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Publication of Process in Attachment Proceedings

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PUBLICATION OF PROCESS IN ATTACHMENT PROCEEDINGS

It would seem that a change introduced in the attachment statutes by the Revised Code has created a situation of uncertainty with reference to a matter that was formerly definitely settled by statute in this state. In the former Code, it was definitely and specifically prescribed that the attachment should be levied before the order of publication should be made.

> "When any attachment, except under the third section, is returned executed, an order of publication, as prescribed in chapter one hundred and twenty-four shall be made against the defendant against whom the claim is, unless he has been served with a copy of the attachment or with process in the suit in which the attachment is issued."[1]

In the Revised Code, the following section was substituted for the section above.

[1] W. VA. CODE (Barnes, 1923) c. 106, § 17.

"In any proceeding under this article process commencing the action shall be served upon the attachment debtor, and may be served in any manner provided in article three, chapter fifty-six of this Code for serving process commencing a suit."[2]

The reason for this substitution is explained in the following Revisers' Note.

"Section 17, c. 106, Code 1923, apparently dispensed with service of process commencing the suit, upon the defendant, if he was served with a copy of the attachment. This section requires service of such process in some manner authorized by law, in all cases."

It may be suspected that the draftsman of the substituted section was laboring under a misapprehension, both as to the object of the original section and as to the necessity of the procedural requirements sought to be imposed by the substituted section.

In this state, an attachment proceeding is an ancillary proceeding in aid of an action, suit or other primary proceeding pending at the time when the attachment is issued. An attachment can not issue until the action, suit or other primary proceeding which it is intended to aid has been started.[3] Normally, an action or suit in this state is started by issuance of a summons (in chancery nomenclature, a subpena).[4] In a suit against a nonresident, where the proceeding is directly *in rem*, it may be instituted wholly by publication of process, without the issuance of any summons which would contemplate personal service on the defendant.[5] It will be noted, however, that, under the former statute quoted above, where jurisdiction of the *res* was sought only through the medium of an attachment, the action or suit could not in any case be started by an order of publication. There could be no order of publication until the attachment had been returned executed and there could be

[2] W. VA. REV. CODE (1931) c. 38, art. 7, § 30.

[3] *Id.* at c. 38, art. 7, § 1.

[4] *Id.* at c. 56, art. 3, § 4; Oil and Gas Well Supply Co. v. Gartlan, 58 W. Va. 267, 52 S. E. 524 (1905); United States Blowpipe Co. v. Spencer, 46 W. Va. 590, 33 S. E. 342 (1899). In a proceeding upon notice of motion for judgment, the suit is started when the notice is returned to and filed in the clerk's office. Charlton v. Pancake, 98 W. Va. 363, 127 S. E. 70 (1925); The Citizens National Bank of Phillipi v. Auvil, 109 W. Va. 753, 156 S. E. 111 (1930).

[5] As in a suit to enforce a lien against property where the lien exists independently of the proceeding to enforce it. Augir v. Warder, 74 W. Va. 103, 81 S. E. 708 (1914). The same principle should control in other proceedings where the remedy and relief sought primarily affect the *res*, as in suits for partition, to remove cloud from title, *etc.* In an attachment proceeding, the primary relief sought is satisfaction of a personal claim. The acquisition and enforcement of the attachment lien against property is secondary and collateral.

no attachment until the action or suit had been started. Consequently, the action or suit, in order to warrant an attachment, must have been instituted by some procedure other than an order of publication. The practice pursued, according to the writer's observation, has been to have a summons issued (although there is no expectation of having it served) in order to start a suit as a condition precedent to attachment, have the attachment issued and levied, and then to proceed with the order of publication. In other words, actions or suits involving attachments (excluding proceedings on notice of motion for judgment[6] and cases where appearances dispense with process) are always started by issuance of a summons. Hence it could not have been the intention of the former statute to dispense with the *issuance* of original process in an action or suit involving an attachment.

Assuming that the draftsman of the substituted section was willing to concede, on the basis of the demonstration attempted above, that the original section did not dispense with the issuance of process, he still may have been of the opinion that, after the issuance of the process, the statute dispensed with its service and permitted, in lieu thereof, service in any case of a copy of the attachment. However, it is believed that such a concept would be based on a misapprehension as to the object of the original section.

