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CPLR 314(1): Limitation on Service Without the State

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of the process server, who had died prior to the referee's hearing. The defendant, however, who resided at a hospital, denied seeing or finding the summons and complaint affixed to the door of his room. In the opinion of the referee, the plaintiff failed to prove by a fair preponderance of the evidence that the summons and complaint were properly affixed.

The supreme court refused to confirm the referee's report, holding that under CPLR 306,[33] such affidavit, as proof of service, was all that was required of plaintiff in order to present a prima facie case. The court further stated that defendant's contention that he did not see the summons and complaint did not overcome the affidavit, since "a reading of CPLR 308 does not require that a defendant see or find the summons and complaint." [34] It is sufficient if service is *"calculated* to insure that actual notice is given to the defendant." [35]

It is submitted that the court is also supported in its decision by CPLR 4531, which provides that "an affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead. . . ."

CPLR 314(1): Limitation on service without the state.

In *Chittenden v. Chittenden,*[36] previously reported in the *Survey,*[37] defendant's first wife, a New York domiciliary, commenced an action to establish the invalidity of a Mexican divorce obtained by her husband. The supreme court, Monroe County, held that the defendant's second wife, a non-domiciliary, could be validly served pursuant to CPLR 314,[38] since the court had acquired in rem jurisdiction by virtue of the fact that the plaintiff's marital res was located within the state. However, the court did not determine whether the additional relief sought, viz., judgments declaring (1) the invalidity of the husband's second marriage, and (2) the validity of his first marriage, could be obtained by service upon a non-domiciliary outside the state.

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[33] "Proof of service. It shall be in the form of a certificate if the service is made by a sheriff or other authorized public officer or in the form of an affidavit if made by any other person. . . ."

[34] Denning v. Lettenty, 48 Misc. 2d 185, 186, 264 N.Y.S.2d 619, 621 (Sup. Ct. N.Y. County 1965).

[35] FIFTH REP. 266. (Emphasis added.)

[36] 46 Misc. 2d 347, 259 N.Y.S.2d 738 (Sup. Ct. Monroe County 1965).

[37] *The Biannual Survey of New York Practice,* 40 ST. JOHN'S L. REV. 142 (1965).

[38] "Service may be made without the state by any person authorized by section 313 in the same manner as service is made within the state:

1. in a matrimonial action. . . ."

Sacks v. Sacks[39] involved an action brought by the first wife, a New York domiciliary, to have the marriage between her husband and his second wife, both non-domiciliaries, declared invalid. The court reasoned that since it was the marital status of the defendants that was being primarily affected, it was necessary that their marital res be within the state. Since defendants were non-domiciliaries, the marital res was in a foreign state. Therefore, the court lacked jurisdiction to adjudicate their marital status. The court noted, however, that under the *Chittenden* rule, jurisdiction existed to declare the nullity of the Mexican divorce because in such a case, the marital status of plaintiff, a New York domiciliary, would be primarily affected.[40] In addition, *Chittenden* appreciates the second wife's interest in the action and treats her as a necessary party, requiring that she be given notice.

Thus, the validity of service without the state under CPLR 314(1) depends on whether the court has jurisdiction over the cause of action. Where the cause of action primarily affects a domiciliary's marital status, the location of that marital res within the state gives the courts in rem jurisdiction upon which service can be based. Where the cause of action primarily affects a non-domiciliary's marital status, the courts do not have in rem jurisdiction, since that marital res is not within the state. Therefore, since the court does not have an in rem basis, service outside the state on the non-domiciliary is without effect.

It can be seen, however, that by declaring invalid the husband's Mexican divorce, the court is, for all practical purposes, voiding the second marriage. It would seem, then, that since the result would be the same in either case, the court instead of dismissing the complaint as to the non-domiciliary second wife, should have allowed the plaintiff-first wife to amend the pleadings.[41]

CPLR 325(a): Lack of jurisdiction no bar to removal.

Under CPA § 110, no action was to be dismissed on the ground of a mistake in the choice of court. In such a case, a justice of the supreme court could order the removal of the action to a proper court.

There were, however, conflicting constructions of this section. Some courts dismissed for lack of jurisdiction unless there was at least a semblance of jurisdiction,[42] while others held that removal was proper even where the court completely lacked jurisdiction.[43]

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[39] 47 Misc. 2d 1050, 263 N.Y.S.2d 891 (Sup. Ct. N.Y. County 1965).

[40] *Id.* at 1052, 263 N.Y.S.2d at 895.

[41] CPLR 3025(b).

[42] Application of Yaras, 283 App. Div. 214, 219, 126 N.Y.S.2d 733, 738 (3d Dep't 1953), *aff'd*, 308 N.Y. 864, 126 N.E.2d 306 (1955); McCarthy v. Rocklin, 25 Misc. 2d 991, 206 N.Y.S.2d 853 (Sup. Ct. N.Y. County 1960).

[43] Taylor v. Goodrich, 284 App. Div. 928, 134 N.Y.S.2d 202, 203 (4th