

# The Survey of New York Practice Table of Contents

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## Recommended Citation

St. John's Law Review (1976) "The Survey of New York Practice Table of Contents," *St. John's Law Review*: Vol. 50 : No. 3 , Article 14.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol50/iss3/14>

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# THE SURVEY OF NEW YORK PRACTICE

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## INTRODUCTION\*

This installment of *The Survey* includes discussions of two important decisions from the Court of Appeals. In *Boryszewski v. Brydges*, the Court granted citizen taxpayers standing to challenge state fiscal legislation, thereby overruling its previous decision in *St. Clair v. Yonkers Raceway*. Also significant is the case of *Bray v. Cox*, wherein a closely divided Court held that the dismissal of an appeal for want of prosecution has the effect of an adjudication on the merits in that it bars subsequent appeal of the same issues. A three-judge federal district court's ruling on the unconstitutionality of New York's postjudgment enforcement procedures is also analyzed. In *Vail v. Quinlan*, the three-judge panel declared invalid and enjoined the future enforcement of certain procedures whereby a judgment debtor could be held in civil contempt, fined, and imprisoned without a prior hearing.

We have also treated a number of decisions from the lower courts of New York. In *Keyes v. McLaughlin*, the Appellate Division, Third Department, impliedly recognized that where an action is commenced by a bare summons, the defendant's failure to make a demand will not prevent the plaintiff from effecting sufficient

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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 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 Law (McKinney)	.....EPTL
WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE (1974)	.....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. 80	.....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 Committees:

1961 N.Y. LEG. DOC. NO. 15	.....FIFTH REP.
1962 N.Y. LEG. DOC. NO. 8	.....SIXTH REP.

service of a complaint for the purposes of entering a default judgment. The Supreme Court, Queens County, in *Gottlieb v. Edelstein*, further extended the ever-increasing liability of attorneys for improper conduct. As a condition to granting an adjournment requested by the defendant, the *Gottlieb* court required defendant's counsel to compensate the plaintiff in the amount of \$1500 because he had deliberately impeded the progress of the litigation. In *Folgate v. Brookhaven Memorial Hospital*, the Supreme Court, Suffolk County, construed the disclosure provisions of the CPLR to permit full discovery by the plaintiff in an action based on medical malpractice of the number and amounts of prior claims against the defendant's liability policy. Finally, we have included a critical discussion of the legislature's extensive revision of the law relating to medical malpractice. In choosing these and other cases for analysis, it is hoped that *The Survey* has achieved its primary goal of calling significant developments in New York practice to the attention of the practitioner.

#### ARTICLE 22 — STAYS, MOTIONS, ORDERS AND MANDATES

*CPLR 2211: Court requires attorney to pay \$1500 as a condition for granting order.*

The practice of imposing financial penalties upon attorneys whose neglectful conduct<sup>1</sup> has led to the dismissal of their clients' cases for want of prosecution is well established.<sup>2</sup> Courts frequently grant a motion to vacate a CPLR 3404<sup>3</sup> dismissal or refuse to grant a motion for a CPLR 3216<sup>4</sup> dismissal on condition that the attorney

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<sup>1</sup> For a general discussion of law office neglect, see 7 CARMODY-WAIT 2d § 44:27, at 307 (1968); 4 WK&M ¶ 3216.07.

<sup>2</sup> See, e.g., *Cichorek v. Cosgrove*, 47 App. Div. 2d 883, 367 N.Y.S.2d 7 (1st Dep't 1975) (per curiam) (\$350 penalty); *Schickler v. Seifert*, 45 App. Div. 2d 816, 357 N.Y.S.2d 225 (4th Dep't 1974) (mem.) (\$1000 penalty); *Cohen v. Tucker*, 44 App. Div. 2d 706, 354 N.Y.S.2d 691 (2d Dep't 1974) (mem.) (\$250 penalty); *Urban v. Maloney*, 40 App. Div. 2d 531, 334 N.Y.S.2d 122 (2d Dep't 1972) (mem.) (\$250 penalty); *Moran v. Rynar*, 39 App. Div. 2d 718, 332 N.Y.S.2d 138 (2d Dep't 1972) (mem.) (\$250 penalty).

<sup>3</sup> Pursuant to CPLR 3404 a case which has been struck from the calendar and not restored within 1 year is deemed abandoned and will be automatically dismissed by the clerk for failure to prosecute. The court, however, has the power to vacate the dismissal and restore the case to the calendar. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 286 (4th ed. 1973). CPLR 3404 governs only cases in the supreme court and county courts. Other courts, however, such as the New York City Civil Court, the court of claims, and the district courts, have similar rules. 4 WK&M ¶ 3404.10 & n.19.

<sup>4</sup> CPLR 3216 enables the court, on its own initiative or upon motion, to dismiss a case because of failure to prosecute. A dismissal is only authorized, however, where 1 year has elapsed since the joinder of issue and the party against whom relief is sought has been served with a written demand for the resumption of prosecution. CPLR 3216(b). The defaulting party may avoid dismissal of the action by filing a note of issue within 45 days of receipt of the written demand for resumption of prosecution. *Id.* 3216(c). For a more