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COMMENT ON THE CASE OF HAGGERTY v. SHERBOURNE MERCANTILE CO. et al.

In November of 1947 the Supreme Court of Montana rendered a decision[1] which has raised several problems for the consideration of attorneys in Montana.

A long period of time is covered in the action, but the facts are fairly brief. On August 11, 1932, the plaintiff filed a complaint and had summons issue. The defendants were a corporation and an individual defendant. The defendants learned of the action and hired an attorney and in writing authorized him to appear in the action and admit service for them. The defendant's attorney then wrote to the attorney for the plaintiff and said, that if the summons and a copy of the complaint were sent to him, he would make an admission of service. In about seven weeks the plaintiff's attorney mailed the documents requested to the defendant's attorney, and he wrote back saying that he had received them and that he would submit to the jurisdiction of the court by filing an answer. In a later exchange of letters, the defendant's attorney wrote that he had been busy, but would find time to file an answer probably the next week. This was the last communication and took place about seven months after the filing of the complaint.

On December 26, 1935, some three years and four months after the commencement of the action, the plaintiff had the default of the defendant entered upon filing in court the original summons with copies of the letters written by the attorney for the defendants. On February 19, 1936, a default judgment was rendered against the defendants and written notice was given to them of that fact.

On January 12, 1946, the defendants through their attorney filed a motion to set aside the order of default and the judgment. On May 27, 1946, the District Court granted this motion, and dismissed the action. The Supreme Court of Montana overruled the District Court and vacated the order granting defendant's motion.

It has been said that "mere knowledge of the pendency of an action is not sufficient to give the court jurisdiction."[2] Thus, in our judicial system provision has been made to inform the defendant of the action before the court.[3] Another court has said

[1]Haggerty v. Sherbourne Mercantile Co. et al (1947) .....Mont....., 186 P.(2d) 884.
[2]Rosenberg v. Bricken et al. (1946), 302 Ky. 124, 194 S.W.(2d) 60.
[3]R.C.M. 1935, Code of Civil Procedure, Chapter 31, Sections 9105-9124.

that a return is necessary only because the law makes it so and if the law doesn't require a return, none is necessary.[4] But in Montana it seems that a return is required by law.

The Montana Code for over fifty years has contained the following language.[5]

> ". . . 7. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, *unless summons have been issued within one year, and served and return made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years.*"

Waiver has been defined as an intentional relinquishment of a known right after knowledge of the facts.[6] The majority opinion in the Sherbourne case says this with regard to waiver:

> "The provisions of subdivision 7 of section 9317 revised codes, have no application in cases such as this where the summons shall have been issued within one year and where defendant, in writing, shall have *waived* the service thereof within three years after the commencement of the action."

Certainly it is true that the correspondence did constitute a waiver of certain sections of the Montana Code[7] dealing with service of process on corporations. But if the majority means to imply that there was no need for any service of process in this action, it would seem that they were in error. Here the defendants did not waive the issuance of summons as provided for in the Montana Code.[8] Rather it seems that one mode of service of process was waived and another substituted in its place. On other occasions the Supreme Court has said that service of process might be waived.[9]

[4]Strandberg v. Stringer, Sheriff et al. King County (1923), 125 Wash. 358, 216 P. 25.
[5]R.C.M. 1935, Sec. 9317, Sub. 7.
[6]Wienke v. Smith (1918), 179 Cal. 220, 176 P. 42; Hosch v. Howe (1932), 92 Mont. 505, 16 P.(2d) 699; Mathers v. Wentworth & Irwin (1933), 145 Or. 668, 26 P.(2d) 1088; Swords v. Occident Elevator Co. (1924), 72 Mont. 189, 232 P. 189.
[7]R.C.M. 1935, §9110 and 9111.
[8]R.C.M. 1935, §9106.
[9]State ex rel Murphey v. Second Judicial District Court in and for Silver Bow County et al. (1935), 99 Mont. 209, 41 P.(2d) 1113.

