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Unacknowledged Lease—Convenants for Renewal and Extension—Periodic Tenancy; Community Property—Living Separate and Apart—Nature of Allotments; Sales—Breach of Warranty—Notice; Evidence—Impeachment—Conviction of Crime; Argument and Conduct of Counsel—Retaliatory Statements and Remarks—Expression of Opinion as to Guilt of Accused; Appeal and Error—Notice of Appeal and Proof of Service—Time for Filing; Full Faith and Credit—Foreign Divorces—Notice—Due Process

B. V. L.

R. R. H.

T. F. K.

W. J. McA.

RECENT CASES

UNACKNOWLEDGED LEASE—COVENANTS FOR RENEWAL AND EXTENSION—PERIODIC TENANCY. On January 5, 1944, *D* entered into possession under a written unacknowledged lease, whereby *P* let the premises to *D* "for a term of one year commencing the 5th day of January, 1944, and ending the 4th day of January, 1945" with a provision that: "The lessor agrees that it will, on or before the expiration of this present lease . . . grant and execute to her a new lease . . . for the further term of one year, to commence from the expiration of the term hereby granted . . ." The rent reserved was 10 per cent of the gross receipts, *payable each Monday*, on the basis of the preceding week's receipts. On November 28, 1944, *P* gave *D* notice to terminate on December 25, 1944. *D* refused to vacate. *P* brought an unlawful detainer action on January 10, 1945. *Held:* The unacknowledged lease for a term of one year with an option for a new lease for an additional year, was unenforcible either as a lease for one year or for the contemplated period of two years, and at most it created a month to month tenancy, which could be terminated by *P* on 20 days' notice. *Labor Hall Association v. Danielson*, 124 Wash. Dec. 73, 163 P.(2d) 167 (1945).

The court refused to recognize any distinction between a covenant for extension of a lease and an option for a new lease, in regard to an unacknowledged lease, saying they felt concluded by the decision in *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499 (1912), wherein a one-year term with the right to renew for two years created only a periodic tenancy because the lease was unacknowledged.

The court implies that it would recognize the distinction in an acknowledged lease, by agreeing with the statement in *Murray v. Odman*, 1 Wn. (2d) 481, 486, 96 P. (2d) 489, 491 (1939), that a covenant for extension in an acknowledged lease, at option of the lessee, operates as a present demise for the full term to which it may be extended, and not as a demise merely for the shorter period with the privilege of a new lease for the second term. The majority rule in other jurisdictions, which clearly preserves the distinction between covenants to extend and covenants to renew, apparently makes no special exception in the case of an unacknowledged lease. 32 AM. JUR., *Landlord and Tenant*, § 956; 35 C. J. 1154.

The court has long recognized the distinction in the fixture cases, holding that under a covenant to renew the lessee must reserve the fixtures if he wishes to remove them at the end of such new lease, and that reservation is not necessary under a covenant to extend. *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53 (1902); *Lynn v. Waldron*, 38 Wash. 82, 80 Pac. 292 (1905); *Bernard v. Crosby*, 121 Wash. 257, 209 Pac. 524 (1922).

The collateral problem now presented is, will the court in the future cases treat renewals and extensions of unacknowledged leases the same, and thereby permit the tenant to remove the fixtures, without prior agreement, at the end of the second period of occupation?

No point was made in the briefs as to the adequacy of the notice given nor as to the length of the tenancy periods. The reservation of the rent weekly would seem to indicate a week to week tenancy. Under the language of REM. REV. STAT. § 10619, and the Washington cases, the length of the rent period is determinative of the length of the tenancy periods, unless a contrary intent is expressed. *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321

(1906); *Erikson v. Manufacturers Distributing Co.*, 103 Wash. 159, 173 Pac. 1095 (1918).

If the tenancy were considered weekly, the notice given on the 28th of November, 1944, would have been adequate to terminate the tenancy as of December 25, 1944, a Monday, and the end of a period, since the statute, REM. REV. STAT. § 812 (2), requires that notice be given only 20 days *prior* to the end of the period.

