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# Concerning Affidavits for Publication of Summons under the Washington Statute

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# CONCERNING AFFIDAVITS FOR PUBLICATION

OF

# SUMMONS UNDER THE WASHINGTON STATUTE

SERVICE of process by publication is not a common-law mode of of procedure, but a statutory creation. The rule, which is almost universal, that the statutes governing this matter must be strictly construed, and literally observed to give the court jurisdiction, is adhered to in this state.[1]

As a condition precedent to the exercise of the right to serve process by publication the statute requires the execution of an affidavit by the plaintiff, his agent or attorney, containing certain allegations. Without this affidavit a valid service by publication cannot be had.[2]

While the statute declares "upon filing" of the affidavit publication of summons may be made, and therefore, appears, under the rule of strict construction, to make the "filing" of the affidavit an essential prerequisite, yet the Supreme Court of this state has decided that a failure to file it until after publication is but an irregularity, "sufficient, perhaps, to warrant reversal of a judgment in a direct appeal, but insufficient on a collateral attack to render the judgment void."[3] And likewise the fact that an affidavit is not filed until some time after its verification is not material if the defendant is not thereby directly injured.[4] Injury may arise by reason of the defendant having become a resident of the state between the time of making the affidavit and its filing, or by reason of plaintiff, his agent or attorney making the affidavit learning of defendant's address between those dates.[5] It is the execution of a proper affidavit setting forth the requisite facts which must exist at the time the publication is made that is the material prerequisite to the right to publish summons.

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[1] *Lutkens v. Young,* 63 Wash. 452, 115 Pac. 1038 (1911) *Felsinger v. Quinn,* 62 Wash. 183, 113 Pac. 275 (1911) *Wick v. Rea,* 54 Wash. 424, 103 Pac. 462 (1909), *McManus v. Morgan,* 38 Wash. 528, 80 Pac. 786 (1905), *DeCorvet v. Dolan,* 7 Wash. 365, 35 Pac. 72 (1893) *Boyd v. Superior Court,* 6 Wash. 352, 33 Pac. 827 (1893), Rem. Comp. Stat. § 228, P C. § 8441.

[2] *Felsinger v. Quinn,* note 1, *supra; Goore v. Goore,* 24 Wash. 139, 63 Pac. 1092 (1901), *DeCorvet v. Dolan,* note 1, *supra.*

[3] *Tilton v. O'Shea,* 31 Wash. 513, 72 Pac. 106 (1903).

[4] *Whitney v. Knowlton,* 33 Wash. 319, 74 Pac. 469 (1903).

[5] *Whitney v. Knowlton,* note 4, *supra.*

In order to be effectual, the affidavit must contain a statement of all the facts specified in the statute,[6] which, however, need not be expressed in the wording of the statute.[7] The essential facts must appear in the affidavit itself, as omissions cannot be supplied by reference to other papers of record,[8] so that an affidavit which does not contain the averments required by the statute is insufficient although the omitted facts may appear in the complaint.[9]

Where an affidavit is insufficient to confer jurisdiction, jurisdiction cannot be conferred by the making and filing of an amended affidavit.

> "There are many defects that sometimes affect judgments that may be cured by amendment; such as the affidavit or return of service, because jurisdiction is obtained from the service itself and not from the proof of service. So the affidavit of publication of summons, or other errors or defects in the record, may be cured by amendment when they occur through the act or omission of the clerk of the court in entering, or in failing to enter, of record, and many other like matters may be cited in which the right to amend is recognized (citing authority)
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> "But we know of no instance, where jurisdiction is lacking, where it is held that jurisdiction may be conferred by amendment."[10]

The specific allegations that must be made are:

1. That "the defendant is not a resident of the state or cannot be found therein."[11] Since it is intended that a defendant shall be personally served with process when he is a resident of or within the state, amenable to process, the importance of this statement is obvious.

2. A statement of the place of residence of the defendant, or, if unknown, then a positive allegation that it is unknown.[12] A number of errors in wording have been noted by the courts. The most common error is the allegation that the "postoffice address" of the defendant is a designated place or is unknown. "Postoffice address" and "place of residence" are not synonomous, and so cannot be used interchangeably in affidavits for publication. This particular matter has not been directly passed upon in Washington. The conclusion

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[6] *Burns v. Stolze,* 111 Wash. 392, 191 Pac. 642 (1920) *Lutkens v. Young,* note 1, *supra; Felsinger v. Quinn,* note 1, *supra.*

[7] *Jesseph v. Carroll,* 126 Wash. 661, 219 Pac. 429 (1923).

