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PROCESS-MISNOMER IN SUMMONS-AMENDMENT

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PROCESS—MISNOMER IN SUMMONS—AMENDMENT—Plaintiff intended to sue James Brago, but by mistake used the name "Joseph Brago" in the complaint and summons. Joseph happened to be the name of intended defendant's brother. Copies of process were left with James' wife, but as sister-in-law of Joseph who resided elsewhere. When plaintiff realized the error, the statute of limitations prevented his bringing a new suit. Plaintiff's motion to amend the summons and complaint was granted. On appeal, *held,* order reversed so far as it purports to amend the summons. *Patrick v. Brago,* 4 N.J. Super. 226, 66 A. (2d) 749 (1949).

The New Jersey statute applicable in the principal case authorized service of process by leaving a copy at the individual's usual place of abode with some member of his family over fourteen years of age then residing there.[1] There are really two problems involved in the case, sufficiency of service as meeting formal statutory requirements, and sufficiency of summons as a notice. The New Jersey court held that James had never been served.[2] Thus he was not subject to the jurisdiction of the court, and amending the summons would not cure the defect.[3] The court evidently thought it did not have to decide whether a misnomer of Joseph for James would in itself nullify a summons, but did

[1] N.J. Laws (1948) c. 355, §1(a).

[2] Process was left with a member of "the" family at "her" usual place of abode. See the quotation from the sheriff's return, principal case at 750.

[3] The court's approach is indicated on p. 750. "We would have little difficulty in affirming if we were satisfied ... that James ... had received a notice .... We may surmise that she showed the summons and complaint to James who recognized ... he had been involved. Perhaps he considered that he was actually the defendant, or pehaps he believed that his brother was being sued by mistake. We cannot speculate on his mental processes. ... But the summons cannot be amended where the amendment would make the record show that a person has been served and brought into court when actually he has not ... or even where it is doubtful whether he has been served."

indicate by way of dictum that it would not.[4] Yet it would seem that the misnomer was necessarily involved in the decision, for, absent the misnomer, the service would clearly have been good.[5] In determining whether a particular error in names is serious enough to be jurisdictional when the other specific requirements of service have been correctly followed, many courts have used the doctrine of *idem sonans*.[6] Other courts have allowed amendments (or default judgments) if the names looked substantially alike in print.[7] Neither of those tests would permit an amendment of the misnomer involved in the principal case, but it is submitted that the type of service used (assuming now no defect in the method of service itself) should be a factor in determining the effect of the misnomer.[8] Considering the particular misnomer with reference to the method of service employed, the issue should be whether the defendant would reasonably conclude that he was intended, or whether he would reasonably conclude that the serving officer had simply made a mistake in identity. It could be argued that personal service should be enough to give jurisdiction regardless of the appellation of the defendant, but probably no court has gone that far.[9] Yet it would seem that if in the principal case the sheriff had actually singled out James and personally handed the papers to him, then James should be put on notice, and should not be able safely to ignore the summons.[10] On the opposite extreme, if service by publication had been authorized and used, then the only notice available to James would have been the language as it appeared in the publication. It is very possible that he would never have seen it. Service by publication is the least likely of all the methods of service to accomplish its purpose in fact, even when there is no misnomer. There, at any rate, an error of Joseph for James would be clearly fatal.[11] Substituted service is somewhere between personal and construc-

[4] See 124 A.L.R. 86 (1940). When amendment is allowed it "relates back" and the statute of limitations is no defense.

[5] The statute would have been satisfied, and very probably the sheriff's return would have been in proper form. But even supposing the return contained an error, it would not be considered fatal. 42 AM. JUR., Process §§131-134 (1942).

[6] That doctrine is that absolute accuracy in spelling names is not required; that if the name as spelled conveys to the ear, when pronounced, a sound practically identical to the correct name as commonly pronounced, then the name is a sufficient designation. See 20 WORDS AND PHRASES 8 (1940). The names "Davison" and "Davidson" were held *idem sonans* in Davison v. Banker's Life Assn., 166 Mo. App. 625, 150 S.W. 713 (1912).

[7] Thus, an error of "Geilfuss" for "Guilfuss" was held not fatal in Ordean v. Grannis, 118 Minn. 117, 136 N.W. 575 (1912). The decision was upheld by the United States Supreme Court in 234 U.S. 385, 34 S.Ct. 779 (1914) against the defendant's due process contention.

[8] See Coffman, "What's in a Name?" 14 NEB. L. REV. 343 (1936).

[9] Note the language used in Jones v. U.P.R.R. Co., 84 Neb. 121, 120 N.W. 946 (1909).

[10] However, the reported cases in the misnomer field indicate that the majority of courts would probably disagree with this statement and with the statement in the principal case at p. 750 that Joseph for James is a "slight misnomer." Cases are collected in 124 A.L.R. 86 (1940).

[11] Butler v. Smith, 84 Neb. 78, 120 N.W. 1106 (1909) points out that in addition to the fact that the defendant has not been singled out, publication of notice was unknown to the common law. Therefore the publication statute will be strictly construed, and any error will result in a failure of jurisdiction.

tive service with respect to accomplishment of purpose. Substituted service might reasonably be held to put the intended party on notice when the summons contains a name which is in fact the name of the party's brother. In such a case, it is reasonable to suppose that the party would be tempted to read the complaint. If it in turn set out facts in which the party realized he was involved, it may be assumed that an inquiry would be made and a reasonable conclusion reached that he himself was intended.[12] The situation differs, in practical effect, when a stranger is named. This same argument can be made where, as in the principal case, the sheriff's return shows that the summons, though actually left at James' domicile, was left as substituted service on Joseph. Nevertheless, the New Jersey court is probably correct in safeguarding fundamental ideas of jurisdiction and valid process.[13] In fact, the formal rules of process are so well settled that, under the facts involved, the court had little alternative.[14]

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[12] But cf. Baker v. Tormey, 209 Wis. 627, 245 N.W. 652 (1932) where intended defendant's name was Weston Tormey, and the summons and complaint named Thomas W. Tormey. Thomas was in fact the name of intended defendant's younger brother. Process was left with the boys' mother at the family residence. A statute permitting the court upon trial to amend misnomers was held inapplicable, and defendant was protected by the statute of limitations.

[13] However, the principal case affirms the amendment of the complaint on the grounds that the defendant was not prejudiced; the case may be considered as one in which no process has issued. The lower court on remand must decide whether the running of the statute of limitations has been stopped. Thus the same result may be reached as though the service had been good and the amendment of the summons had been allowed.

[14] See 42 AM. JUR., Process §1-156 (1942). The necessity of service or a waiver thereof is not dispensed with by the mere fact that a defendant may have learned in some way of the filing of the suit. Piggly-Wiggly Georgia Co. v. May Investing Corp., 189 Ga. 477, 6 S.E. (2d) 579 (1939).