A Game of Telephone: The Evolution of Conspicuous Service in New York State

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This article discusses the evolution of how conspicuous service is regarded by trial courts in New York state. Conspicuous service or "nail and mail service" is the process of nailing notice of an upcoming court hearing to a visible place on the property of a defendant. This article examines the legitimacy of this method of service as it pertains to money judgments in summary proceeding cases.

I. Explanation of New York State Court System

Unlike in most states, the Supreme Court of New York State is the court, where most cases are first heard, with original jurisdiction. When cases are appealed from the state Supreme Court, they reach a level known as the Appellate Division. The Appellate Division is a system of four appellate courts, known as Departments, which each preside over a separate section of the state. New York City is broken up between the First and Second Departments.[157]

The highest court in the State of New York is the Court of Appeals. New York State courts are currently bound by the Civil Practice Laws and Rules (CPLR) and the Real Property Actions and Proceedings Law (RPAPL). Prior to the adoption of the CPLR, the courts were governed by the Civil Practice

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[157] Lawrence K Marks and Janet DiFiore, *New York State Unified Court System New York State Courts An Introductory Guide*, n.d..

Act (CPA). All of these statutes were ratified by the New York State Legislature.[158]

II. Explanation of The Process for Affecting Service

When a plaintiff seeks to sue a defendant in a state court, the state court must acquire jurisdiction over the defendant. A petitioning party must hire a process server to deliver a respondent with notice of the actions the petitioning party is bringing.[159] There are three major types of service a process server can provide. Firstly, there is *in-hand* which directly serves the individual named in an action.[160] Secondly, a *substituted service* refers to notices that are served upon an individual, of the proper age and discretion, substituted to receive notice on behalf of the individual named in the action.[161] Substituted and in-hand services are sometimes jointly referred to as *personal services*. *Conspicuous service* or "nail and mail" service are the final type of service. Conspicuous service entails a process server affixing notice upon a conspicuous part of the respondent's property and mailing a copy of the notice to the respondent's last known residence.[162]

During the late nineteenth century and early twentieth century, all services, excluding in-hand service, were unconstitutional.[163] In 1877, the United States Supreme Court heard the case of *Pennoyer v. Neff*. *Pennoyer*, which was decided in the aftermath of the ratification of the Fourteenth Amendment. *Pennoyer* held that the only way for a state court

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[158] "The CPLR at Fifty: Its Past, Present, and Future," *N.Y.U Journal of Legislation & Public Policy* 16, no. 3 (2013).
[159] A process server is a third party licensed to serve a defendant with the notice.
[160] *Dolan v. Linnen* (2003)
[161] *Dolan v. Linnen*.
[162] *Dolan v. Linnen*.
[163] *Dolan v. Linnen*.

to gain jurisdiction over an individual without violating their due process rights was to serve them while they were physically present.[164] The evolution of methods of service has had a wide range of implications for American jurisprudence. For a court to take any action directly impacting an individual, the court must first be granted jurisdiction over that individual. This process ensures that individuals have notice of their involvement in legal matters and can adequately prepare for legal proceedings. Therefore, issues regarding the legitimacy of various methods of service have the capacity to affect all civil actions. This compendium specifically chronicles the evolution of statutory and common law regarding the role these forms of service play in summary proceeding cases in New York state.

III. Explanation of a Summary Proceeding

In 1820, the New York State Legislature created *summary proceedings*, an expedited process that provided landlords with an easy means to retrieve possession of a property from tenants.[165] Prior to the implementation of this policy, a tenant's decision to stop paying rent was insufficient for a landlord to terminate a lease. This deficiency would prompt landlords to insert clauses into their leases which allowed them to reenter the property if rent payments ceased.[166]

In 1924, an amendment to the Civil Practice Act (CPA) sought to allow courts to award rent during summary proceedings. Previously, landlords would have to commence a separate and costly action to collect rent. Additionally, these separate proceedings were antithetical to the nature of