If the tenancy is considered to have been monthly, however, as the court treated it, the notice appears to have been inadequate, for the end of the monthly periods was on the 4th of each month, based on the date of entry, making the 4th of January, 1945, the earliest date upon which the tenancy could have been terminated, the language of the statute stating that the 20-day notice require the lessee to quit the premises at the *expiration* of such month or period. If the notice, despite its language, was effective to terminate the tenancy on January 4, 1945, then the damages under the statute should have accrued from that date, and not December 25, 1944, as the court held. In *Worthington v. Moreland Motor Truck Co.*, 140 Wash. 528, 250 Pac. 30 (1926), it was held that notice by the tenant was ineffective as to the month ending in less than 30 days, but would be effective to terminate the tenancy at the end of the following month. The question was raised, but not passed upon by the court in the *Worthington* case, whether the same would hold true of a similar notice given by the landlord.

B. V. L.

COMMUNITY PROPERTY—LIVING SEPARATE AND APART—NATURE OF ALLOTMENTS. Neither *H* nor *W* had any property at the time of their marriage. In April, 1943, *H* went to Alaska to work, *W* remaining in Washington, where she then started to work. At this time neither expressed any dissatisfaction with the marriage. In October, *W* wrote to *H* expressing her discontent and her desire not to resume the marital relationship. *H* returned from Alaska, tried unsuccessfully to persuade *W* to return to him, and in January, 1944, joined the navy. In July, *H* brought an action for divorce. From the time of *H's* enlistment, *W* received a wife's allotment from the government. The divorce court apparently permitted *W* to keep the allotment money and her wages without accounting therefore, but did not give her any property settlement. *W* appealed. *Affirmed. Hokenson v. Hokenson*, 123 Wash. Dec. 851, 162 P.(2d) 592 (1945).

REM. REV. STAT. § 989 empowers the divorce court to award property as shall appear just and equitable, regardless of its character as separate or community theretofore. *Leonhard v. Leonhard*, 147 Wash. 311, 265 Pac. 1118 (1928). It seems clear that the disposition made in this case was authorized.

In the course of the opinion, however, the court makes two assumptions which are not necessarily valid. The first concerns *W's* wages while the husband was in Alaska. REM. REV. STAT. § 6896 provides:

> "The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of of the wife."

The status of the property, whether separate or community, is to be determined as of the date of its acquisition. *State ex rel. Van Moss v. Sailors*, 180 Wash. 269, 39 P.(2d) 397 (1934). The problem presented is the

determination of the relationship of the parties as of October, 1943 (when she expressed discontent), that is, whether *W* was living separate within the contemplation of the statute. It is true that a wife being without fault, may acquire a domicile separate from her husband for certain purposes, and that her earnings then are her separate property. *Commissioner of Internal Revenue v. Cavanaugh*, 125 F.(2d) 367 (1942), construing the California statute (DEERING § 169, 1941) which is identical to REM. REV. STAT. § 6896. A husband and wife, living temporarily in different places due to economic or social conditions, are not living separate and apart within the meaning of such statutes, but rather "living separate and apart applies only to the condition where the spouses have come to the parting of the ways with no present intention of resuming the marital status." *Makeig v. United Security Bank & Trust Co.*, 112 Cal. App. Dec. 138, 296 Pac. 673 (1931). Where *D* husband had willfully and without cause abandoned *P* wife, the case was within the California statute. *Woodall v. Commissioner of Internal Revenue*, 105 F.(2d) 474 (1939) (Petition for certiorari denied, 309 U. S. 655 (1940)). It would seem that the courts are concerned with the intent of the parties to remain separated. Where both parties stated in their briefs they were living separate and apart, the court accepted the fact, though there was no supporting evidence. *Caminetti v. Prudence Mutual Life Insurance Ass'n*, 62 Cal. App. Dec. (2d) 945, 142 P.(2d) 41 (1943) (Reversed on other grounds, 146 P.(2d) 15 (1944)).

Thus it would seem in the instant case there is room for doubt whether the parties were living separate, within the contemplation of the statute, during the entire period of their physical separation, as the court seemed to assume.

