Buffalo Law Review

Volume 15 | Number 2 Article 17

12-1-1965

Civil Procedure—Attachment and Publication Sufficient to Obtain in Personam Jurisdiction Over an Absconding State Resident

Brian J. Troy

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

 Part of the Civil Procedure Commons

Recommended Citation

Brian J. Troy, *Civil Procedure—Attachment and Publication Sufficient to Obtain in Personam Jurisdiction Over an Absconding State Resident*, 15 Buff. L. Rev. 425 (1965).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol15/iss2/17

This Recent Case is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

RECENT CASES

CIVIL PROCEDURE—ATTACHMENT AND PUBLICATION SUFFICIENT TO OBTAIN IN PERSONAM JURISDICTION OVER AN ABSCONDING STATE RESIDENT

Defendant lived at and was employed by a boarding school in Westchester County, New York. While driving his car, he collided with an automobile in which plaintiffs were riding, causing them serious injury. In addition to the ensuing negligence action, defendant was charged with reckless driving and a warrant for his arrest was issued. Police officers, Motor Vehicle Bureau officials, process servers and defendant's liability insurers were unable to locate him. Pursuant to a warrant of attachment, the Sheriff of Westchester County made a levy of attachment against twenty-two dollars and seventy cents owed as wages to the defendant by the boarding school. An order was entered authorizing service of summons by publication upon defendant, as a *resident* of New York who could not be found within the state and who was avoiding service of process.[1] Publication was made as directed. Judgment was rendered for plaintiffs on defendant's default for $40,835.87. Insurer's attorney on behalf of defendant, appeared specially to contest jurisdiction. The trial court granted his motion, vacating the judgment insofar as it was in personam, limiting it to the twenty-two dollars and seventy cents attached. The Appellate Division affirmed. The Court of Appeals in reversing, *held*, that the judgment entered after service by publication and prior attachment of property of an absconding *resident* of the state was in personam and not limited to the property attached.[2] *Fishman v. Sanders*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965); *reversing*, 20 A.D.2d 905, 248 N.Y.S.2d 1013 (1964).

Jurisdiction over persons consists of three basic elements, the court's competency over the particular litigation,[3] basis, and notice. The modern concept of jurisdictional basis over persons can best be understood by reference to the case of *Pennoyer v. Neff*[4] where the Supreme Court of the United States applied the common law principle of jurisdictional basis. The case involved a personal claim against a *nonresident* having real property within the forum state. Pursuant to a state statute, plaintiff served defendant by publication. Default judgment was rendered against the nonresident. Execution on his property followed to satisfy the judgment. A subsequent action was instituted, in a federal court, to recover the property. On appeal the Supreme Court held the state court judgment invalid due to lack of jurisdictional basis. The Court reached its conclusion by applying the common law concept, that a state possesses jurisdiction and sovereignty only over persons and property within its own borders. The common law required a state to obtain power and control over persons and

1. N.Y. Sess. Laws 1921, Vol. 4, § 232.
2. N.Y. Sess. Laws 1921, Vol. 4, § 645.
3. It is assumed in this note that the courts are competent to deal with the particular litigations in the cases discussed.
4. 95 U.S. 714 (1877).

property within its territories before it had basis for exercising its jurisdiction. The Supreme Court held that the mere ownership by the *nonresident* of property within the forum state did not confer upon a court sufficient basis to exercise personal jurisdiction. This somewhat rigid approach was modified in a later case[5] when the Supreme Court held, that a state could exercise personal jurisdiction over a *nonresident* who was involved in an automobile accident in the forum state. The *nonresident* was held to have impliedly consented to jurisdiction having availed himself of the protection of the laws of the forum state when using its highways. The Court further liberalized its concept of jurisdictional basis over persons in *Blackmer v. United States*[6] when it stated that, the duty of allegiance owed by a citizen to a country is a sufficient basis for obtaining jurisdiction in personam. This expansion continued to its fullest affirmation in *Milliken v. Meyer*,[7] when the Court stated, "Domicile in the state alone is sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."[8] Some states have not adopted the *Milliken* doctrine of domicile as a basis for exercising jurisdiction.[9] However, the American Law Institute, Restatement of Conflict of Laws, unequivocally states that *domicile* is a sufficient basis for exercising jurisdiction,[10] and the Restatement is in accordance with the weight of authority.[11] The quotation from *Milliken* and the affirmances of it, grant the state plenary power but also provide a limitation—appropriate service. The service must be at least that which is most likely to reach the defendant.[12] The adequacy of the service as far as due process is concerned is dependent on whether or not the form of substituted service is reasonably calculated to give the defendant notice of the proceedings and an opportunity to be heard.[13] It has been established that a personal judgment upon constructive or substituted service of process upon a *nonresident* defendant who does not appear is contrary to due process of law, and is invalid, in the state where rendered and in any state where its enforcement may be sought.[14] However the courts are not entirely in accord as to

