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The Municipal Court Code, which the Civil Court Act replaced *inter alia,* provided that the summons should inform the defendant of the cause of action against him by being served with a complaint or an indorsement upon the summons.[252] This practice was retained in the Civil Court Act.[253] Since the summons under the Civil Court Act requires the defendant to appear and answer the complaint,[254] it is obvious that the defendant cannot satisfy this requirement unless the complaint is served with the summons.[255] Service of a summons without any complaint at all will render it jurisdictionally defective, and hence, void.[256] Even if the defendant had not made his motion to dismiss but had ignored the summons and defaulted the plaintiff could not enter a default judgment against him.[257]

Note that the plaintiff's procedure would have been quite valid in the supreme court, where Section 3012 of the CPLR dispenses with the requirement that the complaint accompany the summons. The Bar should recognize that in the civil,[258] district[259] and (as of April 1, 1965) city[260] courts, the summons cannot be served alone (except in service by publication).

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

Substituted Service — Section 735 of the RPAPL and Section 308(3) of the CPLR

In *Wayside Homes, Inc. v. Upton,*[261] a landlord brought a summary proceeding to recover possession of real property occupied by a defaulting tenant, and for the rent due and owing. Substituted service of process was made pursuant to Section 735 of the RPAPL, which provides: "Service of the notice of petition and petition shall be made in the same manner as personal service of a summons in an action; except that if service cannot be made in such manner, it shall be made by [substituted service]

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252 MUNIC. CT. CODE § 19.

253 CCA § 902(a)-(b). The one exception to this rule is when service is made by publication. See 29A MCKINNEY'S CCA § 902, commentary 141.

254 CCA § 402(a)-(b); N.Y.C. CIV. CT. R. 2(a)-(b). Defendant will also, of course, have the alternative of moving to dismiss under CPLR R. 3211. See CCA Art. 10.

255 Steffens v. Martin, 100 Misc. 263, 165 N.Y. Supp. 445 (1st Dep't 1917); see Baum v. Halpern, 169 N.Y. Supp. 489 (1st Dep't 1918).

256 Steffens v. Martin, *supra* note 255.

257 Compare CPLR § 3215(e).

258 CCA § 902(a)-(b).

259 UDCA § 902(a)-(b).

260 UCCA § 902(a)-(b). The UCCA became law on April 5, 1964, and is to become effective April 1, 1965. N.Y. Sess. Laws 1964, chs. 497-98.

261 40 Misc. 2d 1087, 244 N.Y.S.2d 624 (Nassau County Dist. Ct. 1963).

. . . ." The court granted the default judgment for possession *only* when substituted service was made pursuant to section 735, and held that absent a showing that personal service could not be made *with due diligence* pursuant to the provisions of Section 308(3) of the CPLR, a default judgment for the rent due and owing could not be granted where substituted service was made pursuant to section 735.

The difficulties of service in a summary proceeding under the provisions of section 735 are in the ambiguities it poses in its very opening. It first states that service shall be made "in the same manner as personal service of a summons in an action." It immediately adds a semicolon and then states that "except that if service cannot be made in such manner, it shall be made by [and here it sets forth its own provisions for substituted service which are similar but not identical to the substituted service provisions of Section 308(3) of the CPLR]. . . ."

The prime difficulty is in determining what was meant by the opening requirement of section 735, *i.e.*, the requirement that service be made "in the same manner as . . . a summons." A summons is served under Section 308 of the CPLR. There would be no problem if that section provided only for personal delivery of the summons to the defendant; the opening language of section 735 would then clearly constitute a reference to that method of service so that the alternatives offered by section 735 would then have something to be alternative *to*. But personal delivery is only the first method of service under section 308. The section has three other methods of service, among which is substituted service by means similar to that which constitutes the alternative that section 735 itself spells out.

Did the opening language of section 735 intend to require an endeavor at the substituted service provided by Section 308(3) of the CPLR before the substituted service set forth in section 735 could be used? The court in the *Wayside* case apparently takes that position, at least as concerns a default judgment for rent. But if section 308(3) is a condition precedent to the use of the express alternatives of section 735, why should not section 308(4) (service by court order) *also* be a condition precedent to those alternatives?

Reduced to its lowest terms, the question is whether, by the opening language of section 735, the Legislature intended: (a) to make only section 308(1) a condition precedent to the use of the express alternatives of section 735; or (b) to require all of section 308 to be tried before resort might be had to the alternatives of section 735.