[164] *Pennoyer v. Neff* (Supreme Court of the United States 1877).
[165] *Dolan v. Linnen*.
[166] Stephen Ross, "Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent," *Fordham Urban Law Journal* 15, no. 2 (1987): 48.

summary proceedings, which were expedited hearings. These judgments, which award a landlord rent, are known as *money judgments*.[167]

IV. *McDonald* and the Conflict of Law

In the 1927 case of the *Matter of McDonald v. Hutter*, the process server unsuccessfully searched for the tenants at their respective residences for in-hand service. The process server also unsuccessfully searched for another individual for substituted service. Hence, the process server resorted to conspicuous service to serve the tenants.[168] The lower court found that the language of the CPA amendment, its plain meaning and the typical definitions of the words, could not be construed to limit money judgments to in-hand service.[169] The amendment did not specify any permissible or impermissible methods of service. Therefore, conspicuous service could permissibly be used for a landlord to receive a money judgment.[170]

The case was appealed to the Fourth Department in 1929; the diligence of the server was undisputed when the case was appealed to the Fourth Department. The sole contention of the appellant was that the CPA only permitted a money judgment for in-hand service.[171] The Fourth Department conceded that the language of the CPA was broad enough to encompass the interpretation of the lower court, but the court decided that the broadness of the statute's language required it to assess legislative intent. The court believed that the Legislature had only intended to allow money judgments for in-hand service based on the tradition of summons being

[167] *Ressa Family, LLC v. Dorfman*, (2002).
[168] *Matter of McDonald* (4th Dep't 1929).
[169] *Matter of McDonald v. Hutter*, (County Court Niagara County 1927).
[170] *Matter of McDonald v. Hutter*.
[171] *Matter of McDonald,* 405.

delivered through in-hand service and from the precedent set in *Pennoyer*.[172] The major issue embedded in the Fourth Department's opinion in *McDonald* was balancing the intentions of the Legislature in their 1924 amendment with the boundaries of constitutionality framed by *Pennoyer*. These efforts to reconcile the perceived contradiction led the Fourth Department to reverse the lower court's ruling, despite the Department's concession that the language was broad enough to convey the lower court's interpretation.[173]

McDonald was largely unchanged until 1945 when *Pennoyer* was overturned by the case *International Shoe Company v. Washington*. In *International Shoe*, the Supreme Court upheld substituted service as a form of service in compliance with due process. This effectively reversed the *Pennoyer* rule, which only permitted in-hand service.[174]

After *International Shoe*, the opinion in *McDonald* should have been rendered moot. The constitutional concerns which formed the basis for the *McDonald* ceased to exist under *International Shoe*.[175] Additionally, in 1954, the CPA was amended to eliminate the requirement that due diligence be shown in attempting in-hand service before resorting to conspicuous service.[176] The prerequisite standard became one of *reasonable application,* a more flexible threshold than due diligence. If a reasonable application proved fruitless, conspicuous service was permitted.

The CPA amendment indicated a legislative intention to make conspicuous service a more readily available option to landlords and their process servers.[177] These sentiments that the

[172] *Matter of McDonald,* 406.
[173] *Matter of McDonald,* 406.
[174] *International Shoe Co. v. Washington*, (Supreme Court of the United States, 1945).
[175] *Dolan v. Linnen*.
[176] *Matter of Seagram Sons v. Rossi* (1965).
[177] *Dolan v. Linnen*.

Legislature appeared to harbor are noteworthy as they pertain to subsequent judicial developments.

