St. John's Law Review

Volume 42
Number 2 *Volume 42, October 1967, Number 2*

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THE QUARTERLY SURVEY OF NEW YORK PRACTICE

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THE QUARTERLY SURVEY OF NEW YORK PRACTICE

Introduction *

This episode of the *Survey* presents to the practitioner a varied fare, cases both significant and unique. Of special significance are the brace of Court of Appeals' decisions found in Article 10, in which limited partners were allowed to bring actions both derivative and representative in nature against the limited partnerships. Unique is the case in Article 32 wherein the court dismissed a counterclaim on grounds of general delay. Noteworthy cases also will be found under the usually fecund Articles 3, 32, and 52. Notable by its absence in this installment, though, is the regularly epic treatment of CPLR 3216. But this is not by oversight. Because of the repeal of CPLR 3216 and its replacement with a new provision, the case law built upon the foundation of the old section is now useful solely as an historical

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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
New York City Civil Court Act ..... CCA
Uniform District Court Act ..... UDCA
Uniform City Court Act ..... UCCA
Real Property Actions and Proceedings Law ..... RPAPL
Domestic Relations Law ..... DRL

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. 20 ..... 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.

Additional tools for quick reference are the one-volume pamphlet editions of the CPLR published by Matthew Bender & Co. and Edward Thompson Co.

tool for predicting the reactions of the New York courts to the new enactment. In the absence of case law under the new section, discussion of reaction or prediction would be tenuous indeed.

The basic purpose of the *Quarterly Survey* is to key the practising attorney to significant developments in New York practice. To this end, in each installment of the survey are set forth those cases which have a weighty impact upon the procedural law of New York. Ideally, all the significant cases concerning New York's procedural law would be covered. But, because of space limitations, many other less important, but, nevertheless, significant cases cannot be included.

Considering the *raison d'etre* of the *Survey* to be the imparting of information geared to keeping practitioners abreast of the New York law of procedure, feedback from attorneys would be an important aid in an analysis of our efforts. The *St. John's Law Review* would, therefore, welcome critiques from the readers of the *Survey*. In this way, perhaps, any disjunction between the material in the *Survey* and the needs of the attorneys might be effectively healed.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(b)(4): Delivery of summons in wrong county of New York City not a bar to sixty-day extension.

CPLR 203(b)(4) provides for an automatic sixty-day extension of the statute of limitations by delivery of the summons to the sheriff of the county where the defendant resides, is employed, or is doing business. If the defendant is a corporation, the summons may be delivered to the sheriff "in the county in which [the corporation] . . . may be served. . . ."

Under CPA Section 17, the predecessor of CPLR 203(b)(4), the courts required delivery to the sheriff of the *proper* county as a condition to the extension where the defendant was a *natural person*.[1] However, this requirement was waived under the CPLR in *Kosofsky v. Spivak*,[2] where the delivery was made in Kings County, although defendant, a real person, lived in Bronx County and worked in New York County. Recently, in *Wieboldt v. Rentways, Inc.*,[3] the supreme court held that the

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[1] Kleila v. Miller, 1 App. Div. 2d 697, 147 N.Y.S.2d 589 (2d Dep't 1955); Balter v. Janis, 200 Misc. 635, 107 N.Y.S.2d 837 (Sup. Ct. Kings County 1951).

[2] (Sup. Ct. N.Y. County), N.Y.L.J., Aug. 12, 1964, p. 11, col. 1.

[3] 52 Misc. 2d 931, 277 N.Y.S.2d 216 (Sup. Ct. Nassau County 1967).