

# 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 56, *The Survey* discusses current trends in various areas of New York law. An analysis is included of *Smith v. Russell Sage College* in which the Court of Appeals extended the doctrine of res judicata to include the preclusion of re-litigation when the actions arise from the same transaction notwithstanding prior dismissal on the grounds of Statute of Frauds and statute of limitations. Additionally, the Court of Appeals decision of *In re Kleefeld* is discussed, a case in which the admissibility of a copy of a will without corroboration of the substantive pro-

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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
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.

visions was at issue. The Court, reasoning that the intent of the statute and the policy of preventing the probate of fraudulent wills required a witness to testify as to the contents of the will, held that the copy could not be admitted if the witness only testifies as to its genuineness. The discussion of *Kleefeld* notes the hardship placed on the proponent of the lost will and suggests that the witness' recollection should be permitted to be refreshed by the copy of the will.

The viability of limitations on the incorporation of municipalities when the preservation of a comprehensive growth plan is at stake was presented to the Appellate Division, Second Department, in *Marcus v. Baron*. Emphasizing the public policy considerations underlying the plans, the court held that localities were not prevented from enacting supplemental incorporation criteria although the Village Law sets forth such criteria.

In the area of criminal law and procedure, the Court of Appeals decided *People v. Ferrara* and *Virag v. Hynes*. The right to counsel of a linen supplier subpoenaed by a grand jury investigating nursing home operator kickbacks was at issue in *Ferrara*. Holding that no error was committed in denying the motion to suppress, the Court of Appeals reasoned that no right to counsel had attached since the interrogation by an informant uncovered the intent to commit future crimes. The Court noted that right to counsel was intended to protect the individual from the powerful machinery of the state and not from the investigation of new, yet to be committed, crimes.

In *Virag v. Hynes*, the Court of Appeals noted the presumption of validity afforded a grand jury subpoena duces tecum and held that the party contesting the validity of the subpoena must establish that the materials sought lack relevancy to the investigation. Moreover, it was reasoned that the proper functioning of the grand jury investigatory process necessitated a broader scope of relevancy and the concomitant increased burden placed on the challenging party.

#### CIVIL PRACTICE LAW AND RULES

##### Article 3—Jurisdiction and Service, Appearance and Choice of Court

*CPLR 302(b): Long-arm statute unavailable in action seeking determination of paternity and payment of child support against*