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CPLR 308(5): Substituted Service Permitted in Divorce Action

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return the money, an action was commenced. The court found that the complaint sounded in both tort and contract and decided that the operation of a New York stock account constituted the transaction of business in the state. Additionally, under 302(a)(2), the court found that the defendant's intention to defraud the plaintiff by receiving the proceeds from securities which he allegedly knew were wrongfully in his account, subjected him to jurisdiction for commission of a tortious act within the state.[33]

This case further broadens the scope of CPLR 302(a)(2). On its facts, it is clearly correct. Nevertheless the bench and bar alike must remain vigilant to the danger of allowing "a plaintiff . . . , merely by alleging that a contracting party never intended to fulfill his promise, [to] create a tortious action in fraud. . . ."[34] Such simple conversion of contract actions into tort actions must not be allowed.

CPLR 303: Service of summons upon attorney.

CPLR 303 provides that commencement of an action in New York by one not subject to personal jurisdiction in the state is an automatic designation of his attorney as his agent for the service of process during the pendency of the action. It applies if the second action could have been asserted as a counterclaim in the first action, had the latter been brought in the supreme court. This section has now been amended[35] to incorporate by reference CPLR 308, thereby making the five methods of service provided in CPLR 308 available when service is to be made upon the attorney. Case law had previously held that only personal delivery to the attorney was sufficient.[36]

CPLR 308(5): Substituted service permitted in divorce action.

CPLR 308(5) invests the judiciary with discretionary power to devise modes of serving a natural person when all other statutorily pre-

33 *Id.* at 363, 330 N.Y.S.2d at 150. In Hertz, Newmark, & Warner v. Fischman, 53 Misc. 2d 418, 279 N.Y.S.2d 97 (N.Y.C. Civ. Ct. N.Y. County 1967), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 436, 446 (1968), the court held that it did not have jurisdiction over a New Jersey resident who traded on the New York Stock Exchange through a New Jersey branch of a New York brokerage firm. The defendant telephoned his orders to the plaintiff's New Jersey representative who contacted the plaintiff's main office in New York. The court stated that "where the agent and not a third party sues the principal, the agent's act will confer jurisdiction over the principal only if the agency was an exclusive one." *Id.* at 421, 279 N.Y.S.2d at 100, *citing* A. Millner Co. v. Noudar, Lda., 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966), *discussed in The Quarterly Survey*, 41 ST. JOHN'S L. REV. 279, 293 (1966).

34 Stanat Mfg. Co. v. Imperial Metal Finishing Co., 325 F. Supp. 794, 796 (E.D.N.Y. 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 362 (1971).

35 L. 1972, ch. 487, at 1000-01, eff. Sept. 1, 1972.

36 Twentieth Century-Fox Film Corp. v. Dupper, 33 App. Div. 2d 682, 305 N.Y.S.2d 918 (1st Dep't 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 773 (1970).

scribed means have failed. Under this statute, virtually any method[37] that meets the due process standard, *i.e.*, which is reasonably calculated to apprise the defendant of the action pending against him, may be employed.[38] However, in divorce actions alone, DRL 232 mandates service by publication if personal service within or without the state can not be effected.[39]

In *Prince v. Prince*,[40] the petitioner, a New York City welfare recipient, sought to compel the state or the city to pay the cost of publication of a divorce summons. The United States Supreme Court, in *Boddie v. Connecticut*,[41] had stated that publication is the weakest method of service for giving notice and that due process may be better satisfied by "service at defendant's last known address by mail and posted notice."[42] The Supreme Court, Richmond County, thus found CPLR 308(5) a viable alternative to the "no substituted service rule" of DRL 232.[43] Finding that it had jurisdiction over the defendant, the court, in the exercise of its discretion, utilized CPLR 308(5) to prescribe a means for giving notice of the pending action.[44] In lieu of publication of the summons, the court ordered the petitioner to mail copies of the summons to the defendant's last known address, his last known employer, and his sister.[45]

Prince is laudable. It pragmatically implements the philosophy of *Boddie* by reducing the cost of service in a divorce action to the expense of mailing, thereby avoiding the problem of who should bear the onerous publication costs of the indigent. In addition, *Prince*, by refusing to restrict non-personal service in a divorce action to publication, avoids the constitutional issue latent in the unique mandate of DRL 232.[46]

CPLR 327: Recent developments in the area of forum non conveniens.

Case law[47] and CPLR 302 have offered litigants greater access to New York courts. This has necessitated the liberalization of the doctrine

37 *See* 7B McKinney's CPLR 308, commentary at 212 (1972).

38 *Id.*

39 Note, however, that CPLR 316(b) states that mailing of the summons should accompany an order for service by publication "unless a place where such person probably would receive mail cannot with due diligence be ascertained. . . ."

40 69 Misc. 2d 410, 329 N.Y.S.2d 963 (Sup. Ct. Richmond County 1972).

41 401 U.S. 371 (1971).

42 *Id.* at 382.

43 69 Misc. 2d at 411, 329 N.Y.S.2d at 965.

44 *Id.*

45 *Id.* at 412, 329 N.Y.S.2d at 965.

46 *See The Quarterly Survey*, 46 St. John's L. Rev. 768, 781 (1972).

47 *See, e.g.*, Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *reargument denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968); Seider