It has been held where the separation was the fault of one of the spouses, that spouse's earnings were nevertheless community property. *Commissioner of Internal Revenue v. Cavanaugh, supra.*

If, therefore, the wife in the instant case was "at fault" in her separation from her husband, it may be that REM. REV. STAT. § 6896 affords her no protection and her earnings were community property.

The second assumption that the court makes is that all the money received as an allotment is "undoubtedly community property." 123 Wash. Dec. at 858, 162 P.(2d) at 595. It seems clear that the $22 allotted to the wife and deducted from the pay of the husband is community property. However, the property character of the $28 added by the government is not as easily determined. To be community property, it must be considered as a part of the earnings of the husband while in the service. Arguably, it might be considered as a gift from the government, hence not community property but rather the separate property of the wife. It is money allotted over and above the base pay of the husband. It is payable to the wife only and the husband has no control over it once the sum has been allocated. The wife has the right to insist upon the allotment. 37 U. S. C. A. §§ 201-220. The fact that it is money granted over and above the amount of the husband's base pay makes it somewhat similar to the land grants and pensions given the war veterans. Such grants have been held gifts. *Hatch v. Fegeson*, 68 Fed. 43, 33 L. R. A. 759 (1859). Where a man was granted a pension for services rendered prior to marriage, the court, recognizing it would be separate property because it was given for services rendered before marriage, nevertheless held it to be separate property "on the ground that the pension is purely a gift from the government, and as such is separate under

our statute." *Johnson v. Johnson*, Tex. Civ. App., 23 S. W. 1022, 126 Am. St. Rep. 111 (1893). Land granted under the coal acts has been held to be separate property where the entryman, though married at the time, took an oath that such land was for his benefit alone and not directly nor indirectly for the benefit of any other person. *Guye v. Guye*, 63 Wash. 340, 115 Pac. 731 (1911).

Under the federal income tax rulings, the $22 deducted from the pay of the husband is considered as an assignment while the $28 contributed by the government "is in the nature of a gift from the government." CUM. BULL. p. 52 (1942).

In view of these cases and the ruling by the Bureau of Internal Revenue, it appears that the problem is not so readily disposable as the Washington Court seems to indicate. R. R. H.

SALES—BREACH OF WARRANTY—NOTICE. An action was brought for damages resulting from trichinosis against a manufacturer and seller of sausage. A purchase was made September 24, 1942, and an attorney contacted defendant January 15, 1943, informing her a claim was to be made. The defense was that proper notice had not been given as required by REM. REV. STAT. § 5836-49 (Uniform Sales Act). *Held:* (1) Notice need take no particular form, but must be such as to fairly apprise the seller of the buyer's intent to look to him for damages, (2) omission of the names and addresses of the parties plaintiff will not nullify the effect of a notice, and (3) on the facts of the case whether a reasonable time had elapsed was a jury question. *Baum v. Murray*, 123 Wash. Dec. 835, 162 P.(2d) 801 (1945).

The first holding represents the majority viewpoint, as is evidenced by similar statements in *Johnson v. Kanavos*, 296 Mass. 273, 6 N. E.(2d) 434 (1937), *Ace Engineering Co. v. West Bend Malting Co.*, 244 Wis. 91, 11 N. W.(2d) 627 (1943); *Hazelton v. First Nat. Stores*, 88 N. H. 409, 190 Atl. 280 (1937); and cites *Truslow v. Diamond Bottling Co.*, 112 Conn. 181, 151 Atl. 492, 71 A. L. R. 1142 (1930). Other cases illustrating the informality of notice are *Hubshman v. Louis Keer Shoe Co.*, C. C. A. Ill., 129 F.(2d) 137 (1942), holding "letters asserting right of plaintiff may constitute notice," and *Gutherie v. J. J. Newberry Co.*, 297 Mass. 245, 8 N. E.(2d) 774 (1937), which held "the notice need not be in writing."

The second ruling was based on the reasoning that a party so warned would be placed on his guard, and that he would then take steps to determine who the complainants were. This may be subject to criticism as it tends to shift the burden from the buyer to the seller. The burden of notice of breach of warranty is placed on the buyer by § 49 of the Sales Act to protect the seller. That section is a relaxation of the harsh doctrine of *caveat emptor*. The effect of this ruling is to further relax that doctrine.

