

# 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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# THE QUARTERLY SURVEY OF NEW YORK PRACTICE

## *Introduction\**

Liberality seems to be the theme of the cases presented in this *Survey* installment. For example, the jurisdictional door of CPLR 301 has been flung open in the recent decision of the Court of Appeals, *Frummer v. Hilton Hotels International, Inc.* Other noteworthy cases may be found under Articles 3 and 31, and under the headings of Res Judicata and Collateral Estoppel following Article 32.

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.

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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.

The Table of Contents is designed to key the reader to those specific areas of procedure 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 203(c): Applies to tort counterclaim in a contract action.*

In *Chevron Oil Co. v. Atlas Oil Co.*,<sup>1</sup> decided pursuant to the CPA, the appellate division, fourth department, recently ruled that in a suit for breach of contract the defendant could not interpose a tort counterclaim after the statute of limitations for tort had run. The court noted that, since the alleged act occurred in 1959 and the three year statute of limitations<sup>2</sup> had run prior to the effective date of the CPLR, the ameliorative provisions of the CPLR were not available to the defendant. From this language, it may be presumed that had the case been decided under the CPLR a different result would have been reached.

CPLR 203(c) states that “[i]f the . . . counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.” This section, while based on CPA §§ 11 and 61, greatly changes the statutory law in New York.<sup>3</sup>

Under CPA § 11, the statute of limitations on a defendant’s counterclaim was not tolled until the answer containing the counterclaim was served.<sup>4</sup> The CPLR adopts the rule of *Parsell v. Essex*<sup>5</sup> that the statute of limitations is tolled when the plaintiff serves the summons.<sup>6</sup>

CPA § 61 provided that a cause of action barred by the statute of limitations could not be interposed as a defense or counterclaim. CPA § 11 further provided a similar limitation as concerning the interposition of a claim for relief.

CPLR 203(c) adopts, essentially, the doctrine of “equitable recoupment.” Under this doctrine, a counterclaim barred by the statute of limitations can nevertheless be interposed, but only to the

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<sup>1</sup> 28 App. Div. 2d 644, 280 N.Y.S.2d 731 (4th Dep’t 1967).

<sup>2</sup> CPA § 49(7).

<sup>3</sup> SECOND REP. 46.

<sup>4</sup> Hammill v. Curtis, 18 App. Div. 2d 749, 235 N.Y.S.2d 865 (3d Dep’t 1962) (memorandum decision).

<sup>5</sup> 15 Misc. 2d 617, 181 N.Y.S.2d 1019 (Sup. Ct. Cattaraugus County 1958).

<sup>6</sup> 7B MCKINNEY’S CPLR 203(c), commentary 82 (1963).