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Procedure: Substituted Service on Domiciliary by Notice Outside the State

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the parties to settle their differences by stating to them the rules of law which govern them.'"[30]

So Montana in adopting the UNIFORM ACT has made possible the realization of the benefits to be derived from declaratory judgments. One might query, however, whether or not it is being used as extensively by the members of the Montana bar as it might be used; and it is suggested that a full discussion of the act by the court in cases where declaratory relief is asked might promote greater awareness by the bar of the possibilities under it and fuller realization of the benefits to be derived from it. Furthermore, careful consideration of the act is necessary if it is to accomplish its purpose of uniformity in decisions in States adopting it. And in conclusion, it would be well to keep in mind a warning given by Borchard, the leading authority in this field of the law, when he said:

"But the declaratory judgment is not intended as a sedative to enable fearsome people to 'sleep o'nights', or to enable or permit the courts to decide abstract, hypothetical, or academic questions. The court must be alert to establish the fact that the issue is contested, that the parties have an adverse legal interest in its adjudication, and that by the decision a practical end in clarifying, quieting, and stabilizing the legal position will be subserved. This purpose may not appear on the face of the pleadings, but it is the duty of the judge to call for sufficient facts to enable him to determine the intent and objectives of the suit and to satisfy himself that a useful purpose is served by making a declaration of rights.'"[31]

—Jerome Paulson.

PROCEDURE: SUBSTITUTED SERVICE ON DOMICILIARY BY NOTICE OUTSIDE THE STATE

In Volume I of the *Montana Law Review*[1] the suggestion was made that probably the United States Supreme Court would uphold substituted service upon a domiciliary in any action in personam, even though he be outside the state, provided he receives actual notice—this, by virtue of the extraterritorial authority of a state over her domiciliaries.

[30]SUNDERLAND, CASES AND MATERIALS ON JUDICIAL ADMINISTRATION (1937) p. 317.
[31]Borchard, *op. cit. supra* note 27, p. 260.

[1] McNamer, *Substituted Service on Resident Motorists*, 1 MONT. L. REV. No. 1, p. 51 (1940).

Since the publication of Volume I, the United States Supreme Court has affirmed the suggestion there made, in the case of *Milliken v. Meyer*,[3] by holding that domiciliation within a state is sufficient to bring an absent defendant within the reach of a state's jurisdiction, for purposes of a personal judgment, by means of appropriate substituted service. The court went on to say that the adequacy of substituted service, so far as due process is concerned, is dependent on whether or not the particular form of service is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard, and that such substituted service may be wholly adequate to meet the requirements of due process as was recognized in *McDonald v. Mabee*,[4] despite earlier intimations to

[3] (1940) —— U. S. ——, 85 L. Ed. 269, —— S. Ct. ——. The case arose in Colorado on a suit to enforce a personal judgment rendered by the Wyoming court. Though domiciled in Wyoming, the defendant had been absent from the state for some time and was personally served with a notice of the Wyoming proceeding in Colorado, pursuant to the Wyoming statutes, but he made no appearance in the Wyoming cause, judgment going against him by default. In the present suit the Colorado court held that the Wyoming decree was void on its face because of an irreconcilable conflict between the findings and the decree, not passing on the finding of its lower court that Wyoming had jurisdiction over defendant. After declaring that Colorado must give full faith and credit to the Wyoming judgment, if that state had personal jurisdiction, the United States Supreme Court proceeded to say: "The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him."

[4] (1917) 243 U. S. 90, 61 L. Ed. 608, 37 S. Ct. 343, L. R. A. 1917F 458. It is submitted that the case of Milliken v. Meyer does not directly affect the holding in McDonald v. Mabee which is to the effect that to dispense with personal service the substituted service that is most likely to reach the defendant is the least that ought to be required to satisfy due process requirements. The question of whether a state could subject its absent domiciliaries to jurisdiction in personam by publication, in view of McDonald v. Mabee and Milliken v. Meyer, is an independent question. It would seem, however, that in any case in which the court admits that publication is as likely to give actual notice to a domiciliary who cannot be found, as any other available method, that form of substituted service will be constitutional under McDonald v. Mabee. *Cf.* De La Montanya v. De La Montanya (1896) 112 Cal. 101, 44 P. 345, 53 Am. St. Rep. 165. This case generally is cited as ruling that substituted service on a domiciliary merely by publication is not sufficient, McDonald v. Mabee, *supra;* BOWERS, PROCESS AND SERVICE (1927) p. 429, note 64, although in fact a copy of the complaint and summons were sent defendant by mail. The majority of the court seems to consider the case simply one of service by publication. Further, the majority relied on Pennoyer v. Neff (1877) 95 U. S. 714, 24 L. Ed. 565, as prohibiting any kind of substituted service on residents and non-residents alike, which now is admitted to be a wrong interpretation of that case. Now it generally

the contrary in *Pennoyer v. Neff.*[4]

