

1949

Mary Parker v. S. R. Ross and Edith Ross : Brief of Respondents

Utah Supreme Court

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Romney and Boyer; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY PARKER, Administratrix of
of the estate of Katie C. Johnson,
sometimes known as Kate Johnson,
deceased, also known as Katie John-
son,

Plaintiff,

vs.

S. R. ROSS and EDITH ROSS, his
Wife, S. R. ROSS INCORPORAT-
ED, a corporation, SIDNEY M.
HORMAN and JANE DOE HOR-
MAN, whose true name is unknown,
his wife,

Defendants.

Case No.
7401

Brief of Respondents

FILED

ROMNEY AND BOYER,
Attorneys for Respondent.

CLERK, SUPREME COURT, UTAH

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STATEMENT OF FACTS

Except as amplified in their argument, Respondents agree with the Statement of Facts set forth in the Appellant's Brief.

ARGUMENT

Appellant claims the Decree in question was void for two reasons, namely:

1. That the Defendant, Katie C. Johnson, was dead prior to the commencement of the action.
2. That due diligence was not used in an attempt to locate the Defendants in the action.

The Appellant alleges in Paragraph 3 of her Second Amended Complaint that the action was against Katie C. Johnson, et al, Defendants. The Affidavit for publication of Summons shows that in addition to Katie C. Johnson "unknown Defendants" were also included in the action. Record 20.

Section 104-57-10, Utah Code Annotated, 1943, permits "unknown Defendants" to be sued as such. Section 104-57-11 provides in substance that service of Summons may be made upon all "unknown Defendants" by publication in the manner provided for the publication of Summons in other civil actions, and concludes with the following:

"and any such unknown person who has or claims to have any right, title, estate, lien or interest in the said property, which is a cloud on the title thereto, adverse to the plaintiff, at the time of the commencement of the action, who has been duly served as aforesaid, and anyone claiming under him, shall be concluded by the judgment in such action as effectually as if the action were brought against such person by his or her name, notwith-

standing such unknown person may be under legal disability.” (Italics ours.)

The plaintiff in the present action is suing in her representative capacity as Administratrix of the estate of Katie C. Johnson, deceased. She represents the heirs and creditors of Katie C. Johnson, deceased, who are included as “unknown Defendants” in the previous action in question and are bound by the Decree made and entered therein.

So far as we are aware, Sections 104-57-10 and 104-57-11 have not been construed by this Court. However the problem involved was considered in the case of Lawrence, vs. Murphy, 147 Pac. 903, 45 Utah 572. In the Lawrence vs. Murphy case, John W. West and Sarah A. West, and “unknowns” were named as Defendants in the action, but the Wests were dead before the suit was commenced. Although the Court held that the attempted publication of Summons was void under the Statute in existence at that time, which statute was repealed in 1927, the implication is, that had the requirements of the statute been met, the Decree would have been binding upon the heirs of John W. West and Sarah A. West, as unknown defendants. The Respondents therefore contend that the Plaintiff in this action is bound by the Decree in the action in question, although Katie C. Johnson died prior to the commencement thereof.

Now, let us turn our attention to the question of “due diligence.” The Affidavit for Publication of Summons was made pursuant to Section 104-5-12, Utah Code

Annotated, 1943, on the ground that the Defendants could not "after due diligence be found within the State." The Affidavit for Publication of Summons shows the following: (Record 20, 21, 22)

1. Summons was placed in the hands of the Sheriff of Salt Lake County, and the Sheriff after due search and diligent inquiry shows in his return that he was unable to find the Defendant.

2. The records of the Salt Lake County Recorder were searched and the address of Katie C. Johnson was shown in a Deed on record to be Butte, Montana.

3. The tax rolls in the Salt Lake County Treasurer's office were searched and two street addresses for Katie C. Johnson in Butte, Montana, were found.

4. Letters were addressed to Katie C. Johnson to the two street addresses in Butte, Montana, and also general delivery, Butte, Montana, but no answer was received from such letters.

5. A search was made of the judgment records in the Salt Lake County Clerk's office, the probate records in the Salt Lake County Clerk's office, the records in the Salt Lake County Assessor's office, the records in the City Treasurer's office of Salt Lake City, Salt Lake City Directory and Telephone Directory for many years, but no information was obtained from any of the above sources as to the whereabouts of Katie C. Johnson.

It was further alleged in the Affidavit that each of said Defendants is a necessary and proper party Defendant to said action. And that the said Defendants can not, after due diligence, be found within the State of Utah.

