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Again - How Many Times?

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Again---How Many Times?

BY J. P. HELMAN*

Rule 4 (h) of the RULES OF CIVIL PROCEDURE provides for the publication of summons, and "such publication shall be made at least once a week for four successive weeks." In my opinion, once a week for four successive weeks means four times only, and this was the opinion of Hubert Henry in his article *How Many Times?*¹

Rule 12 C (a) provides that the answer must be made to the summons within twenty days after service of summons, or if copy of complaint be not served with summons or if summons is served without the state or by publication, within thirty days after service on defendant.

*Of the Grand Junction bar.

¹19 Dicta 231 (1942).

Rule 4 (h) provides that service by publication shall be complete on the day of the last publication. The defendant certainly has plenty of time to appear, even though the summons is published only four times, since three weeks elapse between first and last publications, and the party has thirty days thereafter, or over fifty days in all.

Section 6, Chapter 130, 1935 C. S. A., provides that except as otherwise provided by law in express terms or by necessary implication, daily, weekly, semiweekly and triweekly newspapers shall all be equally competent for the publication of all legal notices and advertisements; that where publication of any legal notice at intervals of less than one week is required by law, then publication once each week on the same week day in any such daily, weekly, semiweekly, or triweekly newspaper for the required number of times shall constitute publication in accordance with the law.

It then states that for the purpose of defining and clarifying ambiguities in the various statutes * * * but not for the purpose of increasing any period of publication or the number of publications required by any statute, the meaning and intent of any law governing the publication of legal notices and advertisements, except as otherwise expressly provided, is declared to be as follows:

1. Where publication for ten days is required, publication once each week for *three successive weeks* * * * is sufficient.
2. Where publication for two weeks is required, then publication once each week for *three successive weeks* * * * shall be sufficient.
3. Where publication for three weeks is required, then publication once each week for *four successive weeks* * * * shall be sufficient.
4. Where publication for four weeks is required, then publication once each week for *five successive weeks* * * * shall be sufficient.
5. Where publication for five weeks is required, then publication once each week for *six successive weeks* * * * shall be sufficient.
6. Where publication for thirty days is required, then publication once each week for *six successive weeks* * * * shall be sufficient.
7. Where publication for more than thirty days or five weeks is required, then publication once each week for a period such that *the interval elapsing between first and last publication* shall be equal to the period of publication prescribed by law shall be sufficient.

The question arises, what does "once each week for four successive weeks" mean? It seems that common sense would dictate that it means simply four publications, once each during four calendar weeks. This is accomplished by four publications even though only three weeks' time elapses between the first and last publication. This has been so interpreted in *Smith vs. Collis*, 42 Mont. 350, 112 Pac. 1070 (1910), Ann. Cas. 1912 A 1158, and *Scilley vs. Red Lodge Rosebud Irr. Dist.*, 83 Mont. 282, 272 Pac. 543 (1928).

I have looked up the meaning of "once a week for four successive weeks" under title *Process*, Key No. 106, in the COLORADO AND PACIFIC DIGEST, and find the following:

Utah—The court ordered a citation to be published once a week for four successive weeks. There were four regular insertions of the notice in a weekly newspaper. It was held to comply with the order. *Wells vs. Kelly*, 11 Utah 421, 40 Pac. 705 (1895).

Washington—The statute provided for publication of summons not less than once a week for six consecutive weeks. Publication made once in each of six consecutive weeks was held sufficient. *State vs. Superior Court of Pierce County*, 6 Wash. 352, 33 Pac. 827 (1893).

Montana—In *Smith vs. Collis*, *supra*, the court considered the matter at some length, but concluded that four insertions, where the code provided for publication "once a week for four successive weeks" was sufficient because that section of the code further provided that service of summons is complete on the day of the *fourth* publication, so that it clearly contemplated only four insertions. However, the court referred to interpretations by other courts, including Colorado in *Calvert vs. Calvert*, 15 Colo. 390, 24 Pac. 1043 (1890). Montana had the same rule as we, to count the first day and exclude the last day in computing any period of notice, and the court pointed out that the greatest period of time which could elapse between the first and fourth publication was twenty-one days under this rule. From this reasoning court held that it was self evident that the statute did not contemplate that there should be a period of four weeks, or twenty-eight days elapse between the first and fourth publications.

The matter is settled, in my opinion, by *Calvert vs. Calvert*, *supra*, which I have searched down to date in SHEPARD'S CITATIONS and have found no further cases under the heading. In this case, the question was whether service had been obtained by publication of summons which had been published in four issues of a weekly paper, the first insertion being December 19, 1884, and the fourth and last insertion January 9, 1885. On page 395 the court states, "Must the language 'once a week for four successive weeks' be construed to mean four weeks of seven days

each, to-wit twenty-eight days? This we are inclined to answer in the negative." The court then cites *Brown vs. Tucker*, 7 Colo. 30, 1 Pac. 221 (1883), as the authority for the proposition that the ten days then necessary to complete the service began to run from the last publication. It then cites *Skiles vs. Baker*, 6 Colo. 295, where the first publication was November 13 and the last December 4. This covered only four insertions, so that the publication ran only twenty-two days and was held sufficient.

