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

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THE BIENNIAL SURVEY OF NEW YORK PRACTICE: PART IV

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

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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).