

The Survey of New York Practice Table of Contents

St. John's Law Review

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Recommended Citation

St. John's Law Review (1974) "The Survey of New York Practice Table of Contents," *St. John's Law Review*: Vol. 48 : No. 3 , Article 11.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss3/11>

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THE SURVEY OF NEW YORK PRACTICE

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Introduction*

Several cases of constitutional dimension are discussed in this installment of the *Survey*. *Blye v. Globe-Wernicke Realty Co.* and *Frost*

* The following abbreviations will be used uniformly throughout the *Survey*:
 New York Civil Practice Law and RulesCPLR

v. Mohawk National Bank, which are treated in the *Developments in New York Practice* section deal, respectively, with the New York innkeeper's lien statute and the Uniform Commercial Code's "self-help" provision, two creditor remedies whose constitutionality has been questioned in light of the *Sniadach-Fuentes* line of cases. In *Seligman v. Tucker*, due process questions were raised when a provision in a liability insurance policy barring *Seider* attachment was overridden. *Vanderpool v. Vanderpool* held that an indigent defendant in a matrimonial action has a constitutional right to counsel.

Other cases discussed include *Weinrott v. Carp*, a Court of Appeals decision which adopts the federal separability approach with respect to arbitration agreements; *Murphy v. Grid Realty Corp.*, wherein the court refused to set aside a completed execution sale in the interest of justice; and *Victorson v. Kaplan*, which holds that *Codling v. Paglia* abandoned the rule of *Mendel v. Pittsburgh Plate Glass Co.*

Additionally, the *Survey* continues its treatment of the ramifications of *Dole v. Dow Chemical Co.*, which adopted a rule of relative fault among negligence defendants. Some areas discussed are intrafamily torts, section 167(3) of the Insurance Law and *Dole* retroactivity.

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. It is

New York Civil Practice Act	CFA
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
New York Code of Rules and Regulations	NYCRR
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.

hoped that the *Survey* nonetheless 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 213(2): Prospective warranties and the statute of limitations.

The Uniform Commercial Code prescribes a four-year statute of limitations for breach of a sales contract.¹ Generally, the cause of action is deemed to accrue upon tender of delivery of the goods.² However, where a prospective warranty is involved, *i.e.*, one which "explicitly extends to future performance of the goods," section 2-725(2) provides that the action accrues when the breach is or should have been discovered.

A recent case in the Appellate Division, Second Department, *Mittasch v. Seal Lock Burial Vault, Inc.*,³ examined the applicability of this exception to an express warranty by the manufacturer that a burial vault "is free from material defects or faulty workmanship and will give satisfactory service at all times."⁴ The casket was purchased in 1958 and in 1970 the plaintiff endeavored to remove her husband's body to another cemetery. Exhumation revealed that leakage had caused damage to the body and the casket. The court held that the warranty was prospective, and thus the statute of limitations ran from discovery of the defect.

Under pre-UCC case law, a prospective warranty arose only in the narrow category of cases in which the product was not in existence at the time of contract.⁵ Assurances relating to the condition of the goods at the time of sale were considered present warranties.⁶ For example,

¹ N.Y. U.C.C. § 2-275 (McKinney 1964). Under CPLR 213(2), a contract action must be commenced within six years, except as provided in the U.C.C.

² *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969); *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

³ 42 App. Div. 2d 573, 344 N.Y.S.2d 101 (2d Dep't 1973) (mem.).

⁴ *Id.* at 573, 344 N.Y.S.2d at 102.

⁵ See *Woodworth v. Rice Bros. Co.*, 110 Misc. 158, 179 N.Y.S. 722 (Sup. Ct. Orleans County), *aff'd mem.*, 193 App. Div. 971, 184 N.Y.S. 958 (4th Dep't 1920), *aff'd mem.*, 233 N.Y. 577, 135 N.E. 925 (1922) (trees were sold to the plaintiff guaranteed to bear "Elbertas" and "Willetts," and five years later the trees bore a different fruit; *held*, the warranty extended to the time in the future when the trees would bear fruit). *But see Allen v. Todd*, 6 Lans. 222, 224 (4th Dep't 1872) (where apple trees bore a different variety of apples than promised, the warranty was held to extend only to the "species of the tree at the time the sale was made").

⁶ See *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963) (thirteen years after being administered drug, plaintiff developed carcinoma causing removal of eye; *held*, cause of action accrues when harmful substance