Wyoming Law Journal

Volume 9 | Number 1 Article 15

December 2019

Due Diligence Required for Service by Publication

Harvey J. Landers

It would seem that a similar argument could be made for a uniform system of water administration in Wyoming.

The "jurisdictional fact" doctrine was established in the federal courts by *Crowell v. Benson.*[25] This case involved review of a workmen's compensation award under the Longshoremen's and Harbor Workers' Act.[26] In order for the Commissioner to have jujrisdiction the injury must have occurred upon the navigable waters of the United States and the relationship of master and servant must have existed. Here the court held that where the determination of certain facts was essential to the jurisdiction of the agency, it would make an independent determination of both the law and the facts. Although this doctrine has been severely criticized,[27] it was followed by a circuit court in the subsequent case of *Pittsburgh S.S. Corp. v. Brown.*[28] No similar question seems to have been raised in Wyoming.

It is apparent that review of agency decisions has not been a fertile field of litigation in the Wyoming courts. Perhaps it has been a field in which there have not been many cases because the legislature has not seen fit to entrust the agencies to carry out the legislative delegation impartially. But could not just as much control be exercised over the agencies with review provisions similar to those governing federal administrative agencies? If agencies are going to be merely examiners for the courts, then we have a misconception of the true function and value of administrative agencies.

GLENN W. BUNDY

DUE DILIGENCE REQUIRED FOR SERVICE BY PUBLICATION

In attempting to obtain jurisdiction by constructive service over a defendant whose address is unknown, the plaintiff's attorney is immediately confronted with the question of how far he must go in his search, and exactly what he must do in order to satisfy the requirements of due diligence that are a necessary and essential part of this type of service. Although the requirements of the states vary, from a procedural approach there seem to be two general classifications. First are those jurisdictions that require an order for publication of the necessary notices after the court has been satisfied from the plaintiff's affidavit that due diligence has been exercised in attempting to find the defendant. The other group of jurisdictions merely require that an affidavit be filed before service by publication be made.

The requirement seems to be, in the first group mentioned above, that the court should decide from the facts set forth in the affidavit of the

25. 285 U.S. 22, 52 S. Ct. 285, 76 L.Ed 598 (1932).
26. 44 Stat. 1424, 33 U.S.C. 901 et seq.
27. See DAVIS, ADMINISTRATIVE LAW, 920 (1951).
28. 171 F.2d 175 (7th Cir., 1948).

plaintiff if there has been an adequate search.[1] It is required that the affidavit contain facts concerning the search, and a mere statement that the plaintiff has not been able to make personal service after a diligent search is the affiant's conclusion and not that of the court.[2] What constitutes due diligence is generally held to be a question of law.[3] In an early California case it was said that between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved in the affidavit by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existnce of other facts, and the disclosure is the special office of the affidavit.[4]

The statutory requirements for obtaining constructive service in Wyoming[5] are of the second classification. These statutes are practically the same (except for some added causes of action) as they were when first introduced.[6] They are similar to the Ohio statutes from which they were adopted.[7]

The Wyoming statutes requires no court order prior to publication.[8] However, the failure to file the affidavit has been fatal to the action and has had the effect of rendering a foreclosure sale a nullity.[9]

An affidavit stating the ultimate facts in the language of the statute is sufficient. The accepted opinion in this state for many years among lawyers, cours, and the legislatures has been that an affidavit stating the ultimate facts in the language of the statute is sufficient, and the courts are not disposed, in view of an established practice for many years in the state, to sold otherwise and thereby disturb perhaps hundreds of titles and marital settlements.[10]

The Wyoming Supreme Court has indicated quite definitely what it will expect, at least in part, as a satisfactorily diligent search. In one case a city attempted to foreclose a lien for improvements against some realty. The owner of the property, a non-resident, had been paying her county taxes and city water assessments for some time and her correct address was on file in both the county and city offices. The city, in attempting to obtain constructive service, incorrectly spelled the owner's name and used as her last known address the address of the property sought to be sold. By way of dictum the court said of this case that it could no help feeling