V. *McDonald* in the Wake of *International Shoe*

The 1961 case of *Matter of Raymond v. Grotz* is a noteworthy decision because it was decided in the aftermath of *International Shoe* and the 1954 CPA amendment. In *Raymond*, a process server was unable to find the tenants and resorted to conspicuous service.[178] *Raymond* found that service was consistent with the amended CPA, but the court maintained that personal service was vital for a money judgment. The court argued that *McDonald's* precedent was that money judgments could only be awarded for conspicuous service if a court order authorized it once it was shown that personal service was impossible. *Raymond* chose to uphold *McDonald* as a binding precedent.[179] *McDonald* was cited despite the constitutional restraints of *Pennoyer* no longer binding the court in *Raymond*. Additionally, the due diligence prerequisite for conspicuous service had already eased the process during this time.

Raymond is notable because it was decided between the 1954 CPA amendment and the 1963 repeal of the CPA. During this formative period, *Raymond* upheld *McDonald* as binding and persuasive precedent. *Raymond* deferred to *McDonald* despite the *Pennoyer* case, the basis of *McDonald,* no longer being applicable.[180] On September 1, 1963, the New York State Legislature repealed and replaced the CPA with the New York Civil Practice Laws and Rules (CPLR) and the Real Property Actions and Proceedings Law (RPAPL).[181] When the CPA was

[178] *Matter of Raymond v. Grotz*, 926.
[179] *Raymond,* 926.
[180] *Raymond,* 926.
[181] *Dolan v. Linnen*.

repealed, the statute interpreted by the Fourth Department in *McDonald* ceased to be binding law.

VI. *McDonald* in the Wake of the CPLR

The CPLR permitted substituted service and conspicuous service when in-hand service could not be performed with due diligence, while the RPAPL carried over the reasonable application standard from the 1954 amendment.[182] Two months after the repeal of the CPA, *Wayside Homes v. Upton* was heard on November 26, 1963.[183] *Wayside* interpreted the RPAPL as delegating the details of service for a money judgment to the CPLR. *Wayside* derived this from a provision in the RPAPL which stated that, "service of the notice of petition and petition shall be made *in the same manner as personal service of a summons*."[184] In *Wayside*, the process server engaged in substituted service.[185] A notice of petition is the document a tenant is presented with to acquire jurisdiction in a summary proceeding.

The court in *Wayside* used this language to surmise that process servers delivering summary proceeding papers ought to be held to the same standard as one delivering a summons.[186] Thus, *Wayside* adopted the CPLR and decided that the RPAPL was not the governing statute. At the time, the CPLR's standard for affecting substituted service or conspicuous service in a summons was due diligence. The court acknowledged that the server had complied with the RPAPL, but that the server failed

[182] *Dolan v. Linnen.*
[183] Interestingly, the case was initially supposed to be heard on Monday November 25, 1963. But, courts were closed that day in commemoration of the assassination of President John F. Kennedy on Friday, November 22. So, the case was heard on November 26.
[184] *Wayside Homes v. Upton* (1963).
[185] *Wayside,* 1087.
[186] *Wayside,* 1087.

to comply with the due diligence required by the CPLR.[187] The landlord's compliance with the RPAPL was not enough to award a landlord a money judgment. This case is notable for its ruling that the principles in *McDonald* remained binding and that a similar legislative intent undergirded all of these statutes.

The legislative intent described by the court in *Wayside* makes no mention of the 1954 CPA amendment which replaced the due diligence standard with one of reasonable application.[188] In this amendment, the Legislature indicated a desire to loosen the standard a server needed to meet to affect service. Additionally, this understanding of the intent of the Legislature fails to account for a section of the CPLR which states that "[e]xcept where otherwise prescribed by law, procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings."[189] The RPAPL is a statute intended to govern summary proceedings. Since 1924, the intent of the Legislature had been to merge actions for rent into summary proceedings to expedite the process on all fronts.[190] Even if the language equating summary proceedings and summons kept the process bound by the CPLR, the Legislature removed that language from the RPAPL in 1965.[191]

This was significant because *Wayside*'s ruling was predicated on the idea that these proceedings ought to mirror a summons.[192] *Wayside* incorporated the CPLR because the court believed that this language removed money judgments from the