Certainly, our whole system of jurisprudence and procedure contemplates that process, once issued, shall be personally served, if practicable. Publication of process through the medium of an order of publication is contemplated only as a lame substitute for personal service; lame for the plaintiff because it limits the effect of his judgment, and lame for the defendant because it may never give him any actual notice. The statute permits such a procedure only in those instances where it is not practicable to obtain personal service.[7] A careful reading of the original section, quoted first above, will indicate that it did not at all attempt to dispense with personal service where such a method of service was practicable. It permitted a resort to publication only in those cases

[6] See note 4 *supra*.

[7] Where (1) the defendant is a nonresident, (2) where the plaintiff can not determine in what county he is, (3) where two reasonable attempts have been made to serve him personally without avail, and (4) where the defendant is a foreign corporation and no person is found within the state who may properly be served on its behalf. W. VA. REV. CODE (1931) c. 56, art. 3, § 23.

where the statute generally provides for such a procedure;[8] in other words, where personal service could not reasonably be expected. Its whole object was (1) to *fix the time* when an order of publication might be made — *after the attachment had been returned executed;* and (2) to prescribe a *substitute for the order of publication — service with a copy of the order of attachment* or with process — but not to prescribe a substitute for personal service of process in a case where an order of publication was not proper. In other words, service with a copy of the attachment was not in any sense a substitute for personal service, where personal service was practicable, but merely a substitute for an order of publication. To the extent that service with a copy of the attachment was a substitute for publication of process, it would seem to be a very commendable substitute. It would seem that a defendant would be much more likely to receive adequate notice from such a personal service than he would from a publication which he might never see.

So far as the substituted section merely eliminates service of a copy of the attachment as an alternative to an order of publication, its effect may not be very important. If the plaintiff has an opportunity to find the defendant within the jurisdiction, so that he could be served with a copy of the attachment, it would seem that he would have an equal opportunity to serve him personally with process, and so dispense with an order of publication. But the substituted section involves a further elimination from the original section, whether purposely or through inadvertence,[9] which entails more serious consequences. As has already been noted, the original section fixed the time of the order of publication. The order of publication was to be made *after the attachment had been returned executed.* The substituted section is utterly silent as to the time when the order may be made, and there is no other provision in the Code which fixes the time. What is the effect of this omission?

[8] There is nothing in the attachment statutes which prescribes the conditions upon which an order of publication may be awarded except the reference to the section cited in the preceding note.

[9] It might be surmised that the omission was inadvertent, in view of the fact that it is not mentioned in the Revisers' Note. The new section provides that process "may be served in any manner provided in article three, chapter fifty-six", which of course includes publication of process. Hence it may have been assumed that the provision quoted was a precise substitute for the provision in the old section relating to an order of publication, the draftsman losing sight of the fact that the article referred to fixes no time for entry of the order of publication, or being unaware that there may be peculiar reasons for fixing the time in an attachment proceeding which do not prevail where the proceeding is directly *in rem,* as noted in note 5 *supra.*

According to the usual rules of statutory construction, the elimination of this specific requirement would mean that it is no longer necessary to execute the attachment before entering the order of publication and proceeding to execute it. If this is the result contemplated by the new section, is it constitutionally valid? Or if the object of the elimination is merely to neutralize the statute, with the intention of permitting the time of the levy and the time of the publication to be fixed by general legal principles, are there reasons why, independently of any statute, it will still be necessary to resort to the old statutory practice, regardless of the elimination made by the new section? Or if there are no requirements. statutory or otherwise, making levy of the attachment a condition precedent to the order of publication, are there any other standards which make essential any particular times for these procedural events? Experience in other states would indicate that such questions as these must now receive consideration in this state in order to determine the proper procedure when an attachment is based on an order of publication. To the extent that these questions may be answered, the answers depend upon foreign decisions and are by no means devoid of difficulties.