[8] *Lutkens v. Young,* note 1, *supra.*

[9] *Felsinger v. Quinn,* note 1, *supra.*

[10] *Lutkens v. Young,* note 1, *supra.*

[11] Rem. Comp. Stat. § 228; P C. § 8441.

[12] See note 11, *supra.*

that such an allegation is insufficient is supported by decisions in other jurisdictions, and, as will be noted, inferentially in this. In North Dakota where the statute required, like the statute of this state, a statement of the "place of defendant's residence, if known to the affiant, and if not known, stating that fact," the Supreme Court held the averment that "the last known postoffice address" of the defendant "is unknown" was insufficient to confer jurisdiction.[18] The fact that a plaintiff may know the place of defendant's residence and yet be able to truthfully declare on oath that defendant's last known postoffice address is unknown to him, is deemed enough in itself to render such an allegation invalid as a substantial departure from the statute. The Court declared.

> "An examination of the authorities is conclusively against respondent's contention that the term residence and postoffice are interchangeable and synonymous, and that the statutory requirements of a disclosure as to the fact of residence is not complied with by a showing of fact of last known postoffice address.
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> "A glance at many authorities cited under 'residence' in vol. 7, WORDS AND PHRASES, will disclose that the term 'residence' has a definite legal meaning, i.e. as a place of one's abode, dwelling-house, or habitation. Conceding that the term 'address' is synonymous with 'abode' or 'residence,' the qualification wherein affiant swears to defendant's last known postoffice address may or may not in fact be a compliance with the requirements of the statute that the affidavit shall state 'the place of defendant's residence, if known to the affiant, and if not known, stating that fact,' according to whether the postoffice address does or does not properly designate the place of defendant's residence. For instance, one's residence may be within one state and his postoffice within another, in which case, if the postoffice be taken as his residence, an attachment could not issue or service by publication could not be had, while if the actual place of defendant's residence be stated either or both would be available. This is not only possible, but perhaps frequent as to those domiciled in either state who reside alongside of or near a boundary line between the states. We cannot hold a postoffice address to have been meant or intended to be synonymous with the mandatory statutory requirement that the place of defendant's residence, if known, shall be stated, and, if not known, that fact shall be stated, all as a basis for further proceedings in obtaining substituted service."

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[18] *Atwood v. Roan*, 26 N. D. 622, 145 N. W. 587, 51 L. R. A. (N. S.) 597 (1914).

Those who may deem this view too "technical," may profit by observing what the Court also said in this case:

> "If we depart in some particular from the plain statutory requirement, on a matter concededly jurisdictional, under a theory, as here advanced, of substantial compliance, not only is the rule, consonant with all previous decisions on such jurisdictional questions, disregarded, that such requirements are to be strictly construed, but there is imparted an element of uncertainty as to jurisdictional requirements in this and kindred proceedings in rem, where, if the plain language of the statute is adhered to as the guide, there can be neither uncertainty nor ambiguity"

This construction finds support in jurisdictions where the statute requires that an affidavit shall contain a statement of defendant's "post-office address," if known, or that it be stated his "postoffice address" is unknown. Under such a statute an averment that defendant's "residence" is a designated place or is unknown is held to be insufficient to confer jurisdiction.[14] As observed in one of these cases[15] involving the validity of the allegation that the defendant "is not now, and does not reside in this state, and that his present place of residence is to affiant wholly unknown"

> "The recital in the affidavit, to the effect that defendant's place of residence is to affiant wholly unknown may be true in fact and at the same time his postoffice address be fully within the knowledge of affiant. In other words, such recital is in no way equivalent to a statement that defendant's post-office address is at a certain place, or that such address is unknown. In actions founded upon constructive service of summons, the whole policy of the law is to lodge with defendant, if possible, a summons which, on its face, notifies him of the attack upon his property rights and gives him timely notice to appear in the court and defend, if he cares to do so. The law requires a sworn statement from the plaintiff stating the defendant's postoffice address, or, if not known, to recite that fact. If an affidavit omitting such statements should be held sufficient compliance with the statute, then the purpose of the law, as above suggested, could be easily defeated. It would enable the plaintiff having knowledge of defendant's postoffice address to suppress such knowledge, and thus evade the delivery of summons to defendant—the very thing the

