St. John's Law Review

Volume 55
Number 2 *Volume 55, Winter 1981, Number 2*

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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

This installment of *The Survey* highlights several Court of

* The following abbreviations will be used uniformly throughout *The Survey:*

Appeals decisions pertaining to the CPLR. Of particular significance is the Court's holding in *McGinley v. Hynes* that an Article 78 proceeding in the nature of prohibition may not be maintained against a public prosecutor functioning in an investigatory capacity. Of similar importance is *Priest v. Hennessy* in which the Court strictly construed the attorney-client provision by finding that the payment of legal fees for another does not create an attorney-client relationship.

Also discussed in this installment of *The Survey* is the First Department's decision in *King v. Club Med, Inc.*, which held that, in some circumstances, the class action device may be utilized in fraud actions, notwithstanding the individual questions of reliance. This decision should have great import in the area of consumer fraud actions. Finally highlighted is the Second Department's decision in *Skelka v. Metropolitan Transit Authority. Skelka* determined that a party is not precluded by his testimonial admissions from relying on the more favorable testimony offered by his adversary.

It is hoped that these and the other cases discussed in *The*

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.

Survey will be of assistance to the practicing bar.

ARTICLE 9—CLASS ACTIONS

CPLR 901: Fraud actions not generically unsuitable for class certification

Among the prerequisites to a class action[1] set forth in CPLR 901 is the requirement that "questions of law or fact common to the class . . . predominate over any questions affecting only individual members."[2] Since individual reliance upon a material mis-

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[1] The procedural rules governing class actions in New York are contained in article 9 of the CPLR, which repealed and superseded CPLR 1005. *See* ch. 207, § 2, [1975] N.Y. Laws 316 (McKinney). Under CPLR 1005, one or more persons could maintain a class action where there was a "question of law or fact common to persons of a numerous class whose joinder was impracticable." Ch. 308, § 1005, [1962] N.Y. Laws 1332. Under this section, "[n]either the procedural needs of the members of the class nor the inconvenience to the courts where many separate suits are combined were, alone, sufficient bases for a class action." 2 WK&M ¶ 901.02, at 9-6. In addition, the courts appeared to require some connection "between the substantive rights of members of the class." *Id.; see, e.g.,* Bouton v. Van Buren, 229 N.Y. 17, 22, 127 N.E. 477, 478 (1920). Specifically, under CPLR 1005, the plaintiffs were required to demonstrate some "privity" among the members of the class apart from their separate transactions with the defendant. *See* Onofrio v. Playboy Club, Inc., 15 N.Y.2d 740, 741, 205 N.E.2d 308, 309, 257 N.Y.S.2d 171, 172 (1965) (adopting the opinion of the dissent below, 20 App. Div. 2d 3, 7, 244 N.Y.S.2d 485, 489 (1st Dep't 1963) (Stevens, J., dissenting)); Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 236, 11 N.E.2d 890, 893 (1937); *cf.* Hall v. Coburn Corp., 26 N.Y.2d 396, 400, 259 N.E.2d 720, 721, 311 N.Y.S.2d 281, 282 (1970) (similarity in form of contract insufficient basis for class certification); Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939) (common injury pursuant to a single plan by defendant insufficient basis for class certification). *But see* Ray v. Marine Midland Grace Trust Co., 35 N.Y.2d 147, 154, 316 N.E.2d 320, 324, 359 N.Y.S.2d 28, 33 (1974); Richards v. Kaskel, 32 N.Y.2d 524, 536, 300 N.E.2d 388, 393, 347 N.Y.S.2d 1, 8 (1973); Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 535, 223 N.E.2d 869, 872-73, 277 N.Y.S.2d 377, 382-83 (1966). *See generally* Dole, *Consumer Class Action Under Recent Consumer Credit Legislation,* 44 N.Y.U.L. REV. 80, 104-07 (1969).

[2] CPLR 901(a) (1976) provides:

> a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
>
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> 4. the representative parties will fairly and adequately protect the interests of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id.