In Montana the proof of the service of summons and complaint may be had by the written admission of the defendant.[10] In this instance there was a writing which admitted that the summons and a copy of the complaint was received. The majority opinion feels that this was a sufficient written admission of service. But they go further and make the statement that,

> "the voluntary written admission made by defendants two months and one day after this suit was instituted is equivalent to 'return made,' subdivision 1, sec. 9317, supra, by sheriff within such time in cases where compulsory service of process is relied upon to establish that the court has acquired jurisdiction over the person of the defendants."

Justice Angstman takes a different view and says,

> "The admission of service constitutes proof of service and has the same effect as actual service but the proof must still be filed in court within the three-year period because the admission when filed with the summons constitutes the 'return'."

The basic issue between the dissent and the majority opinion seems to be whether in all cases some evidence of service of process must be filed in court within three years, or whether it is only where there is a return by some officer of the court, that it need be filed within three years under section 9317.

The general rule is that it is the service of process that gives a court jurisdiction of the person and not the proof thereof.[11] Montana and California[12] have added to this general rule the provision that the return must also be made within three years or the jurisdiction of the court over the person will be lost. The reason for the adoption of this provision is stated by Justice Angstman in his dissenting opinion to be, "to hasten prosecution by imposing the penalty of dismissal for want of prosecution."

The Montana Code gives us four ways in which proof of service may be made.[13] These four ways are, by the certificate of the sheriff, the affidavit of any other person making personal service, the affidavit of the printer where service is by publication, and lastly the written admission of the defendant.

[10]R.C.M. 1935, §9122.
[11]Bourgeious v. Santa Fe Trail Stages, (1939), 43 N.M. 453, 95 P.(2d) 204; State ex rel. Buckworth v. District Court of Seventeenth Judicial District et al. (1938), 107 Mont. 97, 80 P.(2d) 367; R.C.M. 1935, §9123.
[12]California Code of Civil Procedure, §581a.
[13]R.C.M. 1935, §9122.

Does Section 9317 of our code apply merely in case proof is by the first of these four?

> By some authorities a return has been defined as,[14]
> "a short account in writing made by an officer in respect to the manner in which he has executed a writ or process; it is his official statement of the acts done by him under the writ in obedience to its directions and in conformity with the requirements of law."

A minority of decisions have held that the return is not simply the indorsement of the officer on the process, but is the actual filing of it in the office from which it was issued.[15] Provided that there are not code provisions to the contrary, the above quotation seems to lay down the general rule.[16]

However, it seems that section 9317 means that evidence or proof must be filed with the court within three years of the service of summons or the court loses its jurisdiction. Certainly if this is not true the statute loses much of its effectiveness. How would the court ever on its own motion or anyone else's be able to dismiss an action? Always there would be the thought that proof of the service of summons might be supplied by some other means than the certificate of the sheriff. It appears that section 9317 requires a broader interpretation of the word 'return' than is common. Further it appears that the words 'return made' in that section would require the bringing back into court of the certificate or other proof of service[17]

In Montana we have not previously had a controversy in connection with this statute, but California which has had a very similar statute[18] for a long period of time has on numerous occasions interpreted it. One California case[19] has this to say,

> "The failure of the plaintiff to cause the summons, with proof of service thereof, to be returned within three years after the commencement of the action, deprived the court of jurisdiction to take any other action than to dismiss the case."

[14]American Jurisprudence, Volume 42, Process, §117.
[15]*Id.*
[16]Montgomery Ward & Co. v. District Court (1944), 115 Mont. 521, 146 P.(2d) 1012; Schmidt v. Schmidt (1939), 108 Mont. 246, 89 P.(2d) 1020.
[17]Johnson v. Curlee Clothing Co. (1925), 1120 Okla. 220, 240 P. 632.
[18]California Code of Civil Procedure, §581a.
[19]Ransome-Crummey Co. v. Wood et al., Dist. Ct. of Appeal, First District, Division 1, California, (1919), 180P.951. Similar—Modoc Land & Live Stock Co. v. Superior Court of Modac County et al. (1900), 128 Cal. 255, 60 P. 848.

It will be noticed that the court in that quotation says that it is the proof of service which must be filed within three years. If we follow that reasoning then it is apparent that the admission of service in this case must also have been filed within three years of the date of the commencement of the action or the court lost its jurisdiction over the defendant.

