quoted the following: "With the enactment of this statute, New York has decided to exploit the fullest jurisdictional potential permissible under federal constitutional restraints."<sup>4</sup>

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<sup>2</sup> 326 U.S. 310 (1945).

<sup>3</sup> 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963).

<sup>4</sup> *Id.* at 188, 245 N.Y.S.2d at 547.