Appellant maintains a "useless search of records in Salt Lake County, Utah" was made and contends that when the address of the Defendant, Katie C. Johnson in Butte, Montana, was ascertained that the search should have continued in the State of Montana, and that by failing to make a further search in the State of Montana that "due diligence" was not used.

It seems absurd for Appellant to contend that after an address for Defendant was ascertained in Butte, Montana, that further search in Utah was useless. The publication of Summons is based upon the ground that "after due diligence the Defendant can not be found within the State." That an old address for Defendant out of the State of Utah was ascertained does not preclude the necessity of making a further search in the State of Utah for the reason that the Defendant may have come into the State of Utah subsequent to having resided at the address which was ascertained outside of the State of Utah.

Were the Court to up-hold Appellant's construction of the statute there would never be an end to the search required. In the instant case, the Appellant claims to have made inquiry in the State of Montana and found that the Defendant, Katie C. Johnson, was

deceased. But suppose upon inquiry Appellant learned that Defendant had moved to some other State or country. Then according to Appellant's theory, a search would have to be made in such other State or Country, and so on ad infinitum. Under such a construction the statute would lose all practical value, and title to properties would forever be in jeopardy. By no possible construction of Section 104-5-12 can it be held that the Legislature intended that the search should go beyond the State of Utah. For as stated in the statute, a ground of publication of Summons exists when the Defendant can not "after due diligence be found within the State", meaning the State of Utah.

Appellant cites no case to support her contention. Some reference is made to the case of Liebhart vs. Lawrence, 40 Utah, 243 120 Pac. 215. In that case the Affidavit was merely in the language of the statute and no facts constituting due diligence were alleged. The assessment rolls showed the property had been assessed in the name of the Defendant for certain years, and disclosed the Defendant's address in Denver, Colorado. No copy of the Summon or Complaint was ever mailed to the Defendant at that address. In addition there was an element of fraud in the case, in that the Plaintiff in the original action prevented the Defendant therein from having his day in Court until the time within which he might appear and object had expired. Under these circumstances, none of which exist in the case now before the Court, the publication of Summons was held to be void. It was held in the Liebhart case that the acts constituting due diligence must be alleged in the Affidavit,

and further that the Clerk, or Judge who makes the order for publication of Summons, acts judicially. The objection to the Affidavit which existed in the Liebhart case, that is that no facts constituting due diligence were alleged, does not exist in the instant case, for here facts were alleged upon which a proper judicial determination could be and was made that due diligence had been used.

We have found no case where the Affidavit was held defective which contained facts showing as exhaustive a search as was made in the case now before the court. However, there are a number of cases in which the Affidavit was upheld where the facts relied upon for due diligence were not nearly as exhaustive as in the instant case. . A leading case on this question is *Rue vs. Quinn*, 66 Pac. 216 (Cal.) The substance of the Affidavit was as stated in the opinion on Page 216, as follows:

“The affidavit for an order directing the publication of summons was made by the attorney for the plaintiff, and in it, after stating that the summons had been placed in the hands of the sheriff of San Diego county for service, he stated that said sheriff had returned the same with his return indorsed thereon to the effect that he could not find the respondent herein in said county of San Diego; that affiant did not know the residence of said defendant; that since said summons was issued he had made due and diligent search and inquiry for the said defendants, and each of them, for the purpose of serving a summons upon them by inquiring for each of them of several prominent county officers (giving the names of such officers); and further stated: “I have also made inquiry of all other persons from whom I

could expect to obtain information as to the residence or whereabouts of each of the said defendants, and after such search and inquiry and due diligence the said defendant, Louisa Munro cannot be found within the state of California.”

The Court held that the Affidavit (which was made by the attorney for the Plaintiff) was good. The entire case should be read as it answers many of the objections of Appellant. The following language of the court on page 217 is especially pertinent to the questions involved:

“When service is to be made in this mode upon the ground that the defendant cannot, after due diligence, be found, within the state, the affidavit must show two facts, viz. the exercise of due diligence to find the defendant within the state, and a failure to find him after the exercise of such diligence. If either of these facts does not appear by affidavit, the court or judge has no jurisdiction to make the order, and an order made thereon will be insufficient to sustain a judgment based upon such service. In making the order for the service by publication, the judge acts judicially upon the evidence which the Code requires to be presented to him for that purpose, and can act upon no other evidence than such as is prescribed by the Code. If the facts set forth in the affidavit have a legal tendency to show the exercise of diligence on the behalf of the plaintiff in seeking to find the defendant within the state, and that, after the exercise of such diligence, he cannot be found, the decision of the judge that the affidavit shows the same to his satisfaction is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination.”