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[14] *Empire Ranch & Cattle Co. v. Saul*, 22 Colo. App. 605, 127 Pac. 123 (1913) *Millage v. Richards*, 52 Colo. 512 122 Pac. 788 (1912) *Empire Ranch & Cattle Co. v. Gibson*, 23 Colo. App. 344, 129 Pac. 520 (1913) *Norris v. Kelsey*, 23 Colo. App. 555, 130 Pac. 1088 (1913) *Empire Ranch & Cattle Co. v. Goodrick*, 23 Colo. App. 385, 128 Pac. 473 (1912).

[15] *Empire Ranch & Cattle Co. v. Saul*, note 14, *supra*.

> statute seeks to accomplish. By the plain language of the section quoted, the affidavit for publication must state the postoffice address of defendant or that such address is unknown to the affiant. The omission of such statement from the affidavit renders it void, and does not justify an order for publication of summons based thereon."

In Washington in one case,[16] the plaintiff did not know defendant's place of residence but did know his postoffice address, and failed to mail a copy of the summons and complaint thereto. It was argued that the terms "residence" and "postoffice address" are not synonymous, and the fact that the plaintiff did know defendant's postoffice address did not prevent him from making in good faith an affidavit that he did not know defendant's residence. But the Court held the failure of the plaintiff to mail a copy of the summons to defendant's postoffice address was a fraud upon him, voiding the judgment. From this decision one may infer, since the Court did not decide the matter, that it recognized that residence and postoffice are not synonymous, else it would have decided that the judgment was void on the ground of insufficiency of the affidavit rather than on the ground of fraud.

Another not uncommon error, is the substitution of the word "whereabout" or "whereabouts" for "place of residence." For example, allegations are often made that defendant is not a resident of this state, etc., and his "whereabouts is" (and in some cases, it is said, his "whereabouts are"), unknown, or that defendant left the state at a designated date, or a given number of years ago, and his "whereabouts ever since have been and now are unknown." Such affidavits are wholly ineffectual. The word "whereabout," or "whereabouts," is not synonymous with "place of residence." This has been decided by the Supreme Court of North Dakota under a statute similar, as heretofore shown, to the statute of this state. That court, in considering the validity of an affidavit which read,[17]

> "That the defendant is not a resident of the State of North Dakota, and for that reason it will be impossible to get personal service on the defendant in the above-entitled action, that the present whereabouts of this defendant are unknown to your affiant;"

held that it was insufficient because it contained no statement that

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[16] *Noble v. Aune,* 50 Wash. 73, 96 Pac. 688 (1908).

[17] *Krumenacker v. Andis,* 38 N. D. 500, 165 N. W 524 (1917).

defendant's residence was unknown. Speaking of the word "whereabouts" used in the affidavit, and of the word "residence" used in the statute, the Court said.

> "These expressions have not the same meaning. It is clear that a person might be in a place or in many different places at different times without that place being his residence. Residence means the place where a person resides or stays with some degree of permanency. A person may be in a place or different places, any or all of which may be referred to as his 'whereabouts,' but none of which is his 'residence.' His residence may be a great distance from the places we have referred to. It might be in a different city or a different state, and a long distance removed from the places which may be referred to as his 'whereabouts.' The term 'whereabouts implies a kind of nomadic quality It to some extent implies a wandering from place to place, while on the other hand 'residence' implies permanency, and brings to our mind an abiding place for a continuance of time. The word 'whereabouts' having a clearly different significance to the word 'residence,' it is not synonymous with it, and is not interchangeable therewith in use or meaning."

The same Court had under consideration in another case[18] an affidavit which read.

> "That P is not a resident of this state, that prior to the commencement of this suit the defendant left this state, and upon information and belief affiant alleges that said defendant went to Canada, that the wherabouts of the defendant in Canada are unknown to this affiant or the plaintiffs of whom affiant has inquired, that the postoffice address of said defendant is unknown to affiant and to the plaintiffs herein."

Holding this affidavit void, the Court declared.

> "Affiant might know of the residence or believe the residence of the defendant to be in an adjoining state, and still truthfully make the qualified affidavit as to the defendant's whereabouts."