1. Mills v. Smiley, 9 Idaho 317, 76 Pac. 783 (1903).
2. Rome Trust Co. v. Cummings, 123 Misc. 884, 206 N.Y.S. 728 (1924).
3. Pillsbury v. J. B. Streeter, Jr. Co., 15 N.D. 174, 107 N.W. 40 (1906).
4. Ricketson v. Richardson, 26 Cal. 149 (1864).
5. Wyo. Comp. Stat. 1945, secs. 3-1101 and 3-1102.
6. Wyo. (Terr.) Laws 1886, c. 60, secs. 99 and 100.
7. Baldwin's Revised Ohio Code, secs. 2703.14, 2703.15, and 2703.16.
8. Clarke v. Shoshoni Lumber Co., 31 Wyo. 205, 224 Pac. 845 (1924).
9. Elstermeyer v. City of Cheyenne, 57 Wyo. 256, 116 P.2d 231 (1941).
10. See note 8, supra.

that the exercise of very little diligence on the part of the city to ascertain the actual residence of the owner would demand that the records of the county assessor, county treasurer, and city clerk be examined. These records would be among the very first sources of information on this matter which would be consulted by anyone really dseirous of ascertaining the correct non-resident address fo the owner of the real estate.[11] It has also been held by other courts that a reasonable inquiry could be made of all persons likely or presumed to know the whereabouts of the person sought to be notified by publication. This would include agents, relatives, business associates, neighbors, and the postmaster.[12] Failure to inquire of the persons in possession of the land in litigation, who were also co-defendants, did not constitute diligent search,[13] nor was an inquiry directed at just one friend of the defendant.[14] A search of the city[15] and telephone directories,[16] an inquiry of the prosecuting attorney who had prosecuted and of the attorney who had defended the defendant in a prior criminal action[17] were held to be activities that would aid in the prosecution of a diligent search. In a case in which the plaintiff or his agents maintained a continuous but not constant surveillance of the defendant's home, inquired of lodgers there, made repeated calls at his place of business and consulted his employees, there was a finding of satisfactory diligence.[18]

In a recent concurring opinion,[19] Justice Wolfe of the Utah Supreme Court set out to enumerate some guiding principles for the determination of due diligence. Among other things he suggested: "The diligence to be pursued . . . is that which is reasonable under the circumstances and not all possible diligence which may be conceived. Nor is it that diligence which stops just short of the place where if it were continued might reasonably be expected to uncover an address or the fact of the death of the person on whom service is sought. There have been cases where the plaintiff in an action to quiet title or in a divorce action was not untruthful in setting down details in the affidavit to show diligence; yet like a person who bustles with activity but accomplishes little, makes an imposing recital of nonproductive diligence. Such type of 'diligence' when probed may reveal a design to draw attention away from the fact that a further pursuit might result in an unwelcome disclosure of the address of the defendant. Due diligence must be tailored to fit the circumstances of each case. It is that diligence which is appropriate to accomplish the the end sought and which is reasonably calculated to do so. . . . Common sense under the circumstances and regard for the rights of the defendant should largely govern. The golden rule may also serve as a guide. The

11. See note 9, supra.
12. Krigsby v. Wopschall, 25 S.D. 564, 127 N.W. 605, 37 L.R.A. NS 206 (1910).
13. Berry v. Howard, 33 S.D. 447, 146 N.W. 577 (1914).
14. Swain & Marsh v. Chase, 12 Cal. 283 (1859).
15. Clarkin v. Morris, 178 Cal. 102, 172 Pac. 981 (1918).
16. Parker v. Ross, 117 Utah 417, 217 P.2d 373, 21 A.L.R.2d 919 (1950).
17. Vorbourg v. Vorbourg, 18 Cal.2d 794, 117 P.2d 875 (1941).
18. Cone v. Ballard, 68 S.D. 593, 5 N.W.2d 46 (1942).
19. See note 16, supra.

admonition should be: Exercise the same diligence to find the defendant as you would expect him to exercise if he were the plaintiff and you were the defendant. . . . I would think it well for the plaintiff, if he is confronted with a doubt as to whether he has used reasonable diligence to go the 'second mile' in tracing the whereabouts of the defendants or determine whether they are with the quick or the dead, rather than to resolve the doubt by not going far enough."