“There is not an entire absence of evidence in the affidavit on behalf of the plaintiff to sustain the order, and it cannot be regarded as void. The facts set forth therein afford some evidence of diligence on the part of the plaintiff to find the defendant, and also that, notwithstanding such diligence, she could not be found within the state; and, although the facts are based upon information of others, it cannot be said that the affidavit is of no legal effect to authorize the court to be satisfied therefrom, or that it did not have a tendency to establish both the fact of diligence and of failure to find the defendant.

“The objections that the facts stated in the affidavit are only hearsay, and that the inquiries of the affiant were limited to persons in the county of San Diego, were proper to be considered by the judge when an application for the order was made, for the purpose of determining whether sufficient diligence had been employed to ascertain if the defendant could be found within the state; but these facts do not justify a disregard of his conclusion, or render his order void. From the nature of the question to be determined, the evidence thereon must, to a very great extent be hearsay, and the number and character of the persons inquired of must in each case be determined by the judge. Diligence is in all cases a relative term and what is due diligence must be determined by the circumstances of each case. If it should be held as an invariable rule that inquiries should be extended beyond the county in which the suit is pending, it might be difficult to say which counties of the state could be safely omitted, and unless the judge is at liberty to determine whether the person from whom inquiries have been made sufficiently show the requisite diligence, it might be necessary for the plaintiff to question all the citizens of the county before obtaining the order.” (Italics ours.)

An affidavit which the court conceded to be not as strong as in *Rue vs. Quinn*, was held valid in the case of *People vs. Wrin*, 76 Pac. 646 (Cal.) See also the following:

Chapman vs. Moore, 91 Pac. 324 (Cal.)

Merchant National Union vs. Buisseret, 115 Pac. 59 (Cal.)

Clarkin vs. Morris, 172 Pac. 981 (Cal.)

Bell vs. McDermoth, 246 Pac. 805 (Cal.)

People v. Fay, 255 Pac. 239 (Cal.)

Cases from other jurisdictions could be cited, but the California cases, which contrue statutes substantially like ours, are ample authority to meet the objections raised by the Appellant. Appellant has quoted from the case of *Liebhart vs. Lawrence* on page 7 of her Brief, as follows:

“The spirit and intent of the statute is to give the non resident notice of the proceedings against or affecting his property, if that can be done.”

Surely the spirit and intent of the statute, as expressed above, has been followed in this case. An exhaustive search for the Defendant in the State of Utah was made, as disclosed by the Affidavit before the Court. The Appellant alleged in paragraph 4 of her Second Amended Complaint that Alice Larson, also known as Mrs. R. E. Larson, is the sole heir of Katie C. Johnson, and that said Alice Larson resided in Butte, Montana, at the time

this action was filed. The Affidavit recites that Mr. Lund caused a letter to be sent to Katie C. Johnson in care of Mr. R. E. Larson, who is a son-in-law of Katie C. Johnson. Appellant alleges in Paragraph 7 of her Second Amended Complaint that mail was caused to be forwarded to Katie C. Johnson in care of the said R. E. Larson, 702 A West Park, Butte, Montana. Respondents demurred to the allegations of said paragraph on the ground of uncertainty, which Demurrer was sustained. Although the entire file of the action in question is not before this Court, it is a reasonable assumption that the "mail" referred to by Appellants in Paragraph 7, consisted of a Summons and Complaint in said action forwarded to Katie C. Johnson by the Clerk of the Court pursuant to Section 104-5-13. Thus two written notices of the existence of the claim of the Plaintiffs in the action to the property formerly owned by Katie C. Johnson went to the home of Alice Larson, the sole heir at law of Katie C. Johnson. The heir of Katie C. Johnson can not complain about not having had an opportunity to be heard in the proceedings effecting the property in question. Therefore in this case the requirements of the statute with respect to publication of Summons have been met, and furthermore, actual notice of the proceedings was given to the heir of Katie C. Johnson. Under these circumstances the judgment of the trial Court should be affirmed.

Respectfully submitted,

ROMNEY AND BOYER,
Attorneys for Respondents.
S. R. ROSS and S. R. ROSS, Inc.