The Sales Act provides that notice must be given within a reasonable time after the buyer knows or ought to know of such breach. Whether a reasonable time had elapsed in this case was left open by the court (due to lack of a finding upon what date either actual or constructive knowledge of the breach was present). The time within which notice must be given has been construed only once under the Sales Act by the Washington court, which found in *Suryan v. Lake Washington Shipyards*, 163 Wash. 164, 300 Pac. 941 (1931), that a period of two months was not unreasonable delay in giving notice of a defect in a boat. T. F. K.

EVIDENCE—IMPEACHMENT—CONVICTION OF CRIME. *D* was charged by information with the crime of negligent homicide committed while driving an automobile on a city street. At the trial *D* took the stand on her own behalf and testified on her direct examination that on several occasions she had been convicted of vagrancy and disorderly conduct. *W*, a witness for *D*, on her direct examination testified that she, also, had been convicted of disorderly conduct. On the cross-examination of *D* and *W* the trial court permitted the prosecuting attorney, over the objections of *D's* counsel, to propound certain questions tending to show that both witnesses were prostitutes. On appeal from judgment of conviction the Supreme Court *held:* It was reversible error to permit the prosecuting attorney "to accuse the witnesses on cross-examination of being prostitutes." *State v. Stevik*, 123 Wash. Dec. 393, 161 P.(2d) 181 (1945).

The instant case *seems to* hold that it is improper to ask a witness on cross-examination whether she is a prostitute. If it does so hold, it is conflict (as pointed out by Justice Mallery in a special concurring opinion) with *State v. Coella*, 3 Wash. 99, 28 Pac. 28 (1891). It is worth noting that the majority opinion makes no reference to the *Coella* case.

Furthermore, the majority opinion states: "In this day in which criminal records are quite complete and available to all prosecuting officials, there is no excuse for asking questions concerning former convictions at random." This plainly implies, if it does not squarely hold, that the right to impeach a witness on cross-examination by showing prior convictions is not as broad as the right to show prior convictions by extrinsic proof, viz., the *record* of the conviction. But the statute, REM. REV. STAT. § 2290, clearly authorizes proof of a prior conviction *either* by the record itself *or* by cross-examination. And in a number of prior cases our court has given full effect to the statutory authorization of these alternate methods of proof. For example, in *State v. Steele*, 150 Wash. 466, 273 Pac. 742 (1929) the court held it proper to develop on cross-examination not only the fact of the conviction but went further and permitted inquiry into the nature of the offense, because, said Chief Justice Fullerton, "It is at once apparent, of course, that if the record of the conviction is introduced, it will of necessity show the nature of the offense and the extent of the punishment, and, since cross-examination is only an *alternate* method of proving the conviction, we see no reason why the witness may not be examined as to any matter the record itself will show, and this we think was the purpose of that part of the statute we have above quoted (§ 2290)." (Italics supplied.) This seems to indicate that one alternative is equally as broad as the other. See also, *State v. Green*, 167 Wash. 266, 9 P.(2d) 62 (1932); *State v. Brames*, 154 Wash. 304, 282 Pac. 48 (1929); *State v. Evans*, 145 Wash. 4, 258 Pac. 845 (1927). W. J. McA.

ARGUMENT AND CONDUCT OF COUNSEL—RETALIATORY STATEMENTS AND REMARKS—EXPRESSION OF OPINION AS TO GUILT OF ACCUSED. In a trial for robbery, *D's* counsel in his closing argument to the jury said, "I think he's (referring to the prosecutor) done well with a bad case. . . . I don't think down in his heart he thinks that this is a case beyond any doubt." In his closing argument, the prosecutor referred to this incident in the following language: "Now, counsel made a statement . . . in which . . . he said 'counsel down in his heart doesn't believe that the defendant, Van Luven, is guilty.' Had he not said that, it would be error for me to tell that I do believe him guilty, sincerely, personally, and with all my heart." *D's*

counsel: "If the court please, I except to that statement inasmuch as it was not precipitated. That was a false statement of what I said. Counsel has committed reversible error, and I ask for a mistrial." The jury was then instructed to disregard the statement, but the motion for a mistrial was denied. *Held:* Not error to deny mistrial because the prosecutor was entitled to answer the statement made by *D's* counsel. *State v. Van Luven,* 124 Wash. Dec. 222, 163 P.(2d) 600 (1945).