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[187] *Wayside*, 1088.
[188] *Wayside*.
[189] *Dolan v. Linnen,* 324.
[190] *Matter of McDonald*.
[191] *Arnold v. Lyons*, (March 2003).
[192] "Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR," *St. John's Law Review* 38 (May 1964).

purview of the RPAPL's language.[193] But, the omission of this language indicated an intent to insulate summary proceedings from the regiment of the CPLR. That same year, *Matter of Seagram Sons v. Rossi* was decided.[194] In *Seagram,* conspicuous service and substituted service were used.[195] In each instance, the process server made only one attempt at in-hand service. The court ruled that it is not necessary to show due diligence for in-hand service before resorting to conspicuous service or substituted service for a summary proceeding based on the RPAPL.[196] The court in *Seagram* believed that the RPAPL's flexible requirements were an intentional attempt by the Legislature to maintain a speedy process for landlords who sought to effectuate summary proceedings.

Conversely, the court in *Seagram* pointed out that the CPLR permitted the service of a summons through substituted service or conspicuous service only when due and diligent efforts to serve in-hand had failed.[197] So, if a landlord does affect conspicuous service or substituted service without meeting the due diligence requirement, they are not entitled to a money judgment. *Seagram* ruled that both substituted and conspicuous services required a preemptive exercising of due diligence in a server's attempts to execute an in-hand service.[198] *Seagram* cited *Wayside* and *Raymond* as precedent for not awarding a money judgment for conspicuous service without the due diligence required by the CPLR.[199]

Seagram's ruling is notable for its preservation of *Wayside*'s due diligence prerequisite and its affirmation of the

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[193] *Wayside*, 1089.
[194] *Matter of Seagram Sons v. Rossi*, (1965).
[195] *Seagram,* 428.
[196] *Seagram,* 428.
[197] *Seagram,* 428.
[198] *Seagram,* 428.
[199] *Seagram*.

adoption of the CPLR for assessing these kinds of cases. *Wayside*'s adoption of the CPLR had been rooted in language found in the RPAPL which analogized notice of petitions and summons.[200] The redaction of this language in 1965 no longer mandated that the service in summary proceedings mirror the service of a summons. Therefore, it was no longer necessary to apply the standard of the CPLR; instead courts should have subjected summary proceedings to the RPAPL entirely.[201] As a result, the Legislature nullified the precedent set in *Wayside* because *Wayside*'s precedent was grounded in this language justifying the adoption of the CPLR. However, *Seagram*'s vindication of *Wayside* was instrumental in maintaining an adherence to the CPLR when assessing the viability of money judgments.

In 1971, *1405 Realty Corp v. Napier* denied a money judgment as a result of a process server's perceived lack of compliance with the CPLR.[202] In *Napier*, there were two visits to the tenant's home to affect personal service before resorting to conspicuous service. *Napier* cites *Wayside* and *Seagram* as precedent for requiring a prerequisite showing of due diligence.[203] *Napier* cites *McDonald* as precedent for how the method of service affects a landlord's ability to win a money judgment.[204] In *Napier,* the court acknowledged that the process server complied with the RPAPL's mandates for the service of process, specifically conceding that these guidelines are easier to meet because of the nature of summary proceedings as expedited relief.[205] Yet, the court found that the process server had not complied with the CPLR and so denied the money judgment. The court in *Napier* should not have been applying

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200 *Wayside.*
201 *New York City v. Wall Street Racquet Club* (1987).
202 *1405 Realty Corp. v. Napier*, 795 (1971).
203 *Napier*, 795.
204 *Napier*, 794.
205 *Napier*, 794.

the CPLR in the first place. By this point, *Seagram* and *Wayside* had been overturned by the Legislature's omission of the language equating summary proceeding notice with that of a summons.[206] There is no further evidence to indicate that *Napier* was appealed.