Since the failure to exercise diligence is fatal to the jurisdiction of the court, the plaintiff's attorney may well ponder the effect of a quiet title action he has brought that may be reopened, or of a defendant setting aside a divorce decree after the plaintiff has remarried and perhaps had children. The defendant, if he learns of the suit, can always make a special appearance for the sole purpose of denying the court's jurisdiction, and here bring up the claim that there has not been a diligent search. This special appearance will relate only to the validity of the constructive service and does not operate to transform the service into one personal in character, and upon which a personal judgment can be made.[20] Far more serious is the institution by the defendant of proceedings to vacate the judgment,[21] which is in effect a new action, equitable in character.[22] Our statutes will premit a new trial within two years in cases in which the defendant has been constructively summoned, if fraud has been practiced by the successful party.[23] In such a suit to set aside a former judgment quieting title to property, it was held in Idaho that the failure of the plaintiff in the first suit to exercise reasonable diligence in his search for the defendant was such negligence as to constitute fraud in fact upon the court which rendered the prior judgment void.[24] In that case, for one year the assessment rolls had incorrectly described the non-resident owner's property, and when the tax payment was made by the owner, it was credited against the incorrect assessment listing. The property was sold for delinquent taxes, and the purchaser brought suit to quiet title, relating in his affidavit that the owner could not with reasonable diligence be found. Since the owner's name had been listed correctly on the assessment rolls both prior and subsequent to the year in which the error in listing was made, and since the owner had continued to be credited for the payment of her taxes in the years following the error, the plaintiff was held to have failed to use reasonable diligence in his search.

In a Washington case, the plaintiff brought an action for specific performance on a written contract to purchase property, claiming he had paid the full purchase price. No appearance was made by the defendant in the suit that was commenced by constructive service, and a commissioner was appointed to convey the property to the plaintiff. The plaintiff

20. Kimbel v. Osborn, 61 Wyo. 89, 156 P.2d 279 (1945).
21. Wyo. Comp .Stat. 1945, sec. 3-3801.
22. State v. Soffietti, 90 Kan. 742, 136 Pac. 260 (1913), and see note 8, supra.
23. Wyo. Comp. Stat. 1945, sec. 3-3810.
24. Lohr v. Curley, 27 Idaho 739, 152 Pac. 185 (1915).

then brought another suit to quiet title against the claims of the defendants. The defendants answered claiming the prior judgment was procured by the fraud of the plaintiff in that his affidavit for summons by publication related that the defendants were non-residents and could not be found, when in fact they were continuous residents of the same city; that they had engaged in business there; that their names were to be found in the official city directory and in the telephone directory; and that their address was known to the agent to whom plaintiff had made payments on the realty in question. The court said that it was the absence of good faith on the part of the plaintiff in making such statements that constituted the grounds for attack on the prior judgment.[25]

There is some question if a collateral attack may be made upon a prior judgment in a case in which the claim relates to the lack of diligent search that was made when attempting to obtain constructive service. In this particular aspect, it has been held that for the purpose of challenging the jurisdiction of the court by reason of the alleged insufficiency of a diligent search, a special appearance was in the nature of a direct attack.[26] In another Wyoming case, a collateral attack was not allowed on a judgment obtained in a sit begun by constructive service, but the attack was not based on the lack of diligent search but upon the completeness of the notice given in the publication.[27]

As has been observed, the Wyoming procedure for obtaining constructive service does not require the plaintiff's attorney to convince the court or anyone but himself, in the original proceedings, that the degree of diligence he has exercised in attempting to find the defendant has been sufficient. It is not the purpose of this article to attempt to show that our procedure is any less desirable than the procedure of those jurisdictions requiring a court order prior to publication. Even there, fraud has been practiced on the courts through the false claims that the defendants could not be found, and people have been unjustly deprived of their property, and no doubt many questionable divorces have been obtained. However, in the event of a subsequent attack, it should be pointed out that since the responsibility rests solely on the plaintiff's attorney to show his honest, diligent, and good faith efforts to find the defendant, he should be prepared to show exactly what he did in conducting his search. A log of his activities and the results would seem to be an indispensable part of his records. And to paraphrase Justice Wolfe, he should exercise at least the some degree of diligence that he would require others to use in seeking constructive service on his clients.

HARVEY J. LANDERS

25. Schmelling v. Hoffman, 111 Wash. 408, 191 Pac. 618 (1920).
26. Emelle v. Spinner, 20 Wyo. 507, 126 Pac. 397 (1912).
27. Closson v. Closson, 30 Wyo. 1, 215 Pac. 485 (1923).