

Costs Disallowed Under Present Law in Case Properly Commenced in Supreme Court Under Prior Law

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instead of to the sheriff. The court held this to be the equivalent of a "settlement,"³¹⁵ entitling the sheriff to payment. That the sheriff did not have physical custody of the property levied upon was not deemed significant; it was reasoned that the sheriff had done all that was within his power to conserve the property for the creditor.

ARTICLE 81 — COSTS GENERALLY

Costs disallowed under present law in case properly commenced in supreme court under prior law.

In *Casella v. Board of Educ.*,³¹⁶ the lower court awarded plaintiff a sum for costs in addition to a five thousand dollar personal injury judgment. The appellate division reversed, holding that under Section 1474 of the CPA, plaintiff was not entitled to costs. When this action was commenced, section 1474(1)³¹⁷ provided that a plaintiff could recover no costs in an action brought in the supreme court of any county in New York City if the action, except for the amount claimed, could have been brought in the City Court of the City of New York, unless the plaintiff recovered four thousand dollars or more. The 1962 amendment to section 1474 substituted the Civil Court of the City of New York for the City Court and six thousand dollars as the minimum sum. Judgment was entered after the effective date of the amendment. Even though the civil court was not in existence at the time the action was commenced, the court found that plaintiff was bound by the amendment, reasoning that the right to costs depends on the statutes in effect at the time the action is terminated, not when it was begun.

The difficulty here is that the civil court was not in existence at the time the action was commenced, and the action was properly brought in the supreme court under the provisions then in force.

The case would be the typical one contemplated by CPLR 10003. That provision permits recourse to prior law, and application thereof, whenever — in a case commenced under prior law — the application of the new law "would work injustice." Though CPLR 8102(1) is not really new law — being the same for present purposes as CPA § 1474(1) as amended in 1962 — there would appear to be within CPLR 10003 a general power to avoid the unfortunate result of the *Casella* case. The Civil Court Act contains a provision of similar import, seeking to avoid the application of the new act to actions commenced under its predecessors whenever it appears necessary to apply prior law.

³¹⁵ "Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made." CPLR 8012(b)(2).

³¹⁶ 21 App. Div. 2d 690, 250 N.Y.S.2d 474 (2d Dep't 1964).

³¹⁷ CPA § 1474(1) is now CPLR 8102(1).