The due diligence prerequisite for substituted services was removed from Section 308 of the CPLR in 1970. As a result of this amendment, in-hand service and substituted service were equated under one category of *personal service*.[207] In the 1972 case *Fairhaven Apartments v. Dolan,* a process server affected substituted service upon a tenant. The court ruled that this complied with the RPAPL and the CPLR. The court in *Fairhaven* distinguished itself from the court in *Wayside* based on the absence of a due diligence prerequisite for affecting substituted service.[208]

VII. ***Ressa* and *Dolan*: Taking Judicial Notice of the Problem**

In the case *Ressa Family LLC v. Dorfman,* personal service was not used. *Ressa* contended that the Legislature never made any indication that the amalgamation of RPAPL and CPLR for summary proceedings was necessary.[209] Instead, the court in *Ressa* argued that efforts to combine these two statutes is the result of a misunderstanding of the *McDonald* rule. *Ressa* found that the RPAPL offers sufficient constitutional protections to tenants.[210] *Ressa* reasoned that the purpose of a summary proceeding is to provide expedited relief. Therefore, it would be logical to ease the burden of

[206] *Dolan v. Linnen.*
[207] *Dolan v. Linnen*.
[208] *Fairhaven Apts. No. 6 v. Dolan*, (1972).
[209] *Ressa,* 320.
[210] *Ressa*, 321.

serving notice. *Ressa* ultimately petitioned the Legislature or another appellate court to overrule *McDonald*. But, *Ressa's* ruling upheld *McDonald* and decided that money judgments may only be awarded in the event of personal service. The court in *Ressa* was a trial-level court and did not believe it had the ability to tamper with *McDonald* without appellate jurisdiction or legislative prerogatives.[211]

Ressa was decided in 2002 and shortly after, in January of 2003, *Dolan v. Linnen* was decided. In *Dolan,* a process server made four attempts to serve the tenant in-hand. After these four attempts, the process server engaged in conspicuous service.[212] *Dolan* asserted that the legislative intent surmised in *McDonald* had been abrogated by the Legislature through subsequent statutory amendments. *Dolan* advocated utilizing the CPLR for assessing the legitimacy of conspicuous service. *Dolan* advised awarding money judgments when conspicuous service met the due diligence standard in the CPLR.[213]

Following the decision of *Dolan* in January 2003, in March of the same year, Judge Kenneth Gartner, who presided over the *Ressa* case, authored the decision in *Arnold v. Lyons*. *Arnold* further elucidated *Ressa* and responded to *Dolan.* In *Arnold*, tenants were served by conspicuous service. *Arnold* awarded possession but denied the money judgment, citing *Ressa. Arnold* affirmed *Ressa's* assertion that the courts which sought to award money judgments for methods of service other than personal service misunderstood *McDonald*. *Arnold* described *Dolan* as an opinion which adopts *Ressa's* historical analysis but which arrived at a diametrically opposed conclusion based on a narrow but crucial area of difference.[214]

Arnold stated that *Ressa* and *Dolan* agree that the CPA, under which *McDonald* was decided, has largely been adopted

[211] *Ressa,* 323.
[212] *Dolan v. Linnen*, 303.
[213] *Dolan v. Linnen*.
[214] *Arnold v. Lyons*, (March 2003).

into the RPAPL. Both agree that *McDonald* construed the Legislature to have sought to limit delivery to personal service. *Arnold* contended that *Ressa* and *Dolan* agreed that the decision in *McDonald* stemmed from a desire to avoid a novel practice and avoid conflicting with *Pennoyer. Arnold* posited that *Ressa* and *Dolan* are in agreement that *McDonald*'s methodology was flawed and that the court in *McDonald* attempted to incorporate an unexpressed intent contrary to the plain meaning of the text. *Arnold* affirmed that both *Ressa* and *Dolan* believe that *McDonald* is no longer defensible on its original grounds.[215]