The majority go further than this however. They argue that an appearance was had in this case. Their argument is that the various communications between the opposing counsel constituted an appearance. Justice Angstman says a flat 'no' to that proposition. It is possible that a stipulation between counsel may constitute an appearance,[20] but on the facts of this case how can it be argued that the correspondence constituted more than an admission of service. Different elements enter into a consideration of whether an admission was made or an appearance had.[21] No broad rule need be laid down, but an appearance out of court must at least be made with a tacit recognition of the court's jurisdiction over the defendant.[22] Here the defendants did not recognize that the District Court had jurisdiction at the time that the admission was made because the defendants said that they would file an answer and thus submit to the jurisdiction of the court.

The majority opinion in the *Sherbourne Case* seems also to say that the motion to set aside the judgment was such an appearance by the defendant as to cure the defects. It seems that the rule in Montana[23] is different and that this is only a special appearance for the purpose of attacking the jurisdiction of the court. However, there is some conflicting law in Montana[24] on this point. Justice Angstman says as to this contention,

> "Certainly my associates do not mean to infer that when a person moves to set aside a judgment void for want of jurisdiction when entered, he thereby cures the jurisdictional point retroactively."

The majority also discusses the fact that no appeal was made from the judgment nor was application made to set aside

[20]Kleinschmidt v. Morse (1868), 1 Mont. 100.
[21]Noyes v. Noyes et al. (1939), 110 Vt. 511, 9 A.(2d) 123. Dauphin v. Landrigen (1925), 187 Wisc. 633, 205 N.W. 557.
[22]Templeman v. Hester (1940), 65 Ohio App. 62, 29 N.E. (2d) 216.
[23]State ex rel. Goldstein v. Dist. Ct. of Second Judicial District in and for Silver Bow County (1934), 96 Mont. 475, 31 P.(2d) 311.
[24]Smith v. Franklin Fire Insurance Co. of Philadelphia (1921), 61 Mont. 441, 202 P. 751.

the judgment within six months as provided by statute.[25] However, in this instance that judgment was void for want of jurisdiction and could be attacked at a later date.[26]

There is also an inference that now the defendants are estopped[27] from raising the jurisdictional point. This seems to be because of the committments of counsel, and also because of the fact that no appeal was made within the six month period provided by statute. The majority of the court seem to mention estoppel not as the basis for their opinion, but rather as dictum. A query could be raised as to whether all the elements necessary to constitute an estoppel are present. Certainly for counsel to wait twenty-nine months for an answer to be filed seems like an unwarranted reliance.

It would appear that the Supreme Court of Montana arrived at the wrong conclusion in the *Sherbourne Case*. Justice Angstman sums up well in this statement:

> "There is no case supporting the essential conclusion that admission of service not exhibited to the court constitutes a return of summons at the time the admission was made."

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[25]R.C.M. 1935, §§9187 and 9732.
[26]State v. District Court of the Ninth Judicial District in and for Gallatin County, (1909), 38 Mont. 166, 99 P. 291, 65 L.R.A. (N.S.) 1098, 129 Am. St. Rep. 636; State v. District Court of the Tenth Judicial District in and for Fergus County (1919), 55 Mont. 602, 179 P. 831. Hodson v. O'Keefe (1925), 71 Mont. 322, 229 P. 722; Ealy v. McGahen (1933) 37 N.M. 248, 21 P.(2d) 84; 3 *Am. Juris.*, Appearances, §22; 50 Corpus Juris 598, (92).
[27]Waddell v. School Dist. No. 2 of Yellowstone County (1925), 74 Mont. 91, 238 P. 884.

INHERITANCE TAX ON JOINTLY OWNED PROPERTY A COMMENT ON IN RE PERIER'S ESTATE[1]

I.

Until recently, the lawyers of Montana were prone to believe that jointly owned property was subject to inheritance tax at 50% of its full market value. The *Perier's Estate* decision has made this line of thought obsolete, and removes what was thought to be a safe technique for minimizing inheritance tax. In place of that simple mathematical formula, the elusive "contemplation of death" concept must now be considered

[1]State Board of Equalization v. Cole (1948) .....Mont....., 195 P.(2d) 989.