

# The Survey of New York Practice Table of Contents

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# THE SURVEY OF NEW YORK PRACTICE

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## INTRODUCTION\*

This issue of *The Survey* treats a variety of recent decisions selected with a view toward keeping the New York practitioner informed of developments in state practice. Two Court of Appeals decisions are included, *F.I. duPont, Glore Forgan & Co. v. Chen* and *American Trading Co. v. Fish*. In *duPont*, the Court interpreted CPLR 308(2) to allow, under certain circumstances, service of a summons upon an apartment house doorman on behalf of an apartment dweller. In *American Trading Co.*, a guarantee provision included in a sales contract was held by the Court to be governed by the CPLR 6-year statute of limitations, despite the fact that the sales contract itself was controlled by the Uniform Commercial Code limitation period. In the statutory sphere, consideration is given to the 1977 revision of New York's no-fault law, with particular emphasis on the abandonment of the \$500 threshold requirement in favor of a more flexible verbal standard.

Also receiving attention are several significant decisions of the

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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
New York Code of Rules and Regulations	NYCRR
New York Rules of Civil Practice	RCP
New York City Civil Court Act (McKinney)	CCA
Uniform District Court Act (McKinney)	UDCA
Uniform Justice Court Act (McKinney)	UJCA
Uniform City Court Act (McKinney)	UCCA
Real Property Actions and Proceedings Law (McKinney)	RPAPL
Domestic Relations Law (McKinney)	DRL
Estates, Powers and Trusts Laws (McKinney)	EPTL
WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE (1977)	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.

lower New York courts. Among these are *Lombardo v. Doyle, Dane & Bernbach, Inc.*, in which the Appellate Division, Second Department, expressly recognized a theory of recovery based upon the existence of a right of publicity, a right independent of the traditional right of privacy embodied in sections 50 and 51 of the Civil Rights Law. Another decision of that same court, *Carter v. Carter*, also is analyzed. The *Carter* court held that child support is no longer to be considered the primary obligation of the father but rather a responsibility of both parents to the extent of their financial ability. It is hoped that *The Survey's* discussion of these and other developments will serve to aid the practitioner in keeping abreast of the major trends in New York practice.

#### ARTICLE 2—LIMITATIONS OF TIME

*CPLR 213(2): Guarantee of contract involving sale of goods governed by 6-year statute of limitations.*

While actions on contracts which involve the sale of goods are restricted by the 4-year statute of limitations set forth in article 2 of the Uniform Commercial Code (UCC),<sup>1</sup> suits to enforce other types of contractual obligations are governed by the 6-year limitations period contained in CPLR 213(2).<sup>2</sup> Recently, in *American Trading Co. v. Fish*,<sup>3</sup> the Court of Appeals held that the guarantee of a party's performance of a contract for the sale of goods was an undertaking separate and distinct from the underlying sales agreement and therefore was controlled by the CPLR's 6-year provision.<sup>4</sup>

In *American Trading*, plaintiff entered into a contract with Kinematix, Inc. and defendant Fish, Kinematix's sole shareholder, providing for the opening of a new branch of plaintiff's business at the Kinematix office. The agreement required Kinematix to buy all of its business materials from plaintiff at a certain price and issue trade acceptances and bills of exchange to plaintiff.<sup>5</sup> Pursuant to the

<sup>1</sup> N.Y.U.C.C. § 2-725(1) (McKinney 1964).

<sup>2</sup> Article 2 of the CPLR sets out the various limitations periods within which a New York litigant must commence a given action "unless a different time is prescribed by law or a shorter time is prescribed by written agreement." CPLR 201.

<sup>3</sup> 42 N.Y.2d 20, 364 N.E.2d 1309, 396 N.Y.S.2d 617 (1977), *rev'g* 50 App. Div. 2d 764, 376 N.Y.S.2d 1014 (1st Dep't 1975), *aff'g mem.* 78 Misc. 2d 210, 357 N.Y.S.2d 337 (Sup. Ct. N.Y. County 1974).

<sup>4</sup> 42 N.Y.2d at 26-27, 364 N.E.2d at 1312-13, 396 N.Y.S.2d at 620.

<sup>5</sup> *Id.* at 23, 364 N.E.2d at 1310, 396 N.Y.S.2d at 617-18. In *Atterbury v. Bank of Wash. Heights*, 241 N.Y. 231, 149 N.E. 841 (1925), the Court defined trade acceptance as a "draft or bill of exchange drawn by the seller on the purchaser of goods sold, and accepted by such purchaser." *Id.* at 239, 149 N.E. at 843 (quoting FED. RES. BD. REGS., ACCEPTANCES § A, ¶