Arnold concluded that the fundamental disagreement between *Ressa* and *Dolan* stems from their differing view of *stare decisis*, the legal principle that judges should adhere to precedent. *Ressa* believed the courts must follow *McDonald,* while *Dolan* did not. *Arnold* asserted that precedents involving statutory interpretation are entitled to a greater degree of stability. The judge in *Arnold* argued that it is the Legislature's job to correct any misinterpretation of legislative intent. But, that courts with original jurisdiction do not have the capacity to influence these kinds of issues.[216]

Arnold submitted that the Legislature could have easily revised the RPAPL to permit all forms of service for all benefits. The fact that the Legislature still has not done that shows that *McDonald's* understanding of the Legislature's intentions remains. *Arnold* contends that applying the RPAPL as written might effectuate the intent of the Legislature in 1924 but would fail to uphold the intent of the current Legislature.[217] Since the *Arnold* ruling, most courts have adopted the *Dolan* rule.

[215] *Arnold,* 6.
[216] *Arnold,* 15.
[217] *Arnold*.

VIII. Adoption of the *Dolan* Rule: "Evisceration" of *McDonald*

In the case of *Avgush v. Berrahu,* from October 2007, a process server attempted in-hand service on five separate occasions before resorting to conspicuous service.[218] In the lower court, after the tenants failed to appear, the landlord was only granted possession. *Avgush* found that the conduct of the process server met the reasonable application standard found in RPAPL section 735.[219] *Avgush* also found that it would have satisfied the due diligence standard found in subsection 4 of section 308 of the CPLR. This case cites *Dolan v. Linnen* as a precedent for awarding a money judgment after satisfying the due diligence standard necessary for conspicuous service under section 308 of the CPLR.[220] *Avgush* acknowledges that the constitutional landscape has changed substantially since the ruling in *McDonald*. The court ultimately awarded a money judgment.

In December 2009, *Expressway Village v. Denman* was decided. The lower court awarded possession but not a money judgment because the process server resorted to conspicuous service. The appeal raised the sole issue of whether a trial court in a summary proceeding can enter a money judgment when notice is served through conspicuous service.[221] *Expressway* states that the rule in *McDonald* appears to be incorrect and speculates that the Fourth Department would no longer apply it. *Expressway* cites *Avgush* to show that an appellate court has rejected *McDonald* and adopted the reasoning of cases like *Dolan.*[222] *Expressway* posits that the absence of a similar ruling

[218] *Avgush v. Berrahu,* 86 (2007).
[219] *Avgush,* 86.
[220] *Avgush*, 90.
[221] *Expressway Village, v. Denman*, 956 (2009).
[222] *Expressway*, 957.

in any other higher court allows the First and Third Departments to adopt *Avgush*. *Expressway* contends that if the Fourth Department wishes to preserve *McDonald*, they can always reverse this decision.[223]

Subsequent courts have denied that *Expressway* overturned *McDonald* because the County Court of Niagara County is a lower court than the Fourth Department.[224] Regardless, the *Dolan* rule is the one that *Expressway* adopted. The *Dolan* rule adopted the policy of melding the RPAPL and CPLR and determining the viability of a money judgment based on whether conspicuous service was performed after a process server used due diligence to attempt personal service.[225] But, with the *Dolan* rule in place, the correct standard for these cases is still not being applied by judges.

A contemporary example comes from the 2022 case *Li-Seabrooks v. Pimento* where two attempts were made at personal service before the process server resorted to conspicuous service. The respondent argued that the process server did not exercise due diligence before resorting to conspicuous service. *Pimento* holds the petitioner to the standard of due diligence and distinguishes this standard from the reasonable application standard under the RPAPL. *Pimento* states that one attempt inside normal working hours and one attempt outside normal working hours satisfies reasonable application, but no rigid standard can be prescribed for due diligence. The opinion cites *Dolan v. Linnen*'s finding that two attempts at personal service satisfy reasonable application but not due diligence. Ultimately, the court ruled in the respondent's favor and denied a money judgment.[226]

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[223] *Expressway*.
[224] *Cornhill LLC v. Sposato* (2017)
[225] *Dolan v. Linnen*.
[226] *Li-Seabrooks v. Pimento* (2022).