Apparently it is assumed by the Montana legal profession that any kind of substituted service on a Montana domiciliary, while outside the state, would be ineffective to give a Montana court jurisdiction in personam over such domiciliary. It is not clear whether this assumption is based on supposed constitutional limitations, a misconception of the common law, the wording of the Montana statutes, or possibly a combination of all three. Since the United States Supreme Court has affirmed this power of a State in *Milliken v. Meyer,* at least where the absent domiciliary is given actual notice, it may be worthwhile to reopen the question of whether an absent domiciliary can be so served under the existing law in Montana.

If the assumption that Montana law does not authorize such substituted service is based on supposed Federal Constitutional limitations, *Milliken v. Meyer* clearly overcomes any objection in this regard. If it is based upon supposed requirements of the common law directing that our statutes be not interpreted to authorize such service, a brief examination of the common law will show that this is not so. It has long been recognized that a State has jurisdiction to subject its domiciliaries to such service if it sees fit.[5] Insofar as the assump-

is recognized that that case only ruled that a *non-resident* defendant is not subject to *any* form of substituted service in a personal action.

[4] (1877) 95 U. S. 714, 24 L. Ed. 565.

[5] In considering the "common law" of service of process, the dominating question actually is, "How much power will the courts of one State recognize as existing in another to subject prospective defendants before the latter's courts to a form of substituted service?" RESTATEMENT, CONFLICT OF LAWS, §§77 and 79 recognize unequivocally that a State has jurisdiction to subject its domiciliaries to substituted service by the generally accepted common law. In Henderson v. Staniford (1870) 105 Mass. 504, 7 Am. Rep. 551, the plaintiff was denied the right to sue in Massachusetts on his original cause of action after having secured a California judgment based on substituted service by publication, although the defendant had left California. Bryant v. Shute's Ex'r. (1912) 147 Ky. 268, 144 S. W. 28. See: Miedreich v. Lauenstein (1914) 232 U. S. 236, 34 S. Ct. 309. In re Hendrickson (1918) 40 S. D. 211, 167 N. W. 172, and Becker v. Becker (Tex. Civ. App. 1920) 218 S. W. 542 both readily approve their own statutes providing for substituted service on their domiciliaries by giving actual notice outside the state. Though this is not a direct "recognition" of power in another state to exercise such jurisdiction, it is submitted that such is the intendment of these cases, because, unlike English courts, these courts could easily have ruled the statutes unconstitutional if they had not considered the enactment of such statutes a reasonable exercise of legislative authority. GOODRICH, CONFLICT OF LAWS (2d ed. 1938) pp. 158-161; BEALE, CONFLICT OF LAWS (1935) §79.1; STUMBERG, CONFLICT OF LAWS (1937) pp. 75, 76. *Contra*: Raher v. Raher (1911) 150 Iowa 511, 129 N. W. 494. See Arthur A. Morrow, *Jurisdiction in Personam Acquired by Extraterritorial Service of notice,* IOWA BAR REVIEW, November Issue, 1934, p. 9. (published

tion is based on the literal wording of the statute, a careful analysis of the statute, it is believed, will show that such assumption is not justified.

R. C. M. 1935, Section 9117 provides:

> "When the person on whom the service of a summons is to be made . . . has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; . . . and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, . . . the clerk shall cause the service . . . to be made by publication. . . . The provisions of this section shall apply to all actions and proceedings in which personal service of summons is not required to be made in order to obtain relief, including every action or proceeding . . . to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance, or lien, or cloud, upon the title of real or personal property within this state."

R. C. M. 1935, Section 9118 provides, in part, that " . . . When publication is ordered, personal service* of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the postoffice. . . ."

Section 9117 has to do only with publication. However, this comment seeks to do no more than to establish actual notice outside of the state, in the manner required under Section 9118, as a recognized statutory form of substituted service. It is clear that wherever Section 9117 authorizes publication, Sec-

in 20 IOWA L. REV., 1934-5). For a definition of jurisdiction as a "recognized power" see RESTATEMENT, CONFLICT OF LAWS, §42.