The probability is that (a) was intended, *i.e.*, that personal delivery under section 308(1), and only that, be the condition precedent. The principal ground for that conclusion is that the Legislature should not be presumed to have intended to do

conflicting things in the same provision. There would be such conflict if the construction suggested by (b) were followed. It would invite the use of section 308(3), providing one means of substituted service, as a condition precedent to the use of the substituted service provided directly in section 735, which method is very similar to that of section 308(3).

The court in *Wayside* followed the (b) construction, but did so only for that part of the default judgment concerning rent due. That itself appears an unwarranted approach under the new RPAPL. In its section 741, which treats of the "contents of petition," it provides (in subdivision 5) that the relief "may include a judgment for rent due." It does not distinguish between contested judgments and default judgments, but apparently wants to treat the money relief requested the same as the request for possession. That a distinction should be made between the two, such as was made in the *Wayside* case, appears unwarranted.

The court in that case points out that the substituted service of Section 308(3) of the CPLR requires that "due diligence" be first used to make personal delivery whereas, notes the court, there is no such requirement imposed on the use of the substituted service provided directly by Section 735 of the RPAPL. Even if that were so, there appears to be no factor impelling the Legislature to require that substituted service be preceded by diligent efforts to make personal delivery. The Legislature may apparently do what it wishes here, so that the only question to be decided is what *did* the Legislature intend? If the alternative service provided by Section 735 of the RPAPL were made the *initial* method of service, it would apparently satisfy due process.[262]

The present section 735 was originally put together in the 1960 Report.[263] The service of summons provision which it sought to adopt was, at that time, less involved than the present section 308, and *it contained no requirement that due diligence be used* to make personal delivery before substituted service could be used.[264]

The foregoing should at least manifest that section 735 had no intention whatever of becoming embroiled with a "due diligence" requirement regarding alternatives contained in the service of summons provision itself.[265] Moreover, even if the courts be

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262 See Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

263 FOURTH REP. 557.

264 See SECOND REP. 155-56. There the reader will find the precursor of present § 308; it was then numbered 25.2(b). It was *that* service of summons provision that the forbear of § 735 of the RPAPL sought to adopt when it (the § 735 precursor) was originally devised. See FOURTH REP. 557 (where present § 735 of the RPAPL was then numbered 787).

265 It is unfortunate that these problems should be encountered in the very method of service in summary proceedings, which occupy so large a

disposed to read in the requirement that due diligence in attempting personal delivery of the summons precede the express alternatives of section 735, there seems ample basis for finding such requirement in section 735 itself without becoming tied up with section 308(3). Section 735 permits its alternative of substituted service to be used only "if service cannot be made in such manner" (*i.e.*, in the manner in which a summons is served). One would naturally assume the use of due diligence in attempting such service before it could be concluded that such service "cannot be made."

The better construction of the opening language of section 735 is that it intends to refer only to subdivision (1) of section 308, *i.e.*, to require an effort at personal delivery. The original service of summons provision sought to be embraced by that reference has been so changed (as it now appears as section 308) as to make impractical an effort to give section 735 its original intent; and imputing to the section an intent to adopt all of the present section 308. When, at the premises, service cannot be made thereunder of section 735 creates that weird situation in which there is then involved two entirely separate, yet very similar, substituted service provisions, each involving its own conditions precedent and its own distinctions as to method.

The proceeding is supposed to be "summary." If it is to retain its summary function, then the opening language of section 735 should be read as a reference only to subdivision (1) of section 308. When, at the premises, service cannot be made thereunder by personal delivery, service should be permissible by the alternatives expressly set forth in section 735, and no further reference should be made to section 308 or *its* alternatives. And service by the section 735 alternatives should be sufficient for both possession and for rent due, without distinction between them. However, prior law may have come by its distinctions in that regard, there appears to be no support for them in the present RPAPL.

Counterclaim Permitted in Holdover Proceeding

In *Great Park Corp. v. Goldberger*,[266] a holdover summary proceeding by the landlord, defendant tenant sought to interpose an

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portion of litigation in our state. The ambiguities that create the problem are readily traceable to their source. The RPAPL is the product of the Law Revision Commission; the CPLR is the work of the Advisory Committee on Practice and Procedure and, later, of the Senate Finance Committee. While the earlier reports of the Advisory Committee indicate some kind of effort at coordination regarding all the provisions involved, that early rapport was later lost. The result is that the final RPAPL as done by the Law Revision Commission was insufficiently coordinated with the final CPLR as it came out of the Senate Finance Committee, and the chief product of that loss of rapport is the problem we have been discussing here regarding service.

[266] 246 N.Y.S.2d 810 (N.Y. City Civil Ct. 1964).