Service by publication is a statutory device and is unknown to the common law.[10] When the practice was first made available by statute, its jurisdictional limitations were not clearly understood. In fact, it seems to have been naively accepted as an absolute substitute for personal service and so recognized as a proper basis for the rendition of purely personal judgments and decrees, the idea that it could serve only as the basis for a proceeding *in rem* or *quasi in rem* being a later development in the law.[11] Although it is now generally accepted as a fundamental principle that a judgment or decree can not be rendered on a mere publication of process unless the court in some way has jurisdiction of a *res* or something in the nature of a *res,* this conclusion has not been reached without much conflict in the decisions as to what facts are sufficient to constitute the jurisdiction and at what stage of the proceeding the jurisdictional facts must exist. When seizure of a *res* is recognized as the fact which establishes the jurisdiction, the controversy is concerned with the time of the seizure. Essentially, the problem seems to resolve itself into an inquiry whether the seizure is merely a condition precedent to the *rendition*

[10] See Hartzel v. Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451(1896).
[11] *Idem.*

of judgment, or whether it is a condition precedent, not only to the rendition of judgment, but also to the *antecedent procedure* upon which the judgment is based; in other words, whether it is essential only that the judgment be directed against a *res* then brought within the control of the court, or whether the whole procedure, at every stage, must be directed against a *res* then under the court's control.[12]

In attachment cases, to which the present discussion is confined, there is little disagreement as to the necessity of seizure of the attachment *res* at some time before judgment. It is now generally held that a court has no jurisdiction to render judgment in an attachment proceeding based solely on an order of publication unless the attachment *res* has been subjected to some method of seizure and so brought within the jurisdiction of the court before judgment.[13] As to whether seizure is further necessary as a condition precedent to the procedure prior to judgment, there is no little controversy. It has been variously held (1) that jurisdiction to entertain the suit and proceed with the publication of process is "acquired by filing the petition, affidavit and bond," without any levy upon the attachment *res;*[14] that the mere fact that the attachment *res* is within the territorial jurisdiction of the court gives the court jurisdiction to proceed without a levy;[15] (3) that levy upon the attachment *res* is a prerequisite to the publication of process.[16]

In some jurisdictions where the controversy has not been settled by considerations hereinafter mentioned, the decisions have been controlled by constructions which the courts have placed upon an ambiguous phrase which occurs in many of the statutes, to the effect that the court may proceed with the publication of process when it has "jurisdiction of the subject of the action".[17] Some courts have construed the words "subject of the action" to

[12] "There are two theories, both supported by authority. One is that, since the judgment is essentially in rem, the seizure must be made before the process is issued for the substituted service. The other is that seizure at any time before rendition of judgment is sufficient to confer jurisdiction." Porter v. Duke, 34 Ariz. 217, 270 Pac. 625 (1928).

[13] See cases cited in three prior notes and cases cited hereinafter.

[14] Tufts v. Volkening, 122 Mo. 631, 27 S. W. 522 (1894).

[15] "The essential fact upon which jurisdiction is made to depend is, property of the defendant in the state, and not whether it has been attached." Jarvis v. Barrett, 14 Wis. 642 (*591, 1861). *Accord*: Closson v. Chase, 158 Wis. 346, 149 N. W. 26 (1914).

[16] See note 12 *supra* and cases cited in note 22 *infra.*

[17] See the dissenting opinion of Corliss, J., in Hartzel v. Vigen, 6 N. D. 117, 69 N. W. 203 (1896).

mean "action" or "cause of action", while other courts have construed them to mean the *res* or property which is the subject of the attachment, and hence have reached the conclusion that acquiring "jurisdiction of the subject of the action" means a levy upon the attachment *res*.[18] Since there is no such statute in West Virginia, the problems involved must be settled in this state on other considerations.

In the midst of the controversy among the state courts, as outlined above, came a famous decision by the Supreme Court of the United States, *Pennoyer v. Neff*,[19] which influenced the whole future drift of the controversy. Since the influence of this case so thoroughly permeates the holdings in subsequent decisions, it will be advisable, before proceeding further, to analyze definitely the scope of its adjudication and the reasoning upon which it is based.

The plaintiff, Pennoyer, owned land in the state of Oregon. He was a nonresident of that state. Mitchell sued him in an Oregon state court to recover an attorney's fee. Pennoyer was not personally served with process and he made no appearance to the action. A personal judgment was taken against him for the amount of the claim, based wholly on a publication of process. Thereafter, land which Pennoyer owned in Oregon was sold under an execution issued upon this judgment, and was purchased by the present defendant Neff. The present action was brought by Pennoyer against Neff to recover the land, on the theory that the judgment taken by Mitchell against Pennoyer was void because there was no personal service on, or appearance by Pennoyer, and there was no attachment or other seizure of the land before judgment to form the basis of a judgment *in rem*, and therefore Neff's title was void. Held, that the Oregon judgment in favor of Mitchell was void, for the reasons stated, and that Neff got no title under the execution sale.

