

# 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 edition of *The Survey* examines a variety of decisions selected with a view toward keeping the New York practitioner informed of significant developments in state practice. Five Court of Appeals decisions are included. Of particular interest is *Martin v. Julius Dierck Equipment Co.*, which involved a claim for personal injuries caused by a defectively manufactured product. The Court of Appeals determined that irrespective of the theory alleged—strict products liability or breach of warranty—for a plaintiff not in privity with the manufacturer, the cause of action accrues in the jurisdiction wherein the injuries occurred. Another decision of interest, *Guggenheimer v. Ginzburg*, held that a court may consider extrinsic evidence upon a motion to dismiss in order to determine whether the facts essential to a plaintiff's cause of action have been negated

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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 Uniform Commercial Code (McKinney)	UCC
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 Binannual 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.

beyond substantial question. In *People v. Coleman*, the Court determined that a right to counsel attaches after the issuance of a court order of removal directing defendant's appearance at a prearrest lineup; however, this right may be waived in the absence of an attorney if one has not been retained or appointed. 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 developments in New York practice.

#### ARTICLE 2—LIMITATIONS OF TIME

*CPLR 202: Cause of action for personal injuries by plaintiff not in privity with manufacturer accrues, for purposes of borrowing statute, in jurisdiction where injury occurred*

Under CPLR 202 New York courts are required to apply a foreign jurisdiction's statute of limitations to causes of action which accrue in that jurisdiction, if to do so would render the suit of a nonresident plaintiff time barred.<sup>1</sup> Until recently there has been a conflict of opinion on the proper application of this statute to actions brought to recover for personal injuries caused by defective products.<sup>2</sup> In such actions, the plaintiff has had a choice of using

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<sup>1</sup> CPLR 202 (McKinney 1972) provides:

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

CPLR 202 represents an attempt to prevent "forum shopping" by non-resident plaintiffs seeking to benefit from New York's generous statutes of limitations. See *Martin v. Julius Dierck Equip. Co.*, 52 App. Div. 2d 463, 468, 384 N.Y.S.2d 479, 483 (2d Dep't 1976), *aff'd*, 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978); *Daigle v. Leavitt*, 54 Misc. 2d 651, 283 N.Y.S.2d 328 (Sup. Ct. Rockland County 1967); [1943] N.Y. LAW REV. COMM'N REP. 146; 1 WK&M ¶ 202.01. Essential to the application of CPLR 202 is the determination of where the cause of action accrued. Traditionally, a cause of action was deemed to accrue in the place of the wrong, *lex loci delicti*. See R. LEFLAR, *AMERICAN CONFLICTS LAW* § 132 (1968). In order to avoid the harsh results often produced by this rigid test, many jurisdictions, including New York, adopted a "grouping of contacts" or "significant governmental interests" approach under which a cause of action is deemed to "accrue" in the jurisdiction most closely related to the events in litigation. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). See generally *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 142, Comment f (1971); Ester, *Borrowing Statutes of Limitations and Conflict of Laws*, 15 U. FLA. L. REV. 33 (1962); Gegan, *Where Does a Personal Injury Action Accrue Under the New York Borrowing Statute*, 47 ST. JOHN'S L. REV. 62 (1972) [hereinafter cited as Gegan]; Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitations*, 27 HASTINGS L.J. 1 (1975); Comment, *Choice of Law and the New York Borrowing Statute: A Conflict of Rationales*, 35 ALB. L. REV. 754 (1971).

<sup>2</sup> Compare *Martin v. Julius Dierck Equip. Co.*, 52 App. Div. 2d 463, 384 N.Y.S.2d 479 (2d Dep't 1976), *aff'd*, 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978), with *Myers v. Dunlop Tire & Rubber Corp.*, 40 App. Div. 2d 599, 335 N.Y.S.2d 961 (1st Dep't 1972).