

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>

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 selbyc@stjohns.edu.

THE SURVEY OF NEW YORK PRACTICE

TABLE OF CONTENTS

CRIMINAL PROCEDURE LAW

Warrants for videotape surveillance issuable despite lack of statutory authority 790

EDUCATION LAW

Voluntary preemployment waiver of tenure rights held not to violate public policy 796

LABOR LAW

Labor Law § 222: Held violative of privileges and immunities clause 803

PENAL LAW

Penal Law art. 140: Intent to commit specific object crime not element of burglary prosecution and hence disclosure of specific object crime not required in bill of particulars 809

PUBLIC OFFICERS LAW

Compensation of public employees disclosable to union official under Freedom of Information Law 816

UNIFORM COMMERCIAL CODE

N.Y.U.C.C. § 2-207: Existence of agreement to arbitrate may be implied from evidence of prior course of dealing or trade usage 821

N.Y.U.C.C. § 4-302: Agreement between depositary and payor banks varying midnight deadline rule binding on payee 827

DEVELOPMENTS IN NEW YORK LAW

Court of Appeals jurisdiction: Motion to dismiss for insufficient evidence will not preserve reviewable question of law on lack of corroboration 832

Third party consent to warrantless police search of jointly occupied premises valid notwithstanding contemporaneous objection of co-occupant 840

Use of defendant's silence at time of arrest for impeachment violates due process, despite absence of Miranda warnings 846

INTRODUCTION*

In this final edition of Volume 54, *The Survey* treats a variety of recent decisions with a view toward increasing the awareness of noteworthy developments in New York law. In *People v. Cona*, the Court of Appeals limited the scope of its jurisdiction in noncapital cases, by restrictively interpreting CPL section 470.05. Traditionally, an effective protest of a disputed ruling or order made in the court of original jurisdiction has been found sufficient to preserve the question for review by the Court of Appeals notwithstanding the imprecise or inarticulate phrasing of the protest. The Court in

* 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.

Cona, however, held that a motion to dismiss for insufficient evidence did not preserve for the Court the issue of whether the conviction was based upon uncorroborated accomplice testimony.

Also noteworthy is *Salla v. County of Monroe*, wherein the Court found that the privileges and immunities clause of the United States Constitution prohibits New York State from statutorily mandating contract terms requiring the employment of its residents on public works projects. In the area of criminal procedure, the Court's decision in *People v. Conyers* held that the credibility of a defendant's exculpatory trial testimony may not be impeached by proof of his silence at the time of his arrest, despite the absence of *Miranda* warnings.

People v. Teicher, an important lower court decision commented upon in *The Survey*, concerns the admissibility of evidence gathered by means of videotape surveillance. In *Teicher*, the Appellate Division, First Department, held that despite the absence of express statutory authority, a court is empowered to issue a warrant for visual electronic surveillance. Through *The Survey's* discussion of these and other refinements in New York law, it is our intention to be of continuing assistance to the practicing attorney.

CRIMINAL PROCEDURE LAW

Warrants for videotape surveillance issuable despite lack of statutory authority

The New York State Constitution¹ and article 700 of the CPL²

¹ N.Y. CONST. art. 1, § 12. The state constitutional prohibition against warrantless telegraphic and telephonic interceptions provides:

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained

N.Y. CONST. art. 1, § 12; see Comment, *Electronic Eavesdropping Under the Fourth Amendment — After Berger and Katz*, 17 BUFFALO L. REV. 455, 466 (1968).

² CPL § 700.15 provides:

An eavesdropping warrant may issue only:

1. Upon an appropriate application made in conformity with this article; and
2. Upon probable cause to believe that a particularly described person is committing, has committed, or is about to commit a particular designated offense; and
3. Upon probable cause to believe that particular communications concerning such offense will be obtained through eavesdropping; and
4. Upon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too