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The Survey of New York Practice Table of Contents

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THE SURVEY OF NEW YORK PRACTICE

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This installment of *The Survey* reflects the recent activity by the Court of Appeals in the area of New York practice. The principles of subject matter jurisdiction, long neglected by the Court, were substantially refined in the cases of *Lacks v. Lacks* and *Nuernberger v. State*. In *Lacks*, the Court ruled that the Domestic Relations Law's residence requirements for obtaining a divorce in New York are merely an element of the divorce cause of action, and failure of the plaintiff to satisfy these requirements does not constitute a defect in the trial court's subject matter jurisdiction. In *Nuernberger*, the Court of Appeals held that an action for false imprisonment does not lie when a court of general criminal jurisdiction issues commitment papers pursuant to a prosecution which came before it in an improper procedural posture.

Other aspects of New York law have received attention as well. In *Rovello v. Orofino Realty Co.*, a divided Court of Appeals ruled that unless a motion to dismiss for failure to state a cause of action is converted to a motion for summary judgment, affidavits normally

* 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 (1976)	.....	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.

may be considered only for the limited purpose of remedying defects in the complaint. *The Survey* also discusses *In re Agioritis*, wherein the Court held that a change in either the depository bank or the beneficiary of a Totten trust is sufficient to create a "new deposit," and hence, a testamentary substitute subject to the surviving spouse's right of election. Consideration is also given to the Court of Appeals' reaffirmation in *People v. Cassidy* of the "merger doctrine" with respect to prosecutions for kidnapping in the second degree.

As in the past, this issue of *The Survey* also discusses several significant decisions of the lower New York courts. With our discussion of these cases, it is hoped that *The Survey* will keep the practitioner abreast of significant developments in New York practice.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 203(c): Revival of landlord's time-barred counterclaim for reformation of lease denied in action by tenant for recovery of rent overpayment.

CPLR 203(c) codifies the doctrine of equitable recoupment, permitting the assertion of a defense or counterclaim which arose from the same transaction, occurrence, or series of transactions or occurrences as a claim asserted in a complaint, even if the defense or counterclaim was time-barred at the commencement of the action.¹ Despite a commentator's suggestion that the "same transaction or occurrence" proviso be broadly construed,² recently, the Court of Appeals, in *SCM Corp. v. Fisher Park Lane Co.*,³ held that a landlord's counterclaim for reformation of the lease agreement,

¹ CPLR 203(c) provides in pertinent part:

A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

The doctrine of equitable recoupment operates not as a basis for "affirmative relief against [the] plaintiff, by way of counterclaim, for any balance proven in . . . [the] defendant's favor," but rather serves "only . . . to abate, in whole or in part, [the] plaintiff's demand." *Title Guar. & Trust Co. v. Hicks*, 283 App. Div. 723, 724, 127 N.Y.S.2d 340, 342 (2d Dep't 1954) (mem.); see *Maders v. Lawrence*, 49 Hun 360, 2 N.Y.S. 159 (3d Dep't 1888); *Herbert v. Day*, 33 Hun 461, 15 Abb. N. Cas. 172 (N.Y. 1st Dep't 1884); *First Nat'l City Bank v. Drake*, 170 N.Y.L.J. 62, Sept. 27, 1973, at 17, col. 6 (N.Y.C. Civ. Ct. N.Y. County).

² See 1 WK&M ¶ 203.25, at 2-86.

³ 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398, *aff'g* 53 App. Div. 2d 595, 385 N.Y.S.2d 79 (1st Dep't 1976) (mem.).