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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this installment of the *Survey*, a significant ruling relating to the availability of the class action is discussed. Following years of

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* The following abbreviations will be used uniformly throughout the *Survey*:
New York Civil Practice Law and Rules ..... CPLR
New York Civil Practice Act ..... CPA
New York Rules of Civil Practice ..... RCP

legislative intransigence in the face of earnest proposals to modify the representative suit, the Court of Appeals, in *Ray v. Marine Midland Grace Trust Co.*, has recently taken an initial step in the liberalization of class action law in New York. The doctrine of *forum non conveniens* was given renewed impetus in *Martin v. Mieth.* The Court of Appeals has conclusively determined that New York courts are not required to retain jurisdiction of a negligence action involving nonresidents despite the fact that the tort was committed within the state.

In another far-reaching decision, *State Farm Automobile Insurance Co. v. Westlake,* the Court has finally resolved a conflict among the lower courts by holding that section 167(3) of the Insurance Law absolves an insurer from defending a third-party action against the spouse of the plaintiff in the main suit. Other significant developments in the application of the *Dole* doctrine are considered. In *Slater v. American Mineral Spirits Co.*, the Court of Appeals denied retroactive application of *Dole* to issues that had been judicially concluded prior to a determination in the main action. In *Gerardi v. Brady,* a lower New York court denied state court jurisdiction over the United States as third-party defendant in suits brought under the Federal Torts Claims Act. Finally, in three recent decisions, *Goswami v. H & D Construction Co., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath* and *Slotkin v. Brookdale Hospital Center,* a lower New York court and two federal district courts reached conflicting conclusions on the applicability of *Dole* to intentional torts.

New York City Civil Court Act ..... CCA
Uniform District Court Act ..... UDCA
Uniform Justice Court Act ..... UJCA
Uniform City Court Act ..... UCCA
Real Property Actions and Proceedings Law ..... RPAPL
Domestic Relations Law ..... DRL
WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE (1974) ..... 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. 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.

Additionally, federal courts in New York continue to pass on the validity of the various provisional remedies provided in the CPLR. The United States District Court for the Southern District of New York, in *Sugar v. Curtis Circulation Co.*, declared sections of the attachment statute unconstitutional as violative of procedural due process.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 214(5): Statute of limitations problems in determining whether action for strict products liability sounds in tort or contract.

The dwindling importance of privity in the area of products liability and the resulting expansion in recovery for personal injury and property damage caused by defectively manufactured products have elicited substantial attention from courts[1] and commentators.[2] Nonetheless, the present state of the law in New York is far from definitive.[3] Particularly vexing has been the ambiguity evidenced with respect to selection of the appropriate statute of limitations.[4] In this area, more so than in others, the applicable limitation period can be crucial, since injury often occurs many years after the original sale of the defective commodity.[5]

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1 *See, e.g.*, Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969) (manufacturer of defective oxygen mask held liable to rescuers); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane manufacturer liable for passenger's death); Randy Knitwear v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (manufacturer of chemical used to retard fabric shrinkage held liable to remote purchaser who sustained economic injury); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961) (seller's warranty extended to members of purchaser's household).

Jurisdictions other than New York have also dealt with this issue. *See, e.g.*, Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972) (strict liability in tort adopted); Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971) (adoption of § 402A of *Restatement (Second) of Torts*, providing for strict liability in tort).

2 *See, e.g.*, Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Comment, *The Last Vestige of the Citadel, Symposium on Products Liability*, 2 HOFSTRA L. REV. 721 (1974); *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

3 *See The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

4 It has been said that "[n]othing in the law of procedure has more sudden or substantive impact" than the statute of limitations. Siegel, *Procedure Catches Up — And Makes Trouble*, in *Symposium on Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 63 (1970) [hereinafter cited as Siegel]. The definitions of limitation periods in the CPLR are in themselves confusing, since some are based on a theory of liability, *e.g.*, breach of contract (CPLR 213(2)), while others are in terms of the injury suffered, *e.g.*, property damage or personal injury (CPLR 214(4), (5)). 7B MCKINNEY'S CPLR 214, commentary at 429 (1972).

5 Such a case was presented in Rivera v. Berkeley Super Wash, Inc., 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974), *discussed in The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974). The infant plaintiff was seriously injured by a defective product sold