IX. Significance and Implications

American society is rooted in contracts, both implicit and explicit. These contracts are agreements predicated in conditions which compel each party to keep their word when a sensitive deal is made. When these contracts are breached, people ought to be able to look to the judicial system, and the due process rights enshrined within it, for an opportunity to defend their rights.[227] In the case of landlord-tenant agreements, the tenant is offered the benefit of shelter by the landlord and the landlord is offered the benefit of rent by the tenant.[228] The New York State Legislature conceived the summary proceeding as a mechanism for affording landlords an expedited hearing when their rights under this contract were denied. Through subsequent legislative amendments, these hearings became a forum for landlords to redress the loss of their contractual benefit because they could petition for a money judgment.[229]

At the root of this issue is the importance of allowing individuals to be compensated for situations where they are taken advantage of. While it is necessary to safeguard the liberties of tenants and ensure they can peacefully enjoy shelter, it is also important to safeguard the rights of a landlord when their property is occupied without their consent while they are not being duly compensated. The purpose of a summary proceeding is to right these wrongs when they occur and award landlords the money they are owed.[230] However,

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[227]Ross, “Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent.”
[228] Ross.
[229] *Matter of McDonald v. Hutter*.
[230]Ross, “Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent.”

New York State courts continue to deny this restitution to landlords on the basis of obsolete legal analysis.

An analogy for this situation is a game of telephone.[231] Imagine a straight line of players in a game of telephone, the cases which deal with this issue in chronological order. The player tasked with formulating the message is the Legislature. The Legislature releases the message in the form of statutes. By passing a statute, the Legislature passes along their message for courts to interpret. Along the way, courts have misinterpreted and mistranslated the original message leading to confusion. A distinction between the legislative process and a game of telephone, however, is that higher courts impact how legislation is enacted and how courts rule on issues.

The Fourth Department was faced with a difficult decision when the *McDonald* case was appealed to them. Summary proceedings were intended to be an expedited process for securing control of one's property when a tenant ceased to pay rent. The 1924 CPA statute was intended to enjoin money judgments in this process to further expedite it.[232] The Fourth Department recognized that the statute contained no enumeration of limitations contingent upon the method of service. Simultaneously, *Pennoyer* was a binding precedent which declared anything other than in-hand service unconstitutional. Thus, the Fourth Department fabricated a legislative intent to avoid disrupting a tradition of recognizing in-hand service as the only legitimate form of service, as enforced by *Pennoyer*.[233] The *McDonald* decision was rendered moot when *Pennoyer* was overturned by *International Shoe*. At this point, any constitutional qualms surrounding methods of service other than in-hand service were eviscerated.[234]

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[231] *Ressa*.
[232] *Matter of McDonald v. Hutter*.
[233] *Matter of McDonald*.
[234] *Ressa*.

Furthermore, the CPA, which governed the *McDonald* case, was repealed in 1963, yet *Wayside* chose to cite *McDonald* as a binding precedent for adjudicating cases pertaining to the RPAPL.[235] Additionally, *Wayside* opted not to submit to the RPAPL as the governing statute and instead subjected summary proceedings to the more scrutinous CPLR to award money judgments.[236] Ultimately, this subjected summary proceedings to a statute the Legislature likely did not intend for them. *Wayside* justified this by pointing to a sentence in the RPAPL seeking to equate summary proceedings with summons, a process governed by the CPLR. The court in *Wayside* believed this was an indication the Legislature intended for courts to adjudicate these cases, using the CPLR.[237]