As a general rule, it is improper for a prosecuting officer, in his argument, to express his individual opinion that the accused is guilty, independent of the evidence in the case. 23 C. J. S. 578, § 1104. He may, nevertheless, argue from the evidence that the accused is guilty, and that the evidence convinces him of the fact. *State v. Armstrong,* 37 Wash. 51, 79 Pac. 490 (1905); *State v. Evans,* 145 Wash. 4, 258 Pac. 845 (1927); *State v. Edelstein,* 146 Wash. 221, 262 Pac. 633 (1927); *State v. Buttry,* 199 Wash. 228, 90 P.(2d) 1026 (1939). See notes: 75 A. L. R. 53; 53 AM. JUR. 291, 92, §§ 485, 486.

Some of the courts have indicated that they will presume that the expression of opinion was based on the evidence unless there is a showing to the contrary. *Ross v. State,* 8 Wyo. 351, 57 Pac. 924 (1899). It is in the interest of sound public policy that the prosecutor be allowed a reasonable latitude in argumentative deduction from the evidence. *State v. Peeples,* 71 Wash. 451, 129 Pac. 108 (1912); *State v. Ragan,* 157 Wash. 130, 288 Pac. 218 (1930); *State v. Melson,* 186 Wash. 8, 56 P.(2d) 710 (1936). In one Washington case the court held this statement of the prosecutor in his closing argument did not constitute reversible error: "It is my sincere belief that the defendant is guilty of murder in the first degree." *State v. George,* 58 Wash. 681, 109 Pac. 114 (1910).

Even though the prosecutor's opinion appears to have been based on evidence outside the record, the error may be cured by the court's admonition to the prosecutor and immediate instructions to the jury to disregard. *State v. Humphreys,* 118 Wash. 472, 203 Pac. 965 (1922); *People v. Ward,* 134 Cal. 301, 66 Pac. 372 (1901). The jury is assumed to have understood and acted on the judge's directions. *Commonwealth v. Cooper,* 264 Mass. 368, 162 N.E. 729 (1928). The California court (making reference to the Canons of Ethics) has stated that it is improper for the prosecutor in his argument to express a personal opinion of guilt, whether or not he bases his conclusion on the evidence in the case. *People v. Bracklis,* 54 Cal. App. 40, 200 Pac. 1062 (1921).

In view of the foregoing, the prosecutor in the reported case may have conceded too much in stating that he would not be justified in giving his opinion as to the defendant's guilt had it not been for the provoking statement of *D's* counsel. Of course, the defendant's prior argument put him on more secure ground, for it is generally conceded that a prosecutor may in his closing argument make statements which have been precipitated, though they would otherwise constitute error. *State v. Wright,* 97 Wash. 304, 166 Pac. 645 (1917); 12 Cyc. 582; *U. S. v. DeVasto,* 52 Fed. (2d) 26 (1931) (comment on the failure of the defendant to testify). *See also: U. S. v. Feinberg,* 140 Fed.(2d) 592 (1944); 154 A. L. R. 272. E. T. E.

APPEAL AND ERROR—NOTICE OF APPEAL AND PROOF OF SERVICE—TIME FOR FILING. Y died intestate in Renton, Wash., in 1942. His daughter, *M,* filed a claim against the estate for the care of deceased. Over the objection of Y's two grandchildren, (children of a deceased son) the claim was allowed, by

order entered Nov. 27, 1944. On Dec. 11, 1944, the grandchildren served notice of appeal upon *M.* But notice of appeal with proof of service was not filed in the office of the clerk of the superior court for King County until Jan. 9, 1945, some twenty-nine days after service. Respondent moved to dismiss the appeal on the ground that appellants did not file the original, or a copy of notice of appeal with proof or written admission of service, with the clerk of the superior court within five days after service of notice upon the respondent, as required by the applicable rule. *Held,* in a six-to-three decision: appeal dismissed, on the ground that failure to file in five days was a fatal jurisdictional defect. *In the Matter of the Estate of John Henry Yand,* 123 Wash. Dec. 782, 162 P. (2d) 434 (1945).