This affidavit just mentioned is a fair example of the inexcusable negligence or incompetency some affidavits expose. Instead of the simple statutory declaration that the defendant's place of residence is unknown, there is set out therein two wholly unnecessary and ineffectual statements, viz., (1) that defendant's whereabouts are unknown, (2) that his postoffice address is unknown.

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[18] *Jablonski v. Piesik*, 30 N. D. 543, 153 N. W 274 (1915).

In Illinois, where the statute in force required that the residence of the defendant, if known, should be stated, or that upon diligent inquiry it cannot be ascertained, an issue in one case[19] was the sufficiency of an affidavit which read,

> "That the defendant formerly resided at the premises located at and known as 5559 State street, Chicago, Illinois; that he has removed from said premises to parts unknown to the complainant, and, although affiant has made diligent search and inquiry among the neighbors and acquaintances of said defendant, he is unable to ascertain his present whereabouts, and affiant does not know his whereabouts."

Of this affidavit the Court said.

> "None of the requirements of the statute are met by the affidavit filed. It does not appear that upon due inquiry the defendant could not be found, or that his place of residence cannot be found upon diligent inquiry. It appears that the defendant removed from his former place of residence to parts unknown to the complainant, and that upon diligent inquiry among his neighbors and acquaintances complainant is unable to ascertain and does not know his present whereabouts. But though his whereabouts on May 8, 1902, when this affidavit was made, may have been unknown, it might be a matter of no difficulty to ascertain his residence. The affidavit is required as to his residence, and not as to his personal presence. Although he had moved to parts unknown to complainant, and complainant was unable to ascertain his present whereabouts when he made the affidavit, it might well be, consistently with the truth of this affidavit, that the defendant could be readily found and served with process."

There is no excuse for a statement of the statutory requirements in other terms than those set out in the statute, which are plain. Other terms, as indicated, may be wholly insufficient, or give rise to doubt as to their sufficiency and as a result, to doubt as to the validity of the judgment entered in the cause, which of itself is a serious matter to parties interested. Thus, the allegation that affiant "is unable to find" defendant's residence has been held a "fair equivalent" to the statement that defendant's place of residence is unknown, and consequently sufficient.[20] But for the decision of this matter by the Supreme Court the validity of the proceedings would have remained doubtful.

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[19] *Anderson v. Anderson,* 229 Ill. 538, 82 N. E. 311 (1917).

[20] *Bardon v. Hughes,* 45 Wash. 627, 88 Pac. 1040 (1907).

3. Unless it be stated in the affidavit that the place of residence of the defendant is unknown, the allegation must be made that affiant

> "has deposited a copy of the summons (substantially in the form prescribed in section 233 of said codes and statutes) and complaint in the postoffice, directed to the defendant at his place of residence."[21]

This requirement must be complied with in order to secure the right to publish summons and give the court jurisdiction. It is only when defendant's place of residence is unknown, and when that fact is specifically stated in the affidavit that it is unnecessary to make this allegation.[22] As heretofore stated the "place of residence" and "post-office address" of a defendant are not necessarily the same—the terms are not synonymous. It may happen that a plaintiff may not know defandant's place of residence, and yet know his postoffice address, and therefore be able to truthfully allege that his place of residence is unknown. Notwithstanding that the statute does not require affiant to allege in his affidavit that the postoffice address of the defendant is a designated place, if known, or that it is unknown, if such be the fact, (as it does with respect to place of residence), or that a copy of the summons and complaint has been mailed to defendant's postoffice address when that is known and his place of residence is unknown, yet a failure to do the latter in such a case operates as a fraud upon the defendant and the court will not acquire jurisdiction of the cause.[23] The same result ensues when a copy of the summons and complaint is mailed, addressed elsewhere than to defendant's residence when known, or, if not known and his postoffice address is known, then to the latter.[24]

The quoted provision under immediate consideration is an example of carelessly worded statutes. What is meant by the parenthetical clause, "substantially in the form prescribed in section 233 of said codes and statutes"? Must the affidavit contain a statement of the form of the summons mailed? Section 233 of what codes and statutes are referred to? Considering that an affidavit must contain the statements prescribed by the statute to be effectual to give the right to publish summons and to confer jurisdiction, it is very essential that this provision be complied with in order to secure a valid judgment,

