

# The Survey of New York Practice Table of Contents

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

## Recommended Citation

St. John's Law Review (1980) "The Survey of New York Practice Table of Contents," *St. John's Law Review*: Vol. 54 : No. 2 , Article 5.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol54/iss2/5>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

# THE SURVEY OF NEW YORK PRACTICE

## TABLE OF CONTENTS

|  |     |
|--|-----|
| ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT   |     |
| <i>CPLR 311(1): Secretary's practice of accepting process deemed authorization by appointment of agent for service upon corporation</i> .....          | 384 |
| ARTICLE 9—CLASS ACTIONS  |     |
| <i>CPLR 902: Court of Appeals refuses to grant class certification following summary judgment</i> .....  | 391 |
| ARTICLE 10—PARTIES GENERALLY   |     |
| <i>CPLR 1007: Second department permits third-party claim for damages in excess of sum demanded in plaintiff's complaint</i> .....                     | 397 |
| ARTICLE 30—REMEDIES AND PLEADING   |     |
| <i>CPLR 3025(a): Amendment of counterclaim permitted within 20 days after last responsive pleading in multiparty litigation</i> .....                  | 404 |
| ARTICLE 45—EVIDENCE  |     |
| <i>CPLR 4502(b): Spousal privilege waived by commencement of wrongful death action</i> .....   | 409 |
| ARTICLE 52—ENFORCEMENT OF MONEY JUDGMENTS  |     |
| <i>Protective order may not set aside sheriff's sale after deed is delivered</i> .....   | 416 |
| CRIMINAL PROCEDURE LAW   |     |
| <i>CPL 470.05: Defendant's failure to assert double jeopardy defense at trial no bar to review on appeal</i> .....                                     | 421 |
| <i>Absent an inquiry by the trial court and upon a demonstration of possible conflict, new trial required for jointly represented defendants</i> ..... | 428 |
| <i>Court of Appeals extends attentuation doctrine to include evidence disclosed by a defendant within seconds of an illegal seizure</i> .....          | 435 |

## INTRODUCTION\*

This edition of *The Survey* discusses and analyzes a number of recent cases which significantly affect several areas of New York law. *O'Hara v. Del Bello*, one of six Court of Appeals decisions noted, further clarified the procedural rules governing class actions. The *O'Hara* Court held that a judgment on the merits at the pre-trial stage precludes class certification under CPLR 902, notwithstanding that the time within which a class may be certified had not yet commenced. In the area of criminal procedure, the Court, in *People v. Michael*, permitted a defendant who had not raised a double jeopardy defense at the trial level to assert it on appeal, thereby indicating that no waiver had occurred. Finally, in *People v. Boodle*, the Court of Appeals, apparently signalling a broader application of the attenuation exception to the exclusionary rule, allowed the introduction of evidence voluntarily disclosed by the defendant within seconds of his unlawful arrest.

In one of several lower court decisions examined, *George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, the Appellate

\* 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 Laws (McKinney)                      | ..... | EPTL                        |
| General Municipal Law (McKinney)                                | ..... | GML                         |
| General Obligations Law (McKinney)                              | ..... | GOL                         |
| D. Siegel, <i>New York Practice</i> (1978)                      | ..... | SEGEL                       |
| 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<br>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. |

Division, Second Department, marked a departure from a long-standing rule of third-party practice, holding that, under CPLR 1007, a third-party claim for damages greater than the amount demanded by the plaintiff may be interposed.

It is hoped that *The Survey's* commentary on these and other decisions of special interest will serve the goal of alerting the practitioner to recent developments in diverse areas of New York practice.

### ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

*CPLR 311(1): Secretary's practice of accepting process deemed authorization by appointment of agent for service upon corporation*

To effect personal service on a corporation, CPLR 311(1) requires delivery of the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."<sup>1</sup> Since service upon an individual not enumerated in the statute generally is invalid despite later redelivery to a proper party,<sup>2</sup> the

---

<sup>1</sup> CPLR 311(1) (Supp. 1979-1980). Enacted in 1962, this subsection adopted and combined sections of the Civil Practice Act. 1 WK&M ¶ 311.01; *The Survey*, 44 ST. JOHN'S L. REV. 313, 325 (1969). The terms "officer, director, managing or general agent" were intended to simplify the phraseology of the CPA without changing its substance. See SECOND REP., at 161.

Section 311 does not confer jurisdiction, but merely prescribes the method of serving a corporation. CPLR 311, commentary at 254 (1972); cf. CPLR 302 (1972) (basis for personal jurisdiction). While pre-CPLR case law apparently authorized substituted service on corporations, see *Lorenz-Schneider Co. v. Teamsters Local 802*, 17 App. Div. 2d 842, 842 (2d Dep't 1962), CPLR 311(1) expressly requires "delivery" to the named persons and has been construed to prohibit the use of the substituted service provisions of CPLR 308(2)-308(4). See *Melendez v. Sharet Realty Corp.*, N.Y.L.J., Nov. 15, 1963, at 16, col. 2 (Sup. Ct. Bronx County); SIEGEL § 70, at 76. Nevertheless, a corporation can be served validly under CPLR 311(1) by delivering process to an agent "authorized . . . by law to receive service," such as the Secretary of State, N.Y. BUS. CORP. LAW § 304 (McKinney 1972), or a registered agent for service of process, *id.* § 305; see SIEGEL § 70.

<sup>2</sup> See, e.g., *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968); *Boser v. Burdick*, 62 App. Div. 2d 1134, 404 N.Y.S. 2d 187 (4th Dep't 1978); *Commissioners of State Ins. Fund v. Singer Sewing Mach. Co.*, 281 App. Div. 867, 119 N.Y.S.2d 802 (1st Dep't 1953); *Guidone v. Saint Aloysius Church*, 65 Misc. 2d 1019, 319 N.Y.S.2d 572 (Sup. Ct. Cayuga County 1971). In *McDonald*, the process server left the summons with a building receptionist who was not employed by the defendant corporation. 22 N.Y.2d at 114, 238 N.E.2d at 727, 291 N.Y.S.2d at 330. Although the receptionist later redelivered the summons to a proper person, the Court held that the service was improper, relying on the general rule that service upon the wrong party is invalid notwithstanding that the papers eventually are delivered to the party to be served. *Id.* at 114-15, 238 N.E.2d at 728, 291 N.Y.S.2d at 331. The Court found that to uphold service "would encourage carelessness,