

## CPLR 602: Second Department Recommends Trial Preference When Summary Proceeding Consolidated with Action

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The *Caton* decision is properly strict, especially in view of the inherent weakness of service by publication in giving notice to the defendant of an impending action.<sup>18</sup>

ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

*CPLR 602: Degree of responsibility attributable to each defendant for similar injuries suffered by a plaintiff in separate automobile accidents held to justify joint trial.*

CPLR 602 bestows upon the courts broad discretionary power to join the trials of separate actions, upon motion, when they involve "a common question of law or fact."<sup>19</sup> *Thayer v. Collett*<sup>20</sup> illustrates the application of this permissive standard.<sup>21</sup> Therein, the Appellate Division, Third Department, held that where a plaintiff had instituted separate actions to recover for similar injuries allegedly sustained in two automobile accidents occurring a year apart, it was not an improper exercise of discretion to grant the motion of one of the defendants for a joint trial. The court found that the degree of responsibility attributable to each defendant for the alleged injuries constituted a common question of fact, and that a determination of this question by a joint trial would be fairer to both the plaintiff and the defendants since it would prevent a litigating defendant from seeking to cast blame for the injuries on the absent defendants.<sup>22</sup>

This decision is sound. When, as in *Thayer*, a joint trial will serve to preserve the rights of the parties, its use should be encouraged as an effective means of expediting litigation and avoiding the inconsistent verdicts that may result from a multiplicity of suits.<sup>23</sup>

*CPLR 602: Second Department recommends trial preference when summary proceeding consolidated with action.*

The CPLR appears to permit the consolidation of a plenary action with a special proceeding,<sup>24</sup> and a majority of New York courts have so

77 N.Y.S. 959 (4th Dep't 1902); *Alfonso v. Alfonso*, 99 Misc. 550, 165 N.Y.S. 1037 (Sup. Ct. Kings County 1917).

<sup>18</sup> See *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971).

<sup>19</sup> CPLR 602(a). See 7B MCKINNEY'S CPLR 602, commentary at 116 (1963). See generally *Boyea v. Lambeth*, 33 App. Div. 2d 928, 306 N.Y.S.2d 481 (3d Dep't 1970) (mem.). Note that CPLR 602 liberalizes the CPA requirement for joinder, i.e., that the actions grow out of the same set of facts. Compare CPA 96-a and *Abbatepaolo v. Blumberg*, 7 App. Div. 2d 847, 182 N.Y.S.2d 83 (2d Dep't 1959) (mem.), with CPLR 602(a) and *Wyant v. Jensen*, 25 App. Div. 2d 388, 270 N.Y.S.2d 156 (3d Dep't 1966).

<sup>20</sup> 41 App. Div. 2d 581, 340 N.Y.S.2d 16 (3d Dep't 1973) (mem.).

<sup>21</sup> See *Wyant v. Jensen*, 25 App. Div. 2d 388, 270 N.Y.S.2d 156 (3d Dep't 1966); *Potter v. Clark*, 19 App. Div. 2d 585, 240 N.Y.S.2d 495 (4th Dep't 1963) (mem.). But see *Korn v. Duhl*, 22 App. Div. 2d 793, 253 N.Y.S.2d 874 (2d Dep't 1964) (mem.).

<sup>22</sup> 41 App. Div. 2d at 581, 340 N.Y.S.2d at 17.

<sup>23</sup> See 2 WK&M ¶ 602.01.

<sup>24</sup> CPLR 602(a) provides for the consolidation of "actions" involving common questions

held.<sup>25</sup> A difficulty arises, however, in the case of one variety of special proceeding — the summary proceeding.<sup>26</sup> How can the expediency of a summary proceeding be preserved in the lengthy procedural context of an action when the two are consolidated?

In *McCarthy v. Lewin*,<sup>27</sup> the vendors of real property brought a contract action and a separate summary proceeding against their vendees who had taken possession of the property sold.<sup>28</sup> Reversing a lower court order, the Appellate Division, Second Department, unanimously granted the defendants' motion to consolidate on the ground that the action and the proceeding involved the same issues of fact and law. To preserve the vendors' right to a speedy adjudication in the summary proceeding, the court recommended that a motion by either party for a trial preference be granted, and that noticing for trial not be delayed by pretrial proceedings.<sup>29</sup>

The court's decision prevents duplication of proceedings while, to some extent, preserving the summary nature of the proceeding which the plaintiffs were entitled to bring.

#### ARTICLE 11 — POOR PERSONS

*CPLR 1102: Local governments must pay indigent matrimonial plaintiffs' publication costs.*

While CPLR 1102 does not expressly provide for public payment of indigents' publication costs in matrimonial actions,<sup>30</sup> the United

of law or fact. CPLR 105(b) states that "[t]he word 'action' includes a 'special proceeding.'" Consolidation is facilitated by CPLR 103(b), which makes the procedure in special proceedings the same as the procedure in actions except where otherwise prescribed by law.

<sup>25</sup> *Elias v. Artistic Paper Box Co.*, 29 App. Div. 2d 118, 286 N.Y.S.2d 371 (2d Dep't 1967); *Schuster v. 490 West End Corp.*, 26 App. Div. 2d 535, 271 N.Y.S.2d 171 (1st Dep't 1966) (mem.); *Street of Shops, Inc. v. Clifford*, 20 App. Div. 2d 622, 244 N.Y.S.2d 858 (4th Dep't 1963) (mem.); cf. *In re Houston's Trust*, 30 App. Div. 2d 999, 294 N.Y.S.2d 225 (3d Dep't 1968) (mem.). *Contra*, *Hanft v. Hanft*, 46 Misc. 2d 548, 260 N.Y.S.2d 104 (Sup. Ct. Bronx County 1965).

<sup>26</sup> RPAPL 701(1) refers to a summary proceeding to recover real property as a "special proceeding."

<sup>27</sup> 41 App. Div. 2d 657, 340 N.Y.S.2d 668 (2d Dep't 1973) (mem.).

<sup>28</sup> RPAPL 713(9) allows a vendor, in certain circumstances, to bring a summary proceeding against a defaulting vendee.

<sup>29</sup> *Accord*, *Street of Shops, Inc. v. Clifford*, 20 App. Div. 2d 622, 244 N.Y.S.2d 858 (4th Dep't 1963) (mem.).

<sup>30</sup> CPLR 1102(d) exempts a poor person from liability for "costs and fees" except when he recovers in the action. Courts have reached opposite conclusions as to whether the statute covers publication costs in matrimonial actions. See *Brown v. Wyman*, 59 Misc. 2d 740, 300 N.Y.S.2d 254 (Sup. Ct. Onondaga County 1969) (statute sanctions payment of publication costs by county); *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 139 (1969), *rev'd on other grounds*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (2d Dep't 1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 162 (1972) (statute does not authorize payment of publication costs).