There is the subordinate question of how a common law system ordinarily *exercises* its power to subject to jurisdiction by substituted service. Is there a common law rule providing for such process in the absence of statute? A very recent Montana case answers in the negative—State v. District Court (1940) 110 Mont. 61, 99 P. (2d) 211: "There is no common law directly applicable to the publication of summons, since such service was unknown to the common law, and is of comparatively recent and strictly statutory origin (50 C. J. 496, sec. 105; 502, sec. 114)." BEALE, CONFLICT OF LAWS (1935) §79.1. See: GOODRICH, CONFLICT OF LAWS (2d ed. 1938) p. 159. Service of process by posting at the market place or at the main cross roads is of ancient origin, and it is doubtful that it always has been founded solely in statute. However, the subject of process is so generally covered by statute today that it uniformly is treated as being founded in and limited by statute.

* R. C. M. 1935, §§9117 and 9118 carefully distinguish between the "service of process" and service of a *copy* of the process, apparently preserving the ordinary rule that process as such is ineffective beyond the borders of the state issuing it. So, we may say that the subjection of a domiciliary to process in the technical sense, is not necessary in view of the holding in Milliken v. Meyer.

tion 9118 authorizes actual notice. Hence, our immediate concern is with the question: "When is publication permissible under Section 9117?" The answer to this question must then be considered as becoming a part of Section 9118 for the purpose of stating the conditions under which actual notice outside the state may be deemed a statutory form of substituted service.[7]

The first part of Section 9117 was taken from a California statute[8] which, at the time, clearly authorized such service in actions in personam. The statute provided, in part:

> "Where the person on whom service is to be made . . . has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; . . . and the fact appears by affidavit . . . , or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; *or* (when the action) . . . relates to . . . real or personal property . . . the service may be made by the publication of the summons." (Italics supplied)

This section is clearly in the alternative—applying either to actions in personam or actions in rem. It also seems clear that the phrase, "Where the person on whom the service is to

[7] It is possible to interpret Section 9118 as authorizing notice outside the State *only* when publication is *constitutionally* available under §9117, but such construction is by no means necessary. Section 9117 first should be interpreted alone, to cover the provisions for publication; then it will be deemed incorporated by implication into Section 9118, thus forming an independent Section substituting the "notice" provisions of the latter for the "publication" provisions of the former, and standing as an absolutely independent basis for substituted service by actual notice. Such construction is consistent with the history of Section 9117 especially, indicating a legislative intention to authorize as comprehensive a substituted service as is constitutional. Moreover, there seems little reason to make substituted service by notice absolutely dependent upon the constitutionality of such service by publication, when the United States Supreme Court considers the giving of actual notice to a domiciliary, where possible, as always preferable to subjecting him to personal jurisdiction by publication. Though the Wyoming "publication" statute (Wyo. Comp. Stat. 1920, §5636) is very explicit as to persons subject, the actual personal notice outside the state in Milliken v. Meyer, our leading case, was made under a Section (Wyo. Comp. Stat. 1920, §5641) very similar to our §9118. The possibility of the "notice" section being limited constitutionally by the "publication" section, was not even considered. It is extremely likely that the Wyoming Supreme Court will treat their §5641 as authorizing an independent form of substituted service, in the light of the United States Supreme Court's decision.

[8] See KERR'S CYC. CODES OF CAL. 1908, CODE OF CIVIL PROCEDURE, §412

be made. . . ." was intended to include any and all persons without exception.

Perhaps the statutory history of this section in Montana is of even greater importance in demonstrating that under the language of the first part of the section, all persons, without exception, were included. The original Bannack Statutes, Section 30, enacted in 1864, uses substantially the same language as our present Code to describe the classes of persons subject to substituted service, emphasizing, however, that any person in hiding should be so subjected. And until 1907 there was no "limitation" whatever in the wording of the statute itself as to the persons subject thereto or the kind of action in which service by publication was possible. In that year for the first time, the qualifications introduced by "The provisions of this section shall apply. . . ," were added by amendment. Very possibly this was added simply from a growing conviction that *due process* requirements of the Federal Constitution compelled some limitations upon the use of substituted service in a personal action.