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[21] See note 11, *supra.*

[22] *Musselman v. Knottingham,* 77 Wash. 435, 137 Pac. 1012 (1914) *Latkens v. Young,* note 1, *supra; Boyd v. Superior Court,* note 1, *supra.*

[23] *Noble v. Aune,* note 16, *supra.*

[24] *Johnstone v. Peyton,* 59 Wash. 436, 110 Pac. 7 (1910).

and yet, in the face of this fact, the statute has needlessly left uncertain whether a statement of the form of summons mailed is essential or otherwise. In other words, is the parenthetical clause a mere direction, an instruction, as to the form of summons which must be mailed, or more than that, intended as a required statement to be made in the affidavit?

The act governing service of process by publication of which the section under consideration relating to affidavits is a part, was passed by the legislature at its 1893 session. In this original act the averment in question was thus set out:

> "That he has deposited a copy of the summons and complaint in the postoffice, directed to the defendant at his place of residence."

This 1893 act, without prescribing forms, provided for three kinds of summons, viz., (1) one for personal service within the state, (2) one for personal service without the state; (3) one for publication. This act did not designate which of these should be mailed to a nonresident defendant served by publication. There seems to have been some uncertainty in regard thereto in the minds of lawyers and laymen. For this reason, it appears, the legislature at its 1915 session amended section 9 of the act of 1893 (the section governing affidavits for publication) by an act entitled, "An Act relating to the commencement of civil action in the Superior Courts and amending section 233 of Remington and Ballinger's Annotated Codes and Statutes of Washington." (ch. 45, p. 146, Sess. L. 1915.) By this amendatory act said section 9 was changed to read as it now appears in the several codes. The only changes in said section 9 by this amendatory act were these: First, to put the words beginning "of which the return of the sheriff" and ending "is prima facie evidence" in parentheses, making these words of the original act a parenthetical clause; and, second, the insertion of the parenthetical clause "(substantially in the form prescribed in section 233 of said codes and statutes)." This reference "section 233 of said codes and statutes" contained in this amendatory act, is to section 233 of the code referred to in the title of the act, viz., Remington and Ballinger's Annotated Codes and Statutes of Washington, which gives the form of summons for publication prescribed by the Act of 1895. Considering the doubts heretofore mentioned it seems manifest this latter parenthetical clause was inserted to make that certain which had been uncertain, to point out, advise, designate and declare what form of summons should be mailed. Curved lines or brackets are punctuation marks. A parenthetical

clause is an explanatory or qualifying clause. So this one appears to be, particularly in view of the fact that the legislature which inserted this one, by the same act put in parentheses the prior clause mentioned which had been in the original act without being so inclosed. It seems clear that the use of parentheses in the first instance to enclose a clause wholly declaratory indicates the enclosure in parentheses of the latter clause in the same section was with the same intent. Again, the character of the language used in the latter clause indicates its character as declaratory, for an affiant to aver that he has mailed defendant a copy of the summons "in the form prescribed by section 233 of said codes and statutes" is not enlightening without designation of the code so referred to. However, it may be said that it is essential, jurisdictional, that the form of summons mailed be averred in the affidavit, because the fact that a proper summons has been mailed in the case where required is a jurisdictional prerequisite. Since the Supreme Court may very reasonably hold a statement in the affidavit of the form of summons mailed, is as essential as the statement of the other facts the statute requires—that the parenthetical clause is not merely explanatory and directory—it is certainly wiser and safer to hold that such a statement is necessary. A designation of the form in the language of the statute, or in other words clearly indicating that the proper form of summons was mailed appears to be sufficient.

The statute under consideration[25] prescribes the "cases" in which summons may be published, and, moreover, requires that the affidavit shall contain a statement of "the existence of one of the cases." This requirement is mandatory; a statement of the right "case" in the affidavit being essential to confer jurisdiction.[26] The "case" may be averred in the words of the statute, or the ultimate fact may be set out substantially in the language of the statute, it being unnecessary to state the probative facts.[27]

One of the "cases" specified is, "When the action is for divorce in the cases prescribed by law"[28] Inasmuch as divorces cannot be obtained except "in the cases," that is to say, for the causes "prescribed by law," this "case" could have been expressed better, as, for example, "When the action is for divorce." The words "in the cases prescribed by law"

