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NOTES AND COMMENTS

Divorce—Substituted Service of Summons—Suggested Statutory Reforms

A recent North Carolina case[1] reveals certain undesirable aspects of our procedural divorce law, particularly the service of summons by publication in divorce cases, which, it is believed, might well be corrected.

Plaintiff brought an action for divorce on grounds of two years' separation in the Superior Court of Martin County. At the time, plain-

[1] Smith v. Smith, 226 N. C. 506, 39 S.E. (2d) 391 (1946). Criticisms in this note are definitely not directed at the granting of the divorce decree on its merits. Rather they are directed at the process by which jurisdiction was obtained. Whatever the particular merits of the case, it is felt that such process is definitely not sufficient in cases where the serious question of the advisability of destroying the marital relationship is under consideration.

tiff was a resident of Hertford County and his wife was a non-resident of the state. They had never lived together in either Martin or Hertford County, having been residents of Warren County until the time of their separation two years before. An order for service of summons by publication was issued by the clerk of court based upon an affidavit of the plaintiff which conformed to the essential statutory requirement[2] in that it specified that "after due diligence . . . [the defendant] cannot be found within the State of North Carolina." The order directed that "summons be served by publication in some newspaper published in Martin County as required by law." Notice of the summons was published in due conformity to the statutory requirements[3] in *The Enterprise,* a newspaper published in Williamston, Martin County. The defendant failed to make appearance. After the submission of issues to the jury, a decree of absolute divorce was entered on the verdict rendered. Plaintiff died some five months later; and seven months after his death defendant appeared by motion in the cause to have the decree set aside. At that time the court, on motion of the plaintiff's executor, allowed an amendment *nunc pro tunc* of the original order by inserting the name of the newspaper therein. Defendant alleged no actual notice of the pending action. The attack on the validity of process was directed primarily at showing that the statutory requirement that, "The order must direct the publication in one or more newspapers *to be designated* as most likely to give notice to the person to be served . . . ,"[4] had not been complied with (italics ours). Defendant contended that this clause of the statute makes mandatory a specific recitation in the clerk's order that the newspaper to be used is the one most likely to give notice. Defendant further argued that the clerk obviously could not have made such a recitation in this order, because the newspaper was published in a locality one hundred miles from Warren County where defendant's North Carolina residence had been, and defendant had no contacts in the locality where publication was made. Defendant contended that this constituted such a defect in the service of summons as to justify setting aside the decree. *Held:* G. S. 1-99 does not specifically require that an order for the publication of notice of summons *state* that the newspaper is the one "most likely to give notice to the person to be served." The court, citing one previous North Carolina case,[5] based this construction of the statute on the proposition that when an order for publication of notice of summons is made by a court of record, there is a presumption of the rightfulness of its decrees and that the newspaper specified *is* the one most likely to give notice.

[2] N. C. GEN. STAT. (1943) §1-98. [3] N. C. GEN. STAT. (1943) §1-99.
[4] *Ibid.*
[5] Elias v. Comm'r's. of Buncombe, 198 N. C. 733, 153 S. E. 323 (1930).

The upshot of this construction of G. S. 1-99 is that insofar as a defendant who has had no actual notice via the publication is concerned, the legislature might as well have omitted the phrase, "to be designated as most likely to give notice . . . ," from the statute. The words may serve to bring the legislative mandate to the clerk's attention, but if he fails to obey the mandate, as it appears he did in the principal case, his failure is not subject to attack by the prejudiced defendant. A New York provision[6] is not so dissimilar from our G. S. 1-99 as to demand an exactly opposite construction; but that is just what occurred in that jurisdiction. The pertinent phraseology of that statute, "The order . . . must direct that such service be made by publication thereof in two newspapers . . . , *designated in the order as most likely to give notice to the defendant to be served* . . . ," was construed by a New York supreme court to require that the order expressly provide that the newspapers are the ones most likely to give notice; and the court held that failure to do so constituted a fatal defect in process. The court also pointed out that the newspapers named in the order attacked were obviously not papers most likely to give notice, also a fatal defect.[7]

