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Dicta Editorial Board

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Rules Committee Proposes Changes in Civil Procedure

TO THE COLORADO BAR:

The rules committee of the Colorado Supreme Court has submitted proposed revisions of certain rules, and the grounds therefor to the court. The court has suggested that they be published in DICTA, and requested that the bar study the same, and submit to the committee all criticisms and suggestions on changes in these and any other rules within sixty days from the publication hereof in DICTA. These suggestions and criticisms will be studied by the committee and a new report will then be submitted by it to the court.

Please let us hear from you. Your suggestions will be welcomed, and they may be sent to any members of the committee.

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Suggested Changes in Rules

RULE 4.

(f) *Personal Service Outside the State.* Personal service outside the state may be made:

1. In any action, upon a natural person over the age of 18 years who is a resident of this state by delivering a copy of the process, together with a copy of the pleading upon which it was issued, to the person served. [From Wyo. Comp. Stat. 1920, Secs. 5636, 5641.]

2. In any action, upon a person domiciled in this state, other than a natural person, by delivering a copy of the process, together with a copy of the pleading upon which it was issued, in the manner provided by this rule for personal service in this state upon such person.

3. In any action affecting specific property or status or in any other proceeding in rem, upon a natural person of any age, without regard to his residence, or upon any other person, without regard to its domicile, by delivering a copy of the pleading and process thereon, in the manner provided by this rule for personal service in this state upon such person. Service under this paragraph 3 upon a natural person under the age of 18 years may be made by delivering a copy of said pleading and process to such person and another copy thereof to the other person designated by subparagraph (e) (2) of this rule, wherever, within or without this state, such other person may be found. [From Code, Sec. 45.]

4. No provision of this subdivision (f) shall be construed to limit the right to serve process in any other manner authorized by this rule.

(g) (2) (iv) In the fourth clause change "persons whose residence and whereabouts are unknown and who cannot be found in the county where the case is pending", to read: "persons whose whereabouts is unknown and who cannot be served by personal service in the state." [From Code, Sec. 45 (b).]

(h) Change the fourth sentence by striking the words "at least once a week" and "successive" so that it will read: "Such publication shall be made for four weeks."

RULE 98.

(c) In the main reverse and change plurals to singular to read as follows:

Except as provided by subparagraphs (a) and (b) of this Rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant be a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had; provided, however, that an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in the county in which the contract was to be performed; an action upon note or bill of exchange may also be tried in the county where the same was made payable; and an action for tort may also be tried in the county where the tort was committed. [From Code, Sec. 29.]

RULE 115.

(i) Add a new sentence and amend to read as follows:

(i) *Number of Copies to be Filed and Served.* One original copy of every typewritten brief and typewritten abstract, and one original and six carbon copies of every motion shall be filed. Two copies of each printed brief, abstract, or other printed paper, and one copy of each typewritten paper shall be served on all parties, and proof of service filed with the clerk. No such service shall be required upon a defendant in error who has not entered his appearance in the supreme court as stated in the summons to hear errors, but in lieu of such service one additional copy of each such paper shall be filed. [From Supreme Court Rules 38 and 46.]

NOTE.

See also subdivisions (a) and (b) of this Rule 115.

Comments

RULE 4.

(f) The proposed amendment in paragraph 1 incorporates, without change in substance, those provisions in the present subdivision (f) which authorize personal service outside the state in any action upon a natural person over the age of 18 years.

Paragraph 2 extends the provisions of the present subdivision (f) to permit personal service outside the state in any action upon a person domiciled in this state, other than a natural person. This will permit personal service outside of Colorado to be made upon a corporation organized under the laws of Colorado or upon a partnership or other unincorporated association domiciled in Colorado, whether as the basis for a personal judgment or in a proceeding in rem. Your committee is of the opinion that if, as was held in *Milliken v. Meyer*, 311 U. S. 457, a provision is valid which permits personal service outside this state to support a personal judgment as against a natural person who is a resident of this state, there is no reason why the same relief may not and should not be provided as against a corporation incorporated under the laws of this state or a partnership or other unincorporated association which has its domicile in this state.

Paragraph 3 relates exclusively to personal service outside the state in proceedings in rem. It authorizes such service upon any person, whether a natural person or not and without regard to the age or residence or domicile of such person.

It has been found that a gap exists in the rules as they now stand, as the result of which service of process in a proceeding in rem could not be had upon a defendant under the age of 18 years who is a resident of Colorado but is out of the state. Personal service upon him in the state could not be had under rule 4 (e) (2) because he is not in Colorado. Personal service upon him outside the state could not be had because rule 4 (f), as it now exists, limits personal service outside the state to natural persons over the age of 18 years. Service upon him by publication could not be had under rule 4 (g) (2) because he is not a non-resident of the state and he has not departed from the state without intention of returning and he does not conceal himself to avoid service of process and his residence and whereabouts are not unknown. And it would be impossible to secure service by mail upon him under rule 4 (g) (1) if he refuses to sign the return receipt or is so young that he cannot sign his name.

This situation would be remedied by the new paragraph 3. At the same time such paragraph provides the same safeguard as to natural persons served who are not over 18 years of age as is now provided by rule 4 (e) (2) as to such persons when they are served by personal service in the state by requiring that, in addition to a copy of the process being delivered outside the state to the person served, another copy of such process must be delivered to the other person (such as his father or mother or guardian, etc.) designated by said rule 4 (e) (2); and, in addition, it requires that a copy of the pleading upon which the process was issued must also be delivered to the person served and to such other person. The proposed amendment provides that the delivery of the copy of the pleading and of the process to such other person may be made either in Colorado or out of Colorado, wherever such other person may be found.