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[25] See note 11, *supra.*

[26] *Burns v. Stolze,* 111 Wash. 392, 191 Pac. 642 (1920) *Pullman v. Pullman,* 92 Wash. 120, 158 Pac. 746 (1916), *Felsinger v. Quinn,* note 1, *supra.*

[27] *Mosley v. Donnell,* 42 Wash. 518, 85 Pac. 259 (1906) *Goore v. Goore,* note 2, *supra.*

[28] Rem. Comp. Stat. § 228, subd. 4; P C. § 8441.

have occasioned uncertainty in the minds of lawyers as to whether the statement of the "case" in affidavits in suits for divorce in the words of the statute is sufficient, or whether the words "in the cases prescribed by law" requires that the cause or grounds for divorce be given, as, for example, "This is an action for divorce on the grounds of cruel treatment." It has been the general practise to set forth the cause, and in *Goore v. Goore*,[29] the Supreme Court appeared to declare such statement essential. In deciding in that case that it was not necessary to mention property to the parties to a divorce suit in the affidavit, the Court said.

> "It is enough that the defendant cannot be found within the state, and that the action is for divorce in one of the cases prescribed by law, naming the case."

And again in the same case the Court declared it is the "better practise" to name the " 'cause prescribed by law,' such as abandonment for one year, cruel treatment, etc." But this issue has more recently been directly presented to the Supreme Court and decided by it, though its dcision as reported gives no clue to that fact. The case is that of *Schwarzmiller v. Schwarzmiller* [30] In the last paragraph of the opinion therein, without discussion of the point involved, it is said.

> "It is further contended that the summons published in the divorce case inadequately stated the object of the action. We are satisfied, however, that it sufficiently answers the requirement of the statute,—subd. 4, sec. 228, Rem. Code."

(The reference is to the subdivision under consideration.) An examination of the briefs filed in this suit (which, by the way, is entitled *Schmartzmiller v. Murphy* in the briefs), discloses that one of appellant's contentions (page 12 of his brief) was "There was also no sufficient service upon the defendant Murphy because of the inadequacy of the AFFIDAVIT for PUBLICATION which merely stated that the object of the action was 'for divorce in cases provided by law' " Respondent admitted in her brief (page 5) that the affidavit contained as a statement of the ground for divorce, "said action is for divorce in cases provided by law." So, it will be observed, that there was no dispute, no contention in regard to what the affidavit contained as a statement of the "case." What appellant did contend in regard to the "case" set out in the affidavit was (page 15 of his brief)

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[29] 24 Wash. 139, 63 Pac. 1092 (1901).

[30] 111 Wash. 672, 191 Pac. 808 (1920).

> "It is further contended by appellant that the affidavit for publication filed by respondent was not sufficient upon which to base service by publication in that said affidavit does not set forth as required by the statute the grounds upon which the action for divorce is based, but merely says that that 'said action is for divorce in cases provided by law.' Manifestly this is not a compliance with the statute authorizing service by publication."

Respondent made no specific reply in her brief to this objection. In neither brief was any contention made, as stated by the Supreme Court in its decision, "that the summons published in the divorce case inadequately stated the object of the action." It is manifest that the Court erred in the last paragraph of its opinion above quoted, and that what it intended to say was that the statement in the affidavit for publication in this divorce suit of the "case" in the language "for divorce in cases provided by law" was sufficient. It, therefore, held that a statement of such a "case" in the language of subdivision 4 of the statute in question is valid without mention of the specific grounds or cause on which the action is based.

Since a presumption of due service arises from recitals thereof in the judgment, it follows that a judgment is not necessarily void simply because the affidavit in the record, and upon which publication was based, is fatally defective.[31] But such presumption is only *prima facie,* and may be overcome by an affirmative showing that the defective affidavit was the only affidavit.[32] Expressed in other words, the presumption of jurisdiction arising from recitals of due and regular service of process notwithstanding the only affidavit for service by publication on file is insufficient, may be overthrown by an affirmative showing that the only service made was based on that affidavit. The judgment cannot be attacked by merely pointing out the defective affidavit.

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[31] *Burns v. Stolze,* note 6, *supra.*

[32] *Burns v. Stolze,* note 6, *supra; Lutkens v. Young,* note 1, *supra.*

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