The construction announced by our court leads to an incongruous result when it is considered that for defects in service by publication less serious to the defendant, our court is quick to set aside the decree of divorce. Thus, where the plaintiff's affidavit alleged that his wife was a non-resident of the state, or that she was keeping herself concealed within the state, but failed to allege that "after due diligence the defendant cannot be found within the State of North Carolina," the court set aside the decree.[8] In another divorce case where the summons, as published, stated that the action was pending in a different county from the one in which it was actually pending, but *did* require the defendant to appear at the office of the clerk of the court of the *correct* county, the decree was set aside.[9] Again, where the affidavit set forth that a summons had been issued to the sheriff and had been returned indorsed: "The defendant, . . . , cannot, after due diligence, be found in Mecklenburg County or in the State of North Carolina"; and further specified that the plaintiff, after due diligence, had been unable to locate the defendant and her whereabouts were unknown to the plaintiff; the court set aside the decree because the affidavit, outside the quoted sheriff's indorsement, failed to make the essential recitation.[9a] Can it be seriously contended that a defendant is more prejudiced by the above noted defects in process than he would be by the fact that the

[6] N. Y. Rules of Civil Practice, Rule 50.
[7] Glinski v. Glinski, 131 Misc. 1, 225 N. Y. Supp. 505 (1927).
[8] Fowler v. Fowler, 190 N. C. 536, 130 S. E. 315 (1925).
[9] Guerin v. Guerin, 208 N. C. 457, 181 S. E. 274 (1935).
[9a] Rodriguez v. Rodriguez, 224 N. C. 275, 29 S. E. (2d) 901 (1944).

publication was made in a newspaper which had only the remotest possibility of ever conveying notice to him?

The opportunity for taking advantage of this loophole in the procedural safeguards incident to divorce actions is enhanced by another statute. As pointed out by the court in the principal case, G. S. 50-3, which provides that in proceedings for divorce the summons shall be returnable to the court of the county in which either plaintiff or defendant resides, is not jurisdictional, but relates to venue, and may be waived by failure of the defendant to demand in writing before answering that the trial be had in the proper county. This statute then provides a perfect inducement to a plaintiff seeking a divorce to institute proceedings in a county where the newspaper used for publication is definitely not likely to give actual notice, knowing that these facts alone will not subject the proceedings to possible invalidation.[10]

It is realized that everything said to this point is as applicable to other actions where service is allowed by publication as it is to divorce actions. However, it is believed that on grounds both of public policy and of the legal considerations involved, criticism of the state of our law on this subject is especially pertinent to divorce actions. It is perhaps trite to say that every thinking citizen is appalled by the number of divorce decrees now granted by our courts, and at the apparent ease with which they are obtained. Our recently much-publicized "divorce mill"[11] verifies the justification for this feeling. The high proportion of divorce actions where service is made by publication may perhaps partially explain the large number of decrees granted.[12] Is it illogical to suppose that the statutory defects noted may be conducive to the

[10] It is gratifying to learn from a superior court clerk that some of our superior court judges, taking cognizance of these abuses possible under G. S. 50-3, are refusing to try divorce actions where the plaintiff is a non-resident of the county where the action is instituted, if the service has been made by publication. This procedure by the judges is commendable as preventing the abuses noted, but at least one authority has questioned the legality of such action by a judge without demand by the defendant. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929 ed.) §295.

[11] Burke Davis, *Divorce,* Charlotte *News,* Nov. 18, 1946; Nov. 19, 1946; Nov. 20, 1946.

[12] Upon written inquiry to the clerks of the superior courts, the following excerpts from letters received in reply from three geographically representative counties should serve as a fairly accurate cross-section view: (1) ". . . within the last three years the average yearly divorces exceed 200 in number. I would say that at least 50 per cent of these are cases in which the defendant is served by publication of summons." (2) "We average around 350 divorce cases in this county each year. Of this number, perhaps one-half are served by publication on the defendants who are alleged not to be residents of the State of North Carolina or of [this] county." (3) "During the year 1943 there were two hundred ninety-one (291) divorce cases tried in [this] county. In 1944 there were three hundred twenty-three (323), in 1945 there were four hundred sixty-eight (468) and while I do not have the complete record for 1946, there has been a sharp increase in the divorces granted. . . . I estimate that service of summons is made by publication in thirty per cent (30%) of these cases."

widespread practice of making service by publication in these actions? Would not more contested divorces lower the number of decrees granted? If our procedure were tightened up, parties might think more seriously before entering into the marital relationship in the first place.

