

December 2012

DRL 211: Service of Complaint with Summons Does Not Void Summons

St. John's Law Review

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Recommended Citation

St. John's Law Review (1971) "DRL 211: Service of Complaint with Summons Does Not Void Summons," *St. John's Law Review*. Vol. 46 : No. 1 , Article 35.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol46/iss1/35>

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It is most unlikely that the Legislature intended DRL 210 to be a condition precedent to dissolution of a dead marriage. Rather, the section is a statute of limitations which defendant waived in *Figueroa*.²⁴³

DRL 211: Service of complaint with summons does not void summons.

Service of summons and complaint in a divorce action is governed by DRL 211, under which a complaint cannot be validly served prior to termination of conciliation proceedings.

In *Vander Kamp v. Vander Kamp*,²⁴⁴ a plaintiff directed service of both summons and complaint upon defendant before termination of conciliation proceedings. The summons lacked the endorsement "Action for a Divorce" required by DRL 232, and service of the complaint before said termination violated DRL 211. After termination, plaintiff served a second copy of the complaint upon defendant. Defendant answered and then moved in the supreme court to dismiss the action, on the ground that service of the complaint with the summons prior to termination invalidated both.²⁴⁵ The court denied this motion, holding that only service of the complaint was voided under DRL 211.²⁴⁶ Then it deemed the defective summons amended to include the necessary endorsement, since defendant was fairly advised of the action.²⁴⁷

Correction of the formal defect of the complaint by deeming it amended, is clearly appropriate in this case; defendant was not misled by the oversight and dismissal would waste time and money. Similarly, upholding service of the summons is appropriate, for there is no authority to the effect that simultaneous service of summons and complaint vitiates both.

DRL 234: Judgment granting exclusive possession cannot be circumvented by partition under RPAPL 901.

When marriage terminates in divorce, real property previously possessed by the parties as tenants by the entirety automatically becomes realty held by them as tenants in common.²⁴⁸ This transmutation renders the property amenable to partition. Under section 901 of the RPAPL a tenant in common in possession can obtain partition.

²⁴³ 66 Misc. 2d at 117, 320 N.Y.S.2d at 117.

²⁴⁴ 65 Misc. 2d 934, 319 N.Y.S.2d 201 (Sup. Ct. Monroe County 1971).

²⁴⁵ *Id.* at 935, 319 N.Y.S.2d at 201.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 935, 319 N.Y.S.2d at 202, citing *Apploff v. Apploff*, 55 Misc. 2d 781, 287 N.Y.S.2d 486 (Sup. Ct. Kings County 1968).

²⁴⁸ *Yax v. Yax*, 240 N.Y. 590, 148 N.E. 717 (1925); *Stelz v. Schreck*, 128 N.Y. 263, 28 N.E. 510 (1891).