

The Survey of New York Practice Table of Contents

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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this issue, the *Survey* continues to trace the ramifications of *Dole v. Dow Chemical Co.*, with emphasis on that decision's impact in the area of intrafamily torts. For background, the reader's attention is directed to the October *Survey* of Volume 47, wherein *Dole* was examined extensively in the *Developments in New York Practice* section, and to the sequels appearing in the March and May *Surveys* of the same volume. Also highlighted herein is a discussion of *Sack v. Low*, a decision by the Second Circuit Court of Appeals which presents important issues under New York's borrowing statute.

Other cases of special significance include *Deason v. Deason*, wherein a lower court, following the recommendation of the New York Court of Appeals, permitted the use of judicially devised service pursuant to CPLR 308(5) in an indigent's matrimonial action; *Wandschneider v. Bekeny*, which holds that a judgment debtor is entitled to an offset equal to the full market value of real property purchased by the judgment creditor at an execution sale; *Concord Landscapers, Inc. v. Pincus*, wherein the Appellate Division, Second Department, held that the purchase of a judgment by a professional collector for the purpose of enforcement under CPLR 5236 does not violate section 489 of the Judiciary Law; and *Crawford v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, which holds that the failure of a party who is served with

*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
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 (1969)	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>
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.

a notice of intention to arbitrate to apply for a stay within the statutory period concedes not only the arbitrability of the controversy but also the adversary's choice of arbitrator.

Also reported are selected amendments to the CPLR and a significant addition to the Judiciary Law which allows administrative vacatur of improperly obtained default judgments.

The reader may have noticed that the *Survey* has a new title, which eliminates "Quarterly" from the former one. The reason for this change is that the *Survey* will no longer appear in all four issues of each volume; henceforth, the December issue will be devoted entirely to the *Second Circuit Note*.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, *viz.*, to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 202: Court applies liberal test of residency for borrowing statute purposes where plaintiff was en route to permanent domicile in New York at time cause of action accrued.

When a cause of action accrues without the state, the borrowing statute prescribes the time within which it must be brought. The statute provides that a non-resident plaintiff's action will be time-barred in New York if the limitations period of either New York or the state of accrual has expired.¹ The resident plaintiff is favored in that his action need only be timely under the New York limitations period. The test of residency for borrowing statute purposes has been strict.² The courts have denied the favored resident status to plaintiffs who became New York residents only after their actions had accrued.³ An additional

¹ CPLR 202. *See, e.g.,* Daigle v. Leavitt, 54 Misc. 2d 651, 283 N.Y.S.2d 328 (Sup. Ct. Rockland County 1967); Burriss v. Alexander, 51 Misc. 2d 543, 273 N.Y.S.2d 542 (Sup. Ct. N.Y. County 1966).

² One example is American Lumberman Mut. Cas. Co. v. Cochrane, 129 N.Y.S.2d 489 (Sup. Ct. N.Y. County 1954), *aff'd mem.*, 284 App. Div. 884, 134 N.Y.S.2d 473 (1st Dep't 1954), *aff'd mem.*, 309 N.Y. 1017, 133 N.E.2d 461 (1956), *discussed in* Lindsay, *Statute of Limitations — Licensed Foreign Corporation Held Non-Resident Under CPA 13*, 4 BUFFALO L. REV. 363 (1955), wherein a foreign corporation qualified to do business in New York was held to be a non-resident for borrowing statute purposes.

³ *See* Cellura v. Cellura, 24 App. Div. 2d 59, 263 N.Y.S.2d 843 (4th Dep't 1965), *discussed in* *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 131 (1967); Oglesby v. Cranwell, 250 App. Div. 720, 293 N.Y.S. 67 (2d Dep't 1937) (*per curiam*) (construing CPA 13).