It should be noted that what the court actually decided in this case, since there was no seizure of the property until after judgment, was that there could be no personal judgment on a mere publication of process and that there could be no judgment *in rem* unless the property was seized *before judgment*. These facts have been seized upon by some of the state courts in order to minimize the effect of *Pennoyer v. Neff*, by way of holding that there is no particular time before judgment at which the property must be seized, but

[18] *Ibid.*
[19] 95 U. S. 714, 24 L. Ed. 565 (1877).

that seizure at any time before judgment is sufficient. Wherefore it is important to analyze the principles upon which the decision is based and seek to determine whether they have a broader application than the minimum which was necessary to dispose of the facts to which they were actually applied.

If the court is to be understood as requiring that the property shall be seized merely at some time before judgment, the following statements may be taken as a fair exposition of the rule.

> "The want of authority of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligation at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered judgment."

This bare statement of the rule, standing alone, might be taken as indicating an intention to prescribe a more or less artificial requirement for the mere purpose of making a formal distinction between judgments *in rem* and judgments *in personam*. That the requirement, at least in most cases, would be wholly artificial, if seizure of the property immediately before judgment is held sufficient, would seem to be beyond controversy. However, the court does not stop with these statements, but states practical reasons for its decision which would not be satisfied by mere seizure of the property at any time before judgment. After calling attention to the fact that, in the great majority of cases, where process against a party is published, he will never have seen the publication, the court makes the following statements.

> "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of the proceedings taken where property is once brought under control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of

> its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."

This is not a positive statement that the reason for the rule requires seizure of the property before publication of process, although it may be surmised that such was what the court had in mind, whether basing the requirement on formal jurisdictional prerequisites or on the necessity of giving adequate notice to the defendant. Whether it is possible to satisfy reasons upon which the rule is intended to be based by seizure of the property after the order of publication is made but some time before judgment, would seem to depend upon what the court requires by way of jurisdiction to proceed *in rem*. If the rule intended is predicated on assumption by the court that not only the judgment, but likewise the whole procedure leading up to the judgment, must be *in rem* against a *res* continuously under control of the court, then of course the publication of process, being a part of the procedure, must be preceded by seizure of the *res*. On the other hand, if the requirements of jurisdiction to proceed *in rem* will be satisfied by a mere seizure before judgment, and an earlier seizure is required only for the practical purpose of giving notice to the defendant, then it does not necessarily follow that the seizure must precede the publication, but a seizure after publication (or at least after publication has started) but a reasonable time before judgment may be sufficient. On which one of these considerations the court intended to place primary emphasis, or whether it intended to base its decision on both, as equally decisive or meaning the same thing, is not clear. It may have assumed (if it did so assume) that the seizure must precede the publication because the whole procedure must be *in rem*, or it may have indulged in this assumption in order to provide a means of insuring that the seizure shall be made a sufficient time before judgment to give the defendant adequate notice. If the latter consideration is the controlling one, then it may result that seizure after publication, but within a reasonable time before judgment, will be sufficient.

With reference to the binding force of the principles announced in *Pennoyer v. Neff* on the procedure in state courts, it should be noted that the judgment attacked in that case had been rendered before adoption of the Fourteenth Amendment to the Federal Constitution. The court indicates that the principles

announced in *Pennoyer v. Neff* should apply with still greater force since the adoption of this amendment.

> "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted on the ground that the proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."

Since the decision of *Pennoyer v. Neff*, a few of the courts have wholly ignored it in determining the time when an attachment must be levied when the proceeding is based on publication of process.[20] Most state courts, however, have considered themselves bound by it and the inhibitions of the Fourteenth Amendment, although the results reached and the views expressed are by no means in accord as to the restrictions which it imposes. Some courts hold that *Pennoyer v. Neff* will be satisfied with seizure of the *res* at any time before judgment;[21] others hold that the *res* must be attached before publication of process.[22] It would seem surprising that there has not been more inclination, by way of compromise between these two views, to hold that attachment after publication but a reasonable time before judgment is sufficient.[23]