Both the history and the enlightened form of the clause, "The provisions of this section shall apply to all actions . . . in which personal service . . . is not required . . . ," would seem to indicate an intention to draft the statute in such a manner as to insure its constitutionality* and at the same time to provide for, as nearly as possible, the complete substituted service which the original California, and probably the early Montana statutes were intended to include. In view of *Milliken v. Meyer,* it is clear that so far as constitutional limitations are concerned, at least some forms of substituted service on absent domiciliaries are possible under this phrasing, as personal service of the summons is not required in actions in personam on an absent domiciliary, in order to satisfy due process. Hence, to this point, the language of Section 9117 seems to authorize any and all substituted service which constitutionally can be made. If there is any language prohibiting substituted service on an absent

*It is submitted that probably the case of Pennoyer v. Neff caused many lawyers and legislators to doubt the constitutionality of the California, early Montana, and similar statutes, and that revisions of said statutes, subsequent to Pennoyer v. Neff, were attempts to insure the constitutionality of the statutes, while at the same time changing the scope of the statutes as little as possible. By "the enlightened form of the statute" is meant that it was apparently drafted with Pennoyer v. Neff in mind, and was intended to apply to all actions in which, the United States Supreme Court should in the future, determine that personal service was not necessary. Thus, when the United States Supreme Court, in Milliken v. Meyer, decided that personal service was not necessary on an absent domiciliary, the statute is so framed as to apply automatically to such absent domiciliaries.

domiciliary in a personal action, provided he receives actual notice, it must be found in some other part of the statute.

The clause, "including every action . . . ," immediately following the general clause quoted above, might be taken to restrict the previous universal language to those actions enumerated.[10] However, it is submitted that this phrase, instead of indicating the full scope of the previous general language, merely illustrates some of the members of a much larger class which is included in the universal phrase. There is a strong presumption in the decisions that the word "including" either introduces an enumeraton of illustrative members of a much larger class, or enlarges the class previously referred to, by the members enumerated.[11] Either construction supports the conclusion here submitted.

Further, the Montana cases, approving generally service by publication on a non-resident in a divorce action, seem to offer compelling authority establishing that this clause is only an enumeration of some of a larger class. Section 9117 is used regularly in such actions to set forth the conditions which must be complied with before service by publication in divorce will

[10]In fact, both the court and the profession seem to assume that §9117 provides for publication in all in rem actions even though not enumerated. However, to any contention that the legislature must have intended to refer only to "in rem" actions a complete answer seems to be that they so easily and simply could have said "shall apply to in rem actions." The supposed traditional common law distinction between actions "in personam" and "in rem," never has been really recognized by the common law as furnishing a basis for measuring the absolute limits of legislative power to subject the defendant to jurisdiction. These categories of actions for this purpose, have been given emphasis in our current law by supposed constitutional limitations now shown to be altogether without foundation. Hence, at most, they should be used for no more than as a basis for raising a presumption as to legislative intention where the statutory language actually is ambiguous on its face. There is no ambiguity whatsoever on the face of this statute.

[11]In re Goetz's Will (1902) 71 App. Div. 272, 75 N. Y. S. 750: In a bequest "of all my personal property, including furniture, plate, etc,," the word "including" was held not to limit the bequest to the property enumerated after the wording, but to cover all of testator's personal property; Cunningham v. Sizer Steel Corp. (W. D. N. Y. 1924) 1 F. (2d) 337: Steel manufacturing corporation's trust mortgage, covering real estate and fixed property of company and all mills, factories, etc., expressly including certain specific things mentioned as being located on described real estate, held not to cover merely specific property particularized following word "including," or property of like nature, since such word is not a term of limitation, notwithstanding *ejusdem generis* rule; Cannon v. Nicholas (C. C. A. 10th 1935) 80 F. (2d) 934: Statute authorizing distraint of delinquent taxpayer's goods, "including" stocks, securities, bank accounts, and evidences of debt, held not intended to exempt intangible property not listed, such as annuity policy, although "bank accounts" was added to the class enumerated, by amendment to the statute in 1924, rule that ex-

be sufficient.[13] The court seems unhesitatingly to assume that this section authorizes such service though divorce actions are not actually named anywhere in it. No other construction possibly can be given the cases, particularly if the Montana Supreme Court means it when it says that substituted service is of strictly statutory origin,[14] since it appears that there is no other statutory authority for service by publication in a divorce action.

There are Montana decisions making general statements to the effect that substituted service will not support a judgment in a proceeding strictly in personam,[15] but apparently all of these cases deal with non-resident defendants and so should not control the present question.