It is to be noted that neither rule 4 (f) as it now reads nor the proposed amendment permits a personal judgment to be secured upon personal service outside the state upon a natural person who is not over the age of 18 years.

Section 45 of the Code of Civil Procedure permitted personal service outside the state to be made upon a foreign corporation in a proceeding in rem (*People, ex rel., Edinburg State Bank and Trust Company v. District Court*, 97 Colo. 485, 50 Pac. (2d) 789). This is not permitted by the rules as they now stand. The proposed amendment of rule 4 (f) (3) permits such service in a proceeding in rem to be made upon a foreign corporation, as well as upon a partnership or other unincorporated association which is not domiciled in Colorado.

Paragraph 4 is designed to prevent a claim being made that, under the proposed amendment, personal service outside the state must be

made if it is possible to secure such service, and that service by mail or by publication cannot be made on a person who is not in Colorado unless it is impossible to secure personal service outside the state upon him.

Subdivision (g) (2) (iv), which relates to service in proceedings in rem, now reads: "Service by publication may be had on the following parties: * * * persons whose *residence and* whereabouts are unknown and who cannot be found in the county where the case is pending." It often happens that the "whereabouts" of a defendant is unknown and such defendant cannot be served by personal service in Colorado in the manner provided in rule 4 (e) (1), but the place of "residence" in Colorado of the defendant is known. Under a strict interpretation of the rule as it now exists, service of process upon such defendant could not be made; personal service upon him in the state could not be made for the reasons already stated; personal service upon him outside the state or service by mail could not be made because his whereabouts is not known; and service by publication could not be made upon him because, although his "whereabouts" is unknown, his "residence" is known.

To remedy this situation, the proposed amendment of this subdivision strikes out the words "residence and" from the language above quoted and changes the word "are" to "is" after the word "whereabouts." Upon this amendment, service by publication may be made upon a defendant who is known to have his legal residence at a certain place in Colorado but whose whereabouts is unknown. In such event, the address of his residence will be stated in the verified motion for an order of publication, because rule 4 (h) requires that such motion give the address, or last known address, if known, of each person to be served by publication, and a copy of the process will be mailed by the clerk to him at that address pursuant to the provisions of the same subdivision. Such defendant would therefore be given all the protection and notice that it is possible to give him and still make him subject to service, since the process would be published and a copy of the process would be mailed by the clerk to his residence address.

The words "and who cannot be found in the county where the case is pending" are no longer applicable, since the rules abolished the requirement of a return that the defendant, who is to be served by publication, cannot after diligent search, be found (code section 45). Such return, in practice, read that the defendant, after diligent search, cannot be found in the county in which the action is pending. In place of same, the amendment substitutes the words "and who cannot be served by personal service in the state." These words are to require that personal service in the state, instead of service by publication, is to be had if it is possible to secure personal service in any of the methods set

out in rule 4 (e) (1); for example, even if the whereabouts of a defendant is unknown, if service may be had by leaving a copy of the process at his usual place of abode, with some member of his family over the age of 18 years, then such service must be made and service by publication is not to be made.

(h) Section 45 of the Code of Civil Procedure, which provided for service by publication in actions in rem, contained the sentence: "Such publication shall be made at least once a week for four successive weeks." This language was incorporated into rule 4 (h) and a note was placed immediately following the subdivision stating: "Four weeks means five publications. See 4 C. S. A., Chap. 130, Sec. 6, for number of publications."

Since the adoption of the rules, there has been considerable discussion among attorneys as to whether publication "at least once a week for four successive weeks," when made in a weekly newspaper, means publication in five weekly issues or in only four. *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043, indicates that publication in four weekly issues is sufficient under the provisions of the code. If so, the wording in the note following subdivision (h) of rule 4, while literally true, is not applicable and creates confusion, since the statute it refers to is not applicable to the language used in the subdivision. Therefore, either the wording of the text of the subdivision or the wording of the note should be changed.

Colorado attorneys almost uniformly have had summons published in five weekly issues while the provision of the code was in effect and since the adoption of the rules and they are accustomed to that period of publication. Rule 4 (h) shortened the time for appearance after the first publication by ten days by providing that service shall be complete on the day of the last publication, as compared to the provision in section 45 of the code that it should be complete at the expiration of ten days from the date of the last publication. For these reasons and for the further reason that your committee feels that a period of twenty-eight days between the first publication and the last publication is not too long and that it should not be so short a period as twenty-one days, and for the further reasons that under the statute relating to foreclosure of deeds of trust by sale by the public trustee the period of twenty-eight days is required to elapse between the first and the last publications and the validity of service of process by publication in five weekly issues is well settled by the decisions, your committee recommends that the change be made in the text of subdivision (h) by striking out the words "at least once a week" and the word "successive."

This amendment would change the subdivision to require publication "for four weeks." The note following the subdivision would

remain as it is and would direct attention to the statute therein referred to, which reads: "Where publication for four weeks is required, then publication once each week for five successive weeks * * * shall be sufficient." The language of the subdivision of the rule and the note following same would be consistent with each other, and, taken together, would show clearly and beyond question what is now inferred by the note, viz.: that, when publication is made once a week, it must be in five weekly issues.

RULE 98.

The rules committee reversed the order in old code section 29, with the result that tort cases could only be tried in counties where the tort was committed. It was thought advisable to restore the old practice, but clarify the old code section.

RULE 115.

The rules do not clearly state the number of copies of typewritten papers which should be filed with the clerk of the supreme court, nor do they properly specify how many copies of printed or typewritten papers are to be served upon parties in the action. The amendment is to clarify these points.