If *Pennoyer v. Neff* undertakes to impose a requirement which will be of any substantial benefit at all to the defendant, in lieu of catering to a bare formality, it would seem that it must at the least contemplate levy of the attachment a sufficient time before judgment to give the defendant adequate notice to prepare a defense in opposition to entry of the judgment. This may be accomplished in two ways. The time of the levy may be fixed with reference to the time of the publication of process, as under the

[20] Tufts v. Volkening, 122 Mo. 631, 27 S. W. 522 (1894); State *ex rel.* Bank of Herrick v. Circuit Court of Gregory County, 32 S. D. 573, 143 N. W. 892 (1913); Closson v. Chase, 158 Wis. 346, 149 N. W. 26 (1914). Each of these cases holds that the order of publication may precede the levy of the attachment.

[21] Porter v. Duke, 34 Ariz. 217, 270 Pac. 625 (1928); Hartzel v. Vigen, 6 N. D. 117, 69 N. W. 203 (1896); dissenting opinion in Little v. Christie, 69 S. C. 57, 48 S. E. 89 (1903).

[22] Dimmerling v. Andrews, 236 N. Y. 43, 139 N. E. 774 (1923); Hartzel v. Vigen, dissenting opinion, 6 N. D. 117, 69 N. W. 203 (1896); Little v. Christie, 69 S. C. 57, 48 S. E. 89 (1903); Cosh-Murray Co. v. Tuttich. 10 Wash. 449, 38 Pac. 1134 (1895); Baumgardner v. Bono Fertilizer Co., 58 Fed. 1 (C. C. W. D. Va. 1893). The last case is based on Pennoyer v. Neff and the Virginia statute.

[23] See dissenting opinion in Hartzel v. Vigen, 6 N. D. 117, 67 N. W. 203 (1896), expressing the view that Pennoyer v. Neff would be satisfied by such a standard.

former West Virginia statute, or it may be fixed with reference to the time of entry of the judgment. In either case, it would seem desirable to have the time definitely fixed by statute, in order to relieve litigants from the uncertainty that will prevail, and the courts from the troublesome task that they must assume, if the courts are required in each case to determine what is a reasonable time. Some courts have got rid of the uncertainty, at the same time insuring that they will not contravene any restrictions imposed by *Pennoyer v. Neff*, by construing that case as requiring levy of the attachment before publication of process.[24] In New York, after a period of uncertainty as to the meaning of *Pennoyer v. Neff*, the uncertainty was resolved by express statutory requirement that levy of the attachment precede the publication of process.[25]

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NOTE ON STATHAM'S ABRIDGMENT

For three centuries or so, it has been customary among legal historians to admit a woeful lack of knowledge when it came to identifying the compiler of Statham's *Abridgment*.[1] Professional tradition originally ascribed the work to Nicholas Statham,[2] but

[24] See cases cited in note 22 *supra*.
[25] Dimmerling v. Andrews, 236 N. Y. 43, 139 N. E. 774 (1923).

[1] WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY (1925) 206: "We shall speak of Statham's *Abridgment* in order to avoid constant periphrasis, but, so far as we know, there is no direct proof, external or internal, that Statham compiled it. In fact, we have no positive knowledge of who was the author or of the date of the printing of the book. What we know of Statham himself is little enough. Even his Christian name is uncertain, and so is the spelling of his surname."

[2] DUGDALE, ORIGINES JURIDICIALES (1666) 58; 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (1923) 543; RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY (1936) 321. The issue as to authorship arises out of the absence of any title-page, as well as the complete lack of evidence within the printed book itself regarding the editorial source.

Y. B. 4 Edw. II, SELDEN SOCIETY, vol. 26 (1914) INTRODUCTION by G. J. TURNER, xxxi-xxxii: "Statham's Abridgment has been generally assigned to a certain Nicholas Statham, a member of Lincoln's Inn who became Lent reader of that Society in 1471 and died in the following year. His book probably printed at Rouen about eighteen years after his death by Guillaume le Tailleur for Richard Pynson of London, though quite possibly printed in London by Pynson himself, is remarkable as being, apart from a few Year Books, our earliest printed law book. Though generally described in catalogues as an 'Abridgment of Cases to the end of K. Henry VI.,' it has in fact no title-page, and its authorship can only be deduced from the fact that it was consistently described as 'Statham' by writers and reporters of the sixteenth century . . . . It may be observed, however that it contains a few notes of cases of the reign