

The Biannual Survey of New York Practice: Part IV-- -Table of Contents

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1965) "The Biannual Survey of New York Practice: Part IV--Table of Contents," *St. John's Law Review*: Vol. 39 : No. 2 , Article 16.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol39/iss2/16>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

THE BIENNIAL SURVEY OF NEW YORK PRACTICE: PART IV

TABLE OF CONTENTS

| | PAGE |
|--|------|
| Article 2—Limitations of Time | |
| An Appraisal of Judicial Reluctance to Imply an Indemnity Contract in Time-Barred Breach of Warranty Suits.* | |
| Continuous trespass: Statute of limitations defense disallowed. | 409 |
| Periodic payments under an allegedly void lease do not constitute separate wrongs for statute of limitations purposes. | 409 |
| CPLR 203(b)(4): Inapplicable to service on out-of-state sheriffs. | 410 |
| Time requirement for commencement of tort action against municipality: Section 50-i of the General Municipal Law supersedes all inconsistent acts. | 410 |
| CPLR 203(e): Lack of notice in original answer of "claims" to be interposed in amended answer prevents "relation back." | 411 |
| Article 3—Jurisdiction and Service, Appearance and Choice of Court | |
| Expansion of jurisdiction under CPLR 302 does not broaden the "doing business" concept. | 413 |
| CPLR 302(a)(1): The "transaction of business." | 414 |
| CPLR 302 applies where plaintiff is agent transacting defendant's business. | 417 |
| Foreign executor held in personam under CPLR 302(a)(1), (2). | 417 |
| Physical injury not required by CPLR 302(a)(2). | 418 |
| Foreign manufacturer of defective component part held in personam under CPLR 302(a)(2). | 420 |
| CPLR 308(4)—Service as the court directs. | 421 |
| CPLR 312: Personal service upon a court. | 422 |
| The interstate commerce objection: Stay under CPLR 2201 may best serve interests of justice. | 423 |
| Article 5—Venue | |
| Federal venue statute regarding national banking associations. | 426 |
| Article 10—Parties Generally | |
| CPLR 1006: Use of interpleader does not preclude jury trial. | 426 |
| Indemnification between tort-feasors. | 428 |

* This subject has been treated as a Comment, *supra* at 361.

| | PAGE |
|---|------|
| Intervention allowed to defend constitutionality of statute granting partial tax exemption. | 430 |
| Nominal corporate defendant allowed substitution as plaintiff despite lack of express sanction. | 431 |
| No abatement of action against foreign insurer domiciled in state which has not adopted Uniform Insurers Liquidation Act. | 432 |
| | |
| Article 12—Infants and Incompetents | |
| Preference given to nominee of relatives of incompetent. | 433 |
| | |
| Article 14—Actions Between Joint Tort-feasors | |
| CPLR does not specify when motion for contribution may be made. | 433 |
| | |
| Article 20—Mistakes, Defeats, Irregularities and Extensions of Time | |
| Opening of a default under CPLR 2004. | 434 |
| | |
| Article 30—Remedies and Pleading | |
| Defect in verification of complaint excused. | 435 |
| Answer must be verified as to all but self-incriminatory matter when complaint has been properly verified. | 436 |
| CPLR 3013: Demand for equitable relief not fatal if facts alleged merely show basis for legal relief. | 437 |
| Liberalized pleading rules not intended to give courts “carte blanche” to create causes of action. | 438 |
| Sham no longer ground for dismissal of irrelevant matter. | 439 |
| Protracted delay in amending bill of particulars causes costs to be assessed against a successful plaintiff. | 400 |
| Pleading dismissed for failure to itemize special damages in counterclaim based on prima facie tort and defamation. | 440 |
| Importance of having court specify whether dismissal is pursuant to CPLR 3012 or 3216. | 441 |
| CPLR 3019(c): Setoff counterclaim on assigned claim. | 443 |
| Reply allowed to state what appears to be a counterclaim. | 444 |
| Amendment to pleading refused when substantial prejudice results. | 445 |
| | |
| Article 31—Disclosure | |
| Accident reports are subject to disclosure. | 446 |
| CPLR 3117(a)(1): Prior deposition not admissible to contradict testimony. | 447 |
| CPLR 3120: Examination before trial prerequisite to obtaining discovery. | 448 |
| CPLR 3120(1): Discovery limited to parties. | 449 |
| Notwithstanding local court rules, disclosure may be had in malpractice cases. | 450 |
| CPLR 3121: Blood grouping tests held constitutional. | 451 |
| Effect of CPLR 3103(a) upon five-day limitation of CPLR 3122. | 451 |

THE BIENNIAL SURVEY OF NEW YORK PRACTICE: PART IV

Introduction

This is the fourth installment of the *The Biennial Survey* which was commenced in December of 1963. The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law under the new provisions of the New York Civil Practice Law and Rules, and under other practice and procedure provisions recently enacted.** Many additional cases might have been treated—the cases chosen are surely not the only cases of significance—but limitations of space require resort to the difficult process of selection. The treatment has been of reported cases only, since unreported cases are generally unavailable to the practitioner.

The Table of Contents is designed to quickly key the reader to the specific areas of procedural law which are treated in the *Survey* in order that he may, at a glance, note such areas of

** 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 |

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. |

treatment as may be of importance to him without having to wade through matter that does not particularly affect his practice.

ARTICLE 2 — LIMITATIONS OF TIME

Continuous trespass: Statute of limitations defense disallowed.

In *506 Sixth Ave. Corp. v. New York City Transit Authority*,¹ a trespass action to recover damages, the defendant pleaded the statute of limitations² as a defense. The court of appeals held that an underground encroachment built in 1939 was a continuing trespass, and although the right to bring an action accrued in 1939, the three-year statute of limitations did not bar institution of the suit in 1960.

The court distinguished a *permanent* trespass, which gives rise to a single cause of action, from a *continuous* trespass. "In New York, we have consistently characterized an unlawful encroachment as a *continuous* trespass giving rise to successive causes of action. . . ."³ The court reasoned that although the structure itself was permanent, the trespass was continuous. Apparently, the court considered that to allow defendant to successfully plead the statute of limitations would, in effect, allow adverse possession without notice thereof to the owner.

Periodic payments under an allegedly void lease do not constitute separate wrongs for statute of limitations purposes.

*Lowell Wiper Supply Co. v. Helen Shop, Inc.*⁴ was a stockholders' derivative suit based on an allegation that a lease entered into between the corporation and a principal stockholder was either void or voidable because of excessive rental charges. Defendants contended that since the lease was entered into nine years prior to the inception of the action, the statute of limitations⁵ was a bar. Plaintiffs countered that each payment under the lease was a separate, continuous wrong, and that they were thus entitled to damages which accrued during the most recent statutory period. The court rejected the theory "that each payment pursuant to a wrongful agreement gives rise to a separate and distinct claim. . . . The settled rule . . . is that the statute of limitations begins to run upon commission of the overt act causing damage."⁶

¹ 15 N.Y.2d 48, 203 N.E.2d 486, 255 N.Y.S.2d 89 (1964).

² CPA § 49(7).

³ *506 Sixth Ave. Corp. v. New York City Transit Authority*, 15 N.Y.2d 48, 52, 203 N.E.2d 486, 488, 255 N.Y.S.2d 89, 92 (1964).

⁴ 235 F. Supp. 640 (S.D.N.Y. 1964).

⁵ The court made no determination as to which statute of limitations was applicable, as it concluded that plaintiff would have been barred under the most favorable statute.

⁶ *Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640, 644 (S.D.N.Y. 1964).