

The Survey of New York Practice Table of Contents

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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this final issue of Volume 57, *The Survey* discusses various developments in New York law, including two Court of Appeals

* 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
 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, *New York Practice* (1978) SIEGEL
 Weinstein, Korn & Miller, *New York Civil Practice* (1979) WK&M
The Biannual Survey of New York Practice *The Biannual Survey*
The Quarterly Survey of New York Practice *The Quarterly Survey*
The Survey of New York Practice *The Survey*

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.

cases defining the circumstances under which blood samples may be extracted from a suspect. In *In re Abe A.*, police investigating a murder sought a sample of the suspect's blood to compare with blood found on the victim. The Court held that the police may compel the suspect, who had not yet been arrested, to supply a sample of his blood only after issuance of a search warrant. In a parallel case, *People v. Moselle*, blood samples were needed to determine the blood alcohol level of the unconscious driver of a car involved in an accident. Despite the presence of exigent circumstances, the *Moselle* Court ruled that the court order required by the criminal discovery statute, CPL § 240.40, was nevertheless a necessary predicate to obtaining an admissible blood sample.

In *Marine Midland Bank, N.A. v. Price; Miller, Evans & Flowers*, the Court of Appeals interpreted N.Y.U.C.C. § 3-206(3) to prevent a depositary bank from acquiring holder in due course status when it paid inconsistently with a restrictive indorsement the bank itself had provided. The jurisdiction of the surrogate's court was considered in *In re Estate of Piccione*. The Court of Appeals held that SCPA § 201 permits jurisdiction over an action brought by an executor to evict tenants from the decedent's property. The Court refused, however, to extend the surrogate's jurisdiction to a claim based on malicious prosecution and abuse of process brought by the tenants against the executor.

Among the appellate division cases examined in *The Survey* is *Acinapuro v. Board of Cooperative Educational Services*, wherein the second department broadly interpreted the employment rights of school teachers employed by the Board of Cooperative Educational Services under section 3014-b of the Education Law. Also discussed is the first department case of *City of New York v. Rodriguez*, which held Real Property Law § 235-b applicable to residential housing owned by New York City, thus allowing a tenant to assert the City's breach of the implied warranty of habitability as a defense to a suit for non-payment of rent.

The second department case of *Doyle v. Happy Tumbler Wash-O-Mat* creates a split in the departments by holding that privity is not a prerequisite to suit under N.Y.U.C.C. § 2-318 for breach of the implied warranty of merchantability. Also of interest is the third department case in which a plaintiff who had donated his kidney to his father to replace one lost as a result of allegedly negligent diagnosis and treatment brought a medical malpractice suit on his own behalf against his father's doctor under the theory

that "danger invites rescue." The court rejected this claim, holding that the instinctive reaction necessary to plead a cause of action under the rescue doctrine was absent. It is hoped that *The Survey's* discussion of these topics will be of service to our readers.

EDUCATION LAW

Educ. Law § 3014-b: Takeover statute confers rights on the most senior of the BOCES teachers in the tenure area who are excused because of the takeover

New York Education Law § 3014-b¹ provides that whenever a school district takes over a program formerly operated by a board of cooperative educational services (BOCES),² each of the teachers

¹ N.Y. EDUC. LAW § 3014-b (McKinney 1981). The relevant sections of this statute provide:

1. In any case in which a school district duly takes over the operation of a program formerly provided by a board of cooperative educational services, each teacher employed in such a program by such a board of cooperative educational services at the time of such takeover by the school district shall be considered an employee of such school district, with the same tenure status he maintained in such board of cooperative educational services.

4. In the event that more than one school district duly takes over the operation of a program formerly provided by a board of cooperative educational services, then each teacher employed in such program by such board of cooperative educational services at the time of such takeover by more than one school district, shall select the particular school district in which he shall be considered an employee, with all of the rights and privileges provided by the other provisions of this section. Such selection of the particular school district by such teacher is to be based upon each teacher's seniority in such board of cooperative educational services, with the right of selection passing from such teachers with the most seniority to such teachers with least seniority.

5. This section shall in no way be construed to limit the rights of any such teachers set forth in this section granted by any other provision of law.

Id.

² Boards of cooperative educational services (BOCES) are organized pursuant to section 1950 of the New York Education Law, N.Y. EDUC. LAW § 1950 (McKinney Supp. 1982-1983), "for the primary purpose of providing to school districts within the supervisory district a program of shared [educational] services in those areas where the districts, because of sparsity of pupils or for other reasons, cannot economically provide such educational offerings." *In re Coutant*, 2 N.Y. Dep't Ed. R. 53, 54 (1961). BOCES is a "body corporate" whose relationship with participating school districts is exclusively contractual. N.Y. EDUC. LAW § 1950(4)(d), (6) (McKinney Supp. 1981). The participating districts are required to pay BOCES for all services received. *Id.* § 1950(4)(d). BOCES' administrative budget is apportioned among the component districts according to statutory formulas. *Id.* § 1950(4)(b). BOCES is authorized to provide school districts with services of personnel such as school nurse teachers, instructors of art, music, or vocational subjects, guidance counsel-