These features of our procedural divorce law are also susceptible to criticism on a purely legal basis. Our statute, G. S. 1-98, makes no distinction between the procedure to be employed in obtaining service by publication in divorce actions and in the other types of action where it is allowed; they are all listed together, all to be governed by the same procedure outlined in G. S. 1-99. The classification of these actions is made on the basis that they are all actions *in rem* or *quasi in rem,* where this form of substituted service constitutes due process of law; as distinguished from *in personam* actions where it does not, the defendant being a non-resident of the state. To bring divorce actions within this classification, the questionable doctrine of considering the marriage relationship itself the *res,* is invoked. The idea then is that over this relationship the state has control, and may dissolve it even where one of the two parties concerned has not been actually notified of the pending proceedings. The inclusion of divorce actions within this classification leads to certain incongruities which are strikingly presented by Mr. Justice Jackson, dissenting in the famous case of *Williams v. North Carolina*[13] on its first trip to the Supreme Court of the United States. One of the results, he says, is that, ". . . settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." Justice Jackson proceeds to question the advisability of allowing any form of substituted service in divorce actions. Admitting, however, that they must be allowed to prevent a party who is guilty of conduct which would justify a divorce in North Carolina from going to a state where it would not, and thus evading our law,[14] this criticism of the whole doctrine should serve to indicate that divorce actions are *not* of the same nature as the other actions with which they are classified. Certainly they are entitled to special consideration in this respect, even if they are allowed to remain in the general classification of actions where service by publication may be made. This special consideration should take form in such stringent safeguarding, by statutes and judicial construction, of the whole substituted service process in divorce actions as to insure the best chance possible of giving actual notice to the defendant. In North Carolina, statutes and judicial construction of these statutes do not afford these safeguards. It would certainly appear that personal service on a de-

[13] 317 U. S. 287, 316 (1942). This case, in all its stages, is discussed at length in Baer, *So Your Client Wants a Divorce!* (1945) 24 N. C. L. REV. 1.

[14] Pennoyer v. Neff, 95 U. S. 714, 735 (1877).

fendant, whose residence out of state is known, by an officer of the county of his out of state residence, is a device more apt to give actual notice than is service by publication. Yet our statute[15] which provides for such service states that it may be used *in lieu* of publication; and the statute has been construed to mean that this form is optional and not exclusive of service by publication in newspapers.[16] Why, if it is consonant with our conception of natural justice that a defendant should have actual notice if at all possible, should not this more certain form be employed *exclusively* when available?

To summarize the state of our law on the subject of substituted service of summons in divorce actions: Service by publication, the most haphazard method, is elevated to a position of equality with a more certain form by G. S. 1-104. G. S. 50-3 makes it possible for a plaintiff to bring his action for divorce in any county, subject only to the defendant's demand in writing that it be removed to another county before answering.[17] This demand will probably not be forthcoming if service is made by publication in a newspaper of the county where the action is commenced and that county is one wherein the absent defendant has no contact with persons who might see the notice. The fact that publication is made in a newspaper which had only the barest mathematical chance of giving actual notice to the defendant is not a basis for attack on the validity of a decree rendered in the action, due to our court's construction of G. S. 1-99 in the principal case.

In order to eliminate these defects, it is submitted that North Carolina should pass legislation designed to provide an entirely separate procedure for substituted service of summons in divorce actions. Such legislation should have two main objectives: *First,* to make service by publication strictly a last-resort process; and *second,* to insure, insofar as is possible, that when publication is used it has the best chance possible of giving actual notice.

A review of the statutes of all the states revealed one state which, it is believed, has legislation more nearly capable than any other of achieving the first objective. The Colorado Statutes[18] provide in sub-

[15] N. C. GEN. STAT. (1943) §1-104.
[16] Mullen v. Norfolk & Carolina Canal Co., 114 N. C. 8, 19 S. E. 106 (1894).
[17] And possibly by the court *ex mero motu,* see note 10 *supra.*
[18] COLORADO STATUTES ANNOTATED (1935) c. 56, §§4 and 5.
Section 4: "In every action for divorce, except where defendant is without the United States, personal service of the summons and a copy of the complaint shall be made on the defendant, except as provided in the next succeeding section, or as hereafter provided. If such service be made within the state of Colorado, then the defendant shall have thirty days thereafter within which to plead to said complaint; if the defendant is not within the state of Colorado, then personal service of the summons and a copy of the complaint may be made by the sheriff of the county in any state in which such defendant is found, or by a United States marshal if the defendant is found in a United States territory or district, and the return of such officer showing such personal service shall be held sufficient service to give

stance: (1) That in every action for divorce, except where the defendant is without the United States, personal service of the summons and a copy of the complaint shall be made on the defendant, except as hereafter provided. (The form for return of summons specified in our G. S. 1-104 might very well be incorporated in this section.) (2) When it is ascertained that personal service is absolutely impossible, then, and then only will service by publication be ordered. This is ascertained from an affidavit by the plaintiff showing in detail all the efforts made by plaintiff to procure personal service, and all the facts which plaintiff has of defendant's location, and all the facts within plaintiff's knowledge which might help in locating defendant; and from a personal examination of the plaintiff relative to these facts by the court or judge in vacation. (The Colorado courts, in construing earlier similar statutes, have insisted upon a strict compliance with all of the requirements therein, and demand that such compliance be made a matter of record, parol evidence being inadmissible to prove it.)[19]