This case overturns what has been the established rule of decision since 1906. The rule was established in *Reynolds v. Reynolds,* 42 Wash. 107, 84 Pac. 579 (1906), the court there denying a motion to dismiss the appeal where appellant had failed to file notice of appeal and proof of service within five days. The court in that case reasoned that so much of the Laws of 1899, chapter 49 (REM. REV. STAT. § 1734, incorporated in Rule 5(6), Rules of the Supreme Court) as reads: "No appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof * * * * * *," had amended Laws of 1893, c. 61, § 4 (REM. REV. STAT. § 1719, incorporated in Rule 5(3), Rules of the Supreme Court), which required that the original or a copy of notice of appeal with proof of service be filed within five days after service; and decided that where the respondent had not been injured, and the appeal was not delayed, the appeal ought not be dismissed for failure to file on time. This decision was followed in *Gazzam v. Young,* 114 Wash. 66, 194 Pac. 810 (1921). In that case, the appellant filed notice of appeal six months after service thereof. The respondent moved for dismissal, arguing that the requirement of REM. REV. STAT. § 1719, was jurisdictional. The court denied the motion, citing *Reynolds v. Reynolds,* supra. *See also: Seargeant v. Russell,* 110 Wash. 216, 188 Pac. 466 (1920); *State v. American Fruit Growers,* 135 Wash. 156, 237 Pac. 498 (1925).

In the instant case, the court specifically overruled *Reynolds v. Reynolds,* holding that it was wrongly decided—that Laws of 1899, chapter 49 (REM. REV. STAT. § 1734) did not amend Laws of 1893, chapter 61, § 4 (REM. REV. STAT. § 1719). A careful reading of the two statutes is convincing that the *Reynolds* case was in fact wrongly decided, and that the *Yand* case is technically correct.

As the majority correctly says, the rule of *stare decisis* is not without its exceptions, and if a prior decision is clearly wrong the court is justified in overruling it. In the ordinary case the hardship to the litigant who has relied on the prior decision is unavoidable because the court cannot legislate prospectively. It can only adjudicate concrete controversies retroactively, so to speak, although in a few cases the court, in the overruling opinion, has adhered to the prior precedent in determining the instant case, at the same time announcing a different rule for the future. *Montana Horse Products Co. v. Great Northern Ry. Co.,* 91 Mont. 194, 7 P.(2d) 919 (1932); *Payne v .City of Covington,* 276 Ky. 380, 123 S. W.(2d) 1045 (1938). But here, as the dissenting opinion points out, the court, by virtue of its rule-making power, does have the undoubted right, by amendment, to change its own rule prospectively, at the same time protecting those who, before such amendment, had relied on the prior decisions. The majority does

not meet this contention and it appears doubtful whether it can be answered.

It might also be suggested that the incorporation of the 1893 and 1899 statutes by the court in its 1938 rules (long after the decision in the *Reynolds* case) carried with it the interpretation of that case. *Geraghty v. National Bank of Commerce of Seattle*, 8 Wn.(2d) 439, 112 P.(2d) 846 (1941). See also 50 AM. JUR. § 458. H. H. H.