In conclusion, it would seem that, in view of *Milliken v. Meyer,* the history of, and construction to which R. C. M. 1935, Sections 9117 and 9118 are susceptible, and the accepted doctrine of a State's power over its domiciliaries, the Montana Supreme Court might well hold that actual notice, without the state, on an absent domiciliary, is sufficient to give Montana courts jurisdiction in actions in personam.[16] There is no doubt that this form of substituted service is urgently needed,[16] par-

pression of one thing is exclusion of another being unavailable. See also: Prairie Oil and Gas Co. v. Motter (D. C. Kan. 1932) 1 F. Supp. 464, 468; U. S. v. Nat. City Bank (S. D. N. Y. 1937) 21 F. Supp. 791, 795; Heffner v. Ketchen (1931) 50 Idaho 435, 296 P. 768, 770; *Include,* 31 C. J. p. 395; ANNOTATION: 97 A. L. R. 1382.

[13]Holt v. Sather (1927) 81 Mont. 442, 264 P. 108; In re Huppe (1932) 92 Mont. 211, 11 P. (2d) 793 (disbarment proceeding based on a divorce proceeding in which substituted service was had under §9117).

[14]*Supra,* note 5.

[15]Winnet Times Pub. Co. v. Berg (1928) 82 Mont. 141, 265 P. 710 (defendant, resident of Oregon, served personally in Oregon); Gassert v. Strong (1908) 38 Mont. 18, 98 P. 497 (defendant, resident of N. Y., served by publication); Silver Camp Mining Co. v. Dickert (1904) 31 Mont. 488, 78 P. 967 (defendant, resident of Utah, served personally in Utah).

[16]If it be admitted that the interpretation of our section's actual language, set forth above, is reasonable, it is submitted that the court should be persuaded readily to so construe the section in the light of R. C. M. 1935, §10519, and the great mass of cases applying that section, to the effect that, ". . . the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . . ."

[16]GOODRICH, CONFLICT OF LAWS (2d ed. 1938) pp. 158, 159: "It would be very inconvenient if this (personal jurisdiction over a domiciliary by substituted service) were not the law. An individual may be concealing himself to avoid service of process; he may be absent in parts unknown. But every person has a domicile. Furthermore, even though absent he is affected by his domiciliary law. That law governs his personal status; it determines his liability for certain taxes; it determines the devolution of his property if he dies intestate. There is good basis for saying, therefore, that he is subject to suit there, and

ticularly where a domiciliary is evading the jurisdiction of the court. If it be felt that such service should be strictly limited, this is done by the express terms of the statute which require that a diligent search be made, with supporting affidavit. Also, where the defendant receives actual notice, there doesn't seem to be the same reason for requiring proof of a diligent search as in the case of publication.

—Murray D. Syverud

PROCEDURE: THE STATUS OF THE ASSIGNEE FOR COLLECTION UNDER REAL PARTY IN INTEREST STATUTES

The "Field Code" of 1848 gave rise to an entirely revised form of procedure intended to combine in one form of acton, the civil action, pleading at both common law and equity.[1] The general statutory form stating the rule for parties plaintiff to this civil action as adopted by many states is: "Every action must be prosecuted in the name of the real party in interest. . . ." Following this general statement there are exceptions which vary in different states in phrasiology and contextual setting. However, the words with regard to the "real party in interest" used in the statutes mean the same thing.[2] It is the purpose of this comment to consider whether the assignee of a chose in action assigned *for the purpose of collection*[3] is the real party in interest within the meaning of R. C. M. 1935, Section 9067 or similar statutes in other states.

In the leading case of *State v. Merchants' Credit Service,*[4] the Montana court held that such an assignee for collection only was not the real party in interest and therefore was not entitled to sue in its own name. Although the court made some point of the fact that the collection agreement was set out in the assignment instead of being "a collateral agreement" as is

that a court of that state may be empowered to render a personal judgment against him which is valid, even though he is not personally served within the state."

[1] Brumback v. Oldham (1878) 1 Idaho 709; POMEROY, CODE REMEDIES (5th ed. 1929) §§4, 50, pp. 5, 6, 83.

[2] *Id.* §§51, 53, 63, pp. 83, 86, 97. See also *fn.* 9, *infra.*

[3] This comment does not deal with assignments "for security" and assignments of negotiable instruments. The former involve a pre-existing interest in the assignee and the latter involve highly specialized rules of the Law Merchant. This distinction was made in State v. Merchants' Credit Service (1936) 104 Mont. 76, 66 P. (2d) 337; and see 1 WILLISTON ON CONTRACTS (1924) §406, p. 754.

[4] (1936) 104 Mont. 76, 66 P. (2d) 337.