To attain the second objective, a statute such as follows is suggested, such statute to immediately succeed those modeled after the Colorado statutes: **In every action for divorce where service of summons by publication is ordered the order shall direct the publication in one or two newspapers of general circulation in the county where it or they are published; and the order shall contain an express statement that**

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the court jurisdiction of such defendant; and in case of such service outside of the state of Colorado the defendant shall have fifty days from the date of such service within which to plead to such complaint, and in all cases the time within which the defendant must appear and plead shall be stated in the summons. Service of summons by a sheriff may be made through an undersheriff, or deputy sheriff in the name of the sheriff, and service by a United States marshal may be made through a deputy marshal in the name of the marshal. If the defendant is without the United States such defendant shall be served by publication in the manner provided in the next succeeding section."

Section 5: "In any case where the defendant is without the state of Colorado and his or her location is unknown to the plaintiff, or where the defendant conceals himself or herself in Colorado so that summons cannot be personally served on him or her, or where the plaintiff has no knowledge or notice, direct or indirect, of where the defendant can be found, within or without the state of Colorado, the palintiff may make an application to the court for an order to make service of the summons on the defendant by publication; such application shall be made under oath and shall state fully and in detail all of the efforts made by the plaintiff to procure personal service of the summons on the defendant, and all of the knowledge of the plaintiff concerning the location of the defendant and shall state all the facts within the knowledge of the plaintiff which might assist in learning the address of the defendant. The court, or the judge thereof, in vacation, shall, upon the hearing of said application, carefully examine the plaintiff and such other witnesses as shall be produced, in order to determine what steps shall be taken to notify such absent defendant of the pendency of the action. The court or the judge thereof shall, if satisfied of the good faith of the plaintiff cause the summons to be published in the same manner and with like effect as is now provided by law for publication of summons in cases of attachment." (This last sentence, for our purposes, should read, ". . . cause the summons to be published as provided in the next succeeding section.")

[19] Roberts v. Roberts, 3 Colo. App. 6, 31 Pac. 941 (1892).

the newspaper or newspapers specified therein have been determined from the application and examination required by law to be that or those most likely to give notice to the person to be served. Provided; that if it be shown that such statement did not appear in said order, or that the information given in the application and examination required by the immediately preceding section was so false and misleading as to cause the newspaper or newspapers specified not to be that or those most likely to give notice to the person to be served, or that from the information given in such application and examination the newspaper or newspapers specified could not reasonably have been determined to be those most likely to give such notice, then the service of summons is to be void and of no effect.[20]

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Evidence—Opinion Rule—Estimate of Speed from Mark on Road

In *Tyndall v. Hines Co.*[1] plaintiff was struck by defendant's truck while walking on the shoulder of the road. A highway patrolman testified as to the presence of marks on the grass and shoulder. He testified that they were not brake marks, but were marks made when the truck made a sudden turn, thus shifting the weight to one side or the other. The trial court allowed him to give his opinion as to the speed of the vehicle, based upon such physical data. On appeal, questioning the admissibility of the evidence and alleging its admission was prejudicial to the defendant, the Supreme Court *Held:* That the witness not having seen the truck in motion would not be permitted to give an opinion as to its speed. "The opinion must be of facts observed. The witness must speak of facts within his knowledge. He cannot under the guise of an opinion give his deductive conclusion from what he saw and knew."[2] Finding the evidence prejudicial, the court awarded the defendant a new trial.

Instances where the court will allow the witness to express himself in terms of inferences drawn from facts observed may be divided in two classes, which are subject to separate and distinct rules of admissibility: (1) Where the witness is specially qualified and by virtue of such may aid the jury. (2) Where the witness is unable otherwise to present the facts to the jury.[3] The former which is most commonly characterized as expert opinion is received because the witness' skill in

[20] The provisions for length and cost of publication could be inserted after the portion set out above.

[1] 226 N. C. 620, 39 S. E. (2d) 828 (1940).

[2] *Id.* at 623, 39 S. E. (2d) at 830.

[3] It is recognized that these classifications are but broad general divisions of admissible opinion, and that there are some admissible opinions that cannot be easily placed in one or the other class but exist in the twilight zone of both.