

The Quarterly Survey of New York Practice Table of Contents

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THE QUARTERLY SURVEY OF NEW YORK PRACTICE

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*Introduction**

Decisions praiseworthy and blameworthy, by liberal and conservative courts, are reported in this installment of the *Survey*. One liberal court laudably construed CPLR 208 literally, to preserve a prisoner's cause of action; a second logically interpreted an indemnification clause, according to its fair intendment, to encompass active negligence; and a third held that a poor person is entitled, under the fourteenth amendment, to assignment of counsel in an action for non-payment of rent. Contrastingly, conservative courts espoused careful distinction, under CPLR 302, between contract cases and tort actions, and refused to extend the basis of class actions. Also noteworthy, is a case of first impression, in which it was held that the liability under CPLR 5222 of a judgment creditor is not absolute.

The reader's attention is particularly directed to the extended treatment under CPLR article 71. Discussed thereunder are two recent

* The following abbreviations will be used uniformly throughout the *Survey*:

New York Civil Practice Law and RulesCPLR
New York Civil Practice ActCPA
New York Rules of Civil PracticeRCP
New York City Civil Court ActCCA
Uniform District Court ActUDCA
Uniform City Court ActUCCA
Real Property Actions and Proceedings LawRPAPL
Domestic Relations LawDRL
WEINSTEIN, KORN AND MILLER, NEW YORK CIVIL PRACTICE (1969)WK&M
The Biannual Survey of New York Practice *The Biannual Survey*
The Quarterly Survey of New York Practice *The Quarterly 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. 13SECOND REP.
1959 N.Y. LEG. DOC. No. 17THIRD REP.
1960 N.Y. LEG. DOC. No. 80FOURTH REP.
1961 FINAL REPORT OF THE ADVISORY COMMITTEE
ON PRACTICE AND PROCEDUREFINAL REP.
Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committees:
1961 N.Y. LEG. DOC. No. 15FIFTH REP.
1962 N.Y. LEG. DOC. No. 8SIXTH REP.

cases which deem ineffective, contractual waiver of the right to notice and a hearing prior to seizure of certain types of property.

Additionally, the practitioner is urged to familiarize himself with *In re Frutiger*, a Court of Appeals decision which apparently injects fresh thought into an area of law generally understood to be well settled. Therein, the Court upheld the withdrawal, prior to probate decree, of a waiver of citation and consent to probate, despite the absence of any showing of fraud, duress, misrepresentation or other basis for vitiating the waiver, where the status quo remained unchanged, *i.e.*, no interested party's rights were prejudiced.

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.

The Table of Contents is designed to direct the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 208: Tolling provision held applicable even though prisoner had legal capacity to sue.

Under CPLR 208, the statute of limitations is tolled during a disability due to imprisonment on a criminal charge or conviction for a term less than for life.¹ In *Ortiz v. LaVallee*,² a recent Second Circuit decision, the court was confronted with the question of whether the tolling provision was intended to apply even where a prisoner had the legal capacity to bring an action while incarcerated. Plaintiff had instituted this action under the Federal Civil Rights Act of 1871.³

¹ The pertinent language of CPLR 208 provides:

If a person entitled to commence an action is, at the time the cause of action accrues . . . imprisoned on a criminal charge or conviction for a term less than for life, and the time otherwise limited for commencing the action is three years or more . . . the time within which the action must be commenced shall be extended to three years after the disability ceases. . . . The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues. . . .

² 422 F.2d 912 (2d Cir. 1971).

³ 42 U.S.C. § 1983 (1964). Plaintiff, in his complaint, alleged that in July of 1965 he was assaulted and mistreated by prison officials while incarcerated in Auburn State Prison.