FULL FAITH AND CREDIT—FOREIGN DIVORCES—NOTICE—DUE PROCESS. Pursuant to a Louisiana statute *H* obtained a divorce from *W* who was absent from the state. *H* later married *P* in Washington while domiciled therein, and died domiciled in Washington ten years after the divorce decree. Upon *H's* death *W*, who did not learn of the divorce proceedings or decree until ten years later, sought to have all papers filed in the probate proceedings served upon her attorneys. Petition was made by *P* for an order declaring that *W* had no interest in the probate of the estate of decedent *H*. At the hearing upon the petition, an exemplified copy of the Louisiana divorce proceedings was received in evidence and afforded full faith and credit as a valid decree. The order was granted. The Louisiana statute provided that upon the absence of a spouse from the state in an action for divorce the court shall appoint a *curator ad hoc* to represent the absent party, and that all proceedings shall be had contradictorily with said *curator*, and that any divorce may be rendered against said *curator* as might be rendered against his principal. DART. LA. GEN. STAT. 2208. *W* appealed, contending that the Louisiana decree was not valid because the statute under which it was obtained was unconstitutitonal in that it did not prescribe a form of substituted service from which it was reasonably probable that the non-resident defendant would receive actual notice of the proceeding. *Held* on appeal: Service upon a *curator ad hoc*, even though "he *(H)* at all times knew her *(W's)* whereabouts and address at which she resided," afforded sufficient notice as required by due process of law and *must* be accorded full faith and credit. *Codling v. Codling*, 123 Wash. Dec. 241, 160 P.(2d) 635 (1945).

That substituted service is sufficient in actions for divorce when the defendant's whereabouts is unknown or if he is absent from the state seems well settled. *Pennoyer v. Neff*, 95 U. S. 714 (1878). The principle of substituted service is that adjudication of adversary rights of persons in property within its borders may be provided for by the state (the *res* here is the matrimonial domicile) and, to make jurisdiction complete, the legislature may prescribe a substituted service of process for cases in which actual service cannot be made. *State v. Guilbert*, 55 Ohio St. 555, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756 (1897); *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773 (1891). *See also* 42 AM. JUR. 68, § 79. Usual forms of substituted service, *e.g.*, publication, posting, mailing to the last known address, provide at least a fair possibility that the defendant may be apprised of the action.

The instant case raises two interesting questions, (1) whether appointing a *curator ad hoc* who is not charged with the duty of attempting to apprise the defendant of the action constitutes sufficient notice to satisfy the requirements of due process of law, and (2) whether there are any requirements of due process of law that a state must provide in suits for divorce, in respect to notice, *i.e.*, does the Fourteenth Amendment require

that in divorces granted by states the normal procedural requirements of notice required in other *in rem* or *quasi in rem* actions be satisfied?

In 1887 the U. S. Supreme Court held valid a divorce granted in 1852 by the Oregon Territorial Legislature wherein no form of service or notice, substituted or otherwise, was provided. *Maynard v. Hill*, 125 U. S. 190. Notice that the Fourteenth Amendment was not involved therein, the divorce having been granted seventeen years prior to its adoption. The due process clause of the Fifth Amendment is usually held binding upon a territorial legislature. *Farrington v. T. Tokuskige*, 273 U. S. 284 (1927); *Thornberg v. Jorgensen*, 60 F.(2d) 471 (1932); *In re McNaught*, 1 Ok. Cr. 528, 99 Pac. 241 (1909). Hence it might be argued that the case is authority for the proposition that there are no due process constitutional barriers as to notice; however, the case is at best of questionable value on the instant problem, for the point was apparently not argued therein—at least it was not discussed in the opinion. The more recent cases seem to require some form of substituted service. And the usual statement as to its sufficiency is similar to that in *Millikin v. Meyers*, 311 U. S. 457 at p. 463 (1940). "Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an oportunity to be heard." *See also Ardnt v. Griggs*, 134 U. S. 316 (1890); *McDonald v. Mabee*, 243 U. S. 90 (1917). It is submitted that the requirements are not unlike those in cases involving divorces, *e.g.*, "There is no constitutional barrier if the form and nature of the substituted service meet the requirements of due process," was the statement in the now famous Nevada divorce case, *Williams v. North Carolina*, 317 U. S. 287 at p. 299, wherein the tests of the *Millikin* case and *Atherton v. Atherton*, 181 U. S. 155 (1901), are cited with approval. It seems clear that under the position taken by the RESTATEMENT a decree rendered under the Louisiana statute would be invalid, hence not entitled to full faith and credit. RESTATEMENT, CONFLICTS (1934) § 109. Possibly further indication of the questionable constitutionality of the statute is the recent amendment of the statute by the Louisiana legislature to provide that "Due proof shall be made of a diligent effort on the part of the plaintiff to locate the said absentee." La. Acts 1944, No. 192, p. 567.

W. C. K.