It is my firm conviction that *Calvert v. Calvert*, *supra*, not having been overruled, is the law of this state, and that publication "once a week for four successive weeks" means just what it says—four insertions. The same way for "once a week for three successive weeks," or any other number, and that any different interpretation has been merely to appease the newspapers and give them additional printing fees at the expense of clients.

ESTATES (1935 C. S. A. CHAPTER 176)

Section 197, Chapter 176, 1935 C. S. A., as amended in 1941,² provides that notice to creditors shall be published "once a week during each of four successive calendar weeks." This unquestionably means four times only, and is so stated in Mr. Henry's article in *DICTA*, *supra*.

Incidentally, this notice must be published within fifteen days of the issuance of letters of administration.

Section 227, as amended in 1941,³ covering notice of final settlement, provides "once a week during each of four successive calendar weeks." This again means only four times. *DICTA*, *supra*.

Section 13 covers publication of hearing on petition for determination of heirship, and provides, "once each week for four successive weeks." Many are publishing five times through overcaution. It seems to me very clear that this means the same as "once a week during each of four successive calendar weeks," and that four publications are ample and sufficient.

Section 19 covers publication for determination of heirship where the value of the property is less than \$2,000, and provides that notice shall be "published at least three successive weeks." It will be noticed that it does not say once each week for three successive weeks, and here the statute might be construed to mean that the notice must be published for a period of three weeks, which of course requires four publications in order to cover, particularly in view of Section 6, Chapter 130.

²S. L. '41, c. 235, §18, p. 910.

³S. L. '41, c. 235, §17, p. 913.

Section 29, descent of property after one year, provides for publication "once each week for four successive weeks." This, in my opinion, means publication only four times for the reasons given.

Section 51, notice of the probate of a will, provides for notice to be published "four successive weeks." This is a period of four successive weeks, so that one must publish five times in order to cover a period of four weeks between the first and last publications. This is the conclusion of Mr. Henry in *DICTA, supra*.

Section 166 covers the sale of real estate and provides that publication shall be "once each week for two successive weeks." This requires only two publications.

EXECUTION AND FORECLOSURE

Section 47, Chapter 93, 1935 C. S. A., provides for the sale of lands under execution and that such sale shall have been previously advertised "for the space of twenty days." This requires the advertising to cover a period of twenty days. The interpretative statute, Chapter 130, does not specifically provide for twenty-day period, but in view of its express statement of not being prepared for the purpose of increasing the number of publications and its final declaration that where more than thirty days or five weeks publication is required, once each week for a period such that the interval elapsing between first and last publication shall be equal to the period of publication prescribed indicates that four weekly publications will be sufficient, since the period of time elapsed between the first and last publication would be twenty-one days.

Section 57, Chapter 93, 1935 C. S. A., covers sale of chattels and states, "No goods or chattels shall be sold by virtue of any execution unless previous notice of such sale shall have been given *for at least ten days successively* in the same manner as required in the sale of real estate upon execution. Since a period of ten days is required, there must be three publications, since otherwise ten days would not elapse between the first and third publication.

With respect to foreclosure of mortgage or trust deed, where the foreclosure is in a court of record and the sale is under special execution, one must follow the provisions of Section 47, Chapter 93, in the sale of lands under execution, and publish four times, but when the foreclosure is by the public trustee, it is governed by Section 69, Chapter 40, 1935 C. S.A., which provides that all deeds of trust shall prescribe a period of advertising notice of sale weekly in some newspaper of general circulation *which publication shall not in any case be for less than four weeks*. Since this publication must be for a period of four weeks, it requires five insertions.

DIVORCE

Rule 81 (a). These rules do not govern procedure and practice in any special statutory proceedings insofar as they are incompetent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former code of civil procedure, such procedure shall be in accordance with these rules.

(b) These rules do not govern procedure and practice in actions in divorce or separate maintenance insofar as they are incompetent or in conflict with the procedure and practice provided by the present applicable statutes.⁴

Section 4, Chapter 56, 1935 C. S. A., provides that if service is made in the state, the defendant in a divorce action has thirty days within which to plead. In case of service outside the state, the defendant has fifty days from date of service.

Section 5 provides for service by publication by order of the court in the same manner and with like effect as is now provided by law for publication of summons in cases of attachment.

Rule 102 (f) of the RULES OF CIVIL PROCEDURE provides that the writ of attachment now shall be served in like manner and under the same conditions as provided in these rules for service of process, that is, a summons. It also provides that service shall be deemed completed at the expiration of the same period as is provided for service of process. However, this rule was adopted after the statute governing service in a divorce action, so apparently in such actions we must follow the old CODE OF CIVIL PROCEDURE, §45, which provided for substituted service (publication) in cases of attachment. This section of the old code provided that after the return is made that the defendant after diligent search cannot be found and not less than ten days after issuance of summons, publication shall be made by order of the court, once a week for four successive weeks, and service shall be complete at the expiration of ten days from the date of last publication.

It is, therefore, my conclusion that in a divorce action one must first comply with the old code by having a return made that the defendant cannot be found, obtain an order from the court for publication of summons, publish the summons once each week for four weeks, that is, four insertions. The defendant has ten days after the last publication before service is complete and fifty days thereafter in which to answer or plead.

⁴Rules of Civil Procedure (1941).