Even if this was their initial intention, the Legislature revised the RPAPL in 1965 to omit this language.[238] This action indicated a desire to keep summary proceedings within the parameters of the RPAPL, yet courts continued to wrongfully assess these cases under the CPLR.[239] Even *Ressa* and *Arnold*, which acknowledged this method of jurisprudence was incorrect, applied *McDonald* and denied a money judgment for a case which did not involve personal service. The rationale was a desire to comport with the intentions of the current Legislature. Since the Legislature could amend the RPAPL to explicitly enumerate the permissible methods of service and did not, Judge Gartner believed that trial courts were still forced to uphold this ingrained practice.[240]

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[235] "Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR."
[236] "Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR."
[237] *Wayside*.
[238] "McManus v. Condren," *All Decisions*, October 27, 2022, https://ir.lawnet.fordham.edu/housing_court_all/676.
[239] *Napier*.
[240] *Arnold*.

Returning to the analogy of a game of telephone, a noteworthy distinction between the legislative process and a game of telephone is that the Legislature can amend their statutes. This would be like a player sending new messages down the telephone line while other players are still trying to decipher the first message. In this way, courts are not bound by the Legislature's initial statute and should take subsequent revisions into consideration. Even though Judge Gartner's understanding of the RPAPL is valid, he chose not to rule in accordance with this philosophy because he believed that the Legislature did not convey any intention of ameliorating how courts adjudicated this matter.[241] Judge Gartner argued that if he did not comport with *McDonald*, he would be upholding the intent of the Legislature in 1924, but not necessarily the contemporary legislative intent on this issue.[242]

Judge Gartner's belief, however, discards all of the subsequent legislative developments between 1924 and the present day which indicated a desire to reform the process.[243] Throughout this time, it was courts that remained stagnant, not the Legislature. The Legislature engaged in periodic revisions designed to steer courts towards enforcing less stringent service requirements for summary proceedings. For example, after *Pennoyer*, the CPA eliminated the due diligence prerequisite for a process server's attempts to affect personal service before resorting to substituted service or conspicuous service.[244] This development was ignored by *Raymond,* which chose to defer to *McDonald*.[245] The Legislature then repealed the CPA and overhauled the statutory framework with the CPLR and the RPAPL. In *Wayside*, these developments were ignored and the case held that the same intent surmised by *McDonald*

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241 *Arnold*.
242 *Arnold*.
243 *Dolan v. Linnen.*
244 *Dolan v. Linnen.*
245 *Raymond*.

undergirded these statutes.[246] *Wayside* pointed to the provision equating summons and summary proceedings in the RPAPL to come to this conclusion.[247] Thus, the Legislature removed this language from the statute entirely.[248] Yet, *Napier* chose to follow *Wayside* and maintained a framework which ignored subsequent legislative developments.[249]

Ressa recognized the contradictions embedded in this saga, yet Judge Gartner believed that it was necessary to adhere to *stare decisis*.[250] Even after Judge Gartner witnessed *Dolan* perpetuating the architecture of *Wayside*, he refused to carve out a better path in *Arnold* because he did not believe the Legislature expressed a desire to see the RPAPL govern summary proceedings.[251] As a result of this series of mistranslations and misinterpretations of legislative intent, individuals have been robbed of their ability to be justly compensated for wrongs they faced at the hands of those who unjustly occupied their property. As evidenced by *Pimento*, this mistake continues to occur in contemporary jurisprudence. This is antithetical to the legislative intent which undergirds summary proceedings.[252] Additionally, this fails to heed to the legislative intent to have summary proceedings be governed by the RPAPL's standard of reasonable application.[253] Yet, this practice has endured for over a century. In the time since this issue first emerged, there have been a variety of technological and social developments that have altered one's capacity to

[246] "Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR."
[247] *Wayside*.
[248] *Ressa*.
[249] *Napier*.
[250] *Arnold.*
[251] *Arnold*.
[252] Ross, "Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent."
[253] *Arnold.*

gain information. Despite these developments, the process for delivering notice of one's involvement in legal proceedings has not evolved.

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