

# The Survey of New York Practice Table of Contents

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### Recommended Citation

St. John's Law Review (1982) "The Survey of New York Practice Table of Contents," *St. John's Law Review*: Vol. 57 : No. 1 , Article 7.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol57/iss1/7>

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# THE SURVEY OF NEW YORK PRACTICE

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### INTRODUCTION\*

In this first issue of Volume 57, *The Survey* discusses several

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\* The following abbreviations will be used uniformly throughout *The Survey*:  
New York Civil Practice Law and Rules (McKinney) . . . . . CPLR  
New York Civil Practice Act . . . . . CPA  
New York Criminal Procedure Law (McKinney) . . . . . CPL

decisions of interest affecting New York practice, two of which involve the New York Insurance Law. In *Gurnee v. Aetna Life & Casualty Co.*, the Court of Appeals considered the retroactivity of its recent decision construing section 671 of the Insurance Law, in which it was determined that a covered person injured in a motor vehicle accident could recover actual lost earnings up to a maximum recovery of \$1,000 per month. Applying "retroactivity analysis," the *Gurnee* Court held that its earlier statutory interpretation was to be applied retroactively because that holding did not represent a new principle of law. In *Zappone v. Home Insurance Co.*, the Court interpreted section 167(8) of the Insurance Law, which requires that a liability insurer give written notice, as soon as is reasonably possible, to a claimant if the insurer intends to disclaim liability or deny coverage. The Court held that notwithstanding a contractual relationship between the insured and the insurer, a failure to give such notice could not create insurer liability where, in fact, neither the vehicle nor the driver involved in the accident were included within the policy. Also discussed in *The Survey* is the Court's decision in *People v. Harrell*, which commented on the scope of the newly established parent-child privilege. The Court unanimously held that a minor's custodial inculpatory statements

New York Code of Criminal Procedure .....	CCP
Real Property Actions and Proceedings Law (McKinney) .....	RPAPL
Domestic Relations Law (McKinney) .....	DRL
Estates, Powers and Trusts Law (McKinney) .....	EPTL
General Municipal Law (McKinney) .....	GML
General Obligations Law (McKinney) .....	GOL
D. Siegel, <i>New York Practice</i> (1978) .....	SIEGEL
Weinstein, Korn & Miller, <i>New York Civil Practice</i> (1979) .....	WK&M
<i>The Biannual Survey of New York Practice</i> .....	<i>The Biannual Survey</i>
<i>The Quarterly Survey of New York Practice</i> .....	<i>The Quarterly Survey</i>
<i>The Survey of New York Practice</i> .....	<i>The Survey</i>

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

1957 N.Y. Leg. Doc. No. 6(b) .....	FIRST REP.
1958 N.Y. Leg. Doc. No. 13 .....	SECOND REP.
1959 N.Y. Leg. Doc. No. 17 .....	THIRD REP.
1960 N.Y. Leg. Doc. No. 120 .....	FOURTH REP.
1961 Final Report of the Advisory Committee on Practice and Procedure .....	FINAL REP.

Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committee:

1961 N.Y. Leg. Doc. No. 15 .....	FIFTH REP.
1962 N.Y. Leg. Doc. No. 8 .....	SIXTH REP.

to his parents were privileged unless the minor defendant was afforded the right to communicate privately or was warned that any overheard utterances may be used against him.

Included among the appellate division cases analyzed is *Adler & Topal, P.C. v. Exclusive Envelope Corp.*, involving the extent to which a plaintiff could invoke the 6-year statute of limitations for breach of contract where his complaint against an accountant sounded essentially in malpractice. Notably, the second department restricted the Court of Appeals' decision in *Sears, Roebuck & Co. v. Enco Associates*, which held the 6-year period applicable when the claim arose from an underlying written agreement. The court distinguished *Sears*, holding that a malpractice claim, arising from a simple oral agreement, was subject to the 3-year statute of limitations.

It is hoped that the cases treated in this issue of *The Survey* will keep the bar abreast of the important recent developments in New York law.

## CIVIL PRACTICE LAW AND RULES

### Article 2—Limitations of Time

*CPLR 214(6): Three-year statute of limitations governs claim of accountants' malpractice notwithstanding the existence of an underlying oral agreement between the parties*

Section 214 of the CPLR requires that malpractice actions, other than claims for medical malpractice, must be commenced within 3 years<sup>1</sup> from the time of their accrual.<sup>2</sup> In determining the

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<sup>1</sup> CPLR 214(6) (McKinney Supp. 1981-1982). In addition to nonmedical malpractice claims, actions to recover for personal injuries or property damage are covered by the 3-year statute of limitations. CPLR 214(4),(5) (McKinney Supp. 1981-1982). Prior to 1877, however, actions to recover for personal injuries and property damage, as well as for breach of contract, were governed by a 6-year limitations period. 1 WK&M ¶ 214.11, at 2-290. It is interesting to note that early common law recognized no fixed period of time for instituting an action. See *Trepuk v. Frank*, 58 App. Div. 2d 556, 557, 396 N.Y.S.2d 18, 18 (1st Dep't 1976), *rev'd on other grounds*, 44 N.Y.2d 723, 376 N.E.2d 924, 405 N.Y.S.2d 452 (1978).

<sup>2</sup> In both medical and nonmedical malpractice claims, the cause of action accrues on the date of the alleged malpractice. See 1 WK&M ¶ 214.18, at 2-305. There are two recognized exceptions to this general rule, however, in medical malpractice cases. CPLR 214-a (McKinney Supp. 1981-1982). First, if the physician commits a wrongful act and continues treatment for the same illness, injury or condition which gave rise to the said act, the action will accrue at the end of the course of treatment. *Id.* Second, if a foreign object is negligently left in a patient's body, the statute of limitations runs from the time the patient could have either discovered the object or have reasonably discovered the object. *Id.* While