5. Hess v. Pawloski, 274 U.S. 352 (1927).
6. 284 U.S. 421 (1932).
7. 311 U.S. 457 (1940).
8. *Id.* at 462.
9. Chesin v. Superior Court, 142 Cal. App. 2d 360, 298 P.2d 593 (2d Dist. 1956); De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896); 126 A.L.R. 1465 (1940).
10. Restatement, Conflict of Laws § 79 (1934).
11. McCormick v. Blaine, 345 Ill. 461, 178 N.E. 195 (1931); Edwards v. Smith, 238 Iowa 1080, 29 N.W.2d 404 (1947); Naylor v. Naylor, 217 Md. 615, 143 A.2d 604 (1958); Goodrich, Conflict of Laws 158 (2d ed. 1938).
12. McDonald v. Mabee, 243 U.S. 90, 92 (1917).
13. Milliken v. Meyer, 311 U.S. 457, 463 (1940).
14. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Propper v. Clark, 337 U.S. 472 (1949); Estin v. Estin, 334 U.S. 541 (1948); Esenwein v. Commonwealth *ex rel.* Esenwein, 325 U.S. 279 (1945); Pennoyer v. Neff, 95 U.S. 714 (1877); Schuster v. Schuster, 75 Ariz. 20, 251 P.2d 631 (1952); Cooper v. Cooper, 229 Ark. 772, 318 S.W.2d 587 (1958); Owens v. Superior Court, 338 P.2d 465 (2d Dist. Ct. of App., Cal. 1959); Sutton v. Hole, 349 Ill. App. 219, 110 N.E.2d 455 (1953); Annot., 126 A.L.R. 1465, 1474 (1940).

whether this doctrine precludes recovery of a personal judgment against a *domiciliary* of the state upon constructive or substituted service of process.[15] The constitutionality of statutes authorizing substituted or constructive service on domiciliaries have generally been sustained if service could not be made personally.[16] The limiting phrase (could not be served personally) is important, for statutes which omit it or a comparable inclusion have been rejected as violations of due process.[17] If the plaintiff can prove that the facts were such that service by publication was reasonably calculated to give defendant notice, it would seem that the service should be held sufficient.[18] The New York legislative history illustrates the battle that has ensued over the use of publication as a substituted method of service. At first the granting of an order for service by publication was allowed in the case of resident defendants.[19] The residence requirement was removed as to marital and specific property actions in 1879.[20] The attachment requirement affecting an order for service by publication in a specific property action against a defendant's property within the state was first added in 1920.[21] A corresponding addition was made requiring attachment, if publication was to be used as a method of service, in actions to recover a sum of money only.[22] These attachment requirements were subsequently incorporated in the Civil Practice Act of 1921.[23] The New York Judicial Council, in 1943 and 1945, suggested the elimination of the requirement of prior attachment in actions for sum of money only, where the defendant was a *resident* of the state.[24] The suggestion was not enacted and attachment remained a prerequisite for service by publication. The Appellate Division held attachment necessary for publication but stated, "It is difficult to understand why this requirement was ever imposed in the case of an action against a resident, over whom the courts of this State may assert plenary jurisdiction upon the basis of any form of authorized constructive service."[25]

Some states, New York among them, have expanded the *Milliken* doctrine of jurisdictional basis by domicile to residents.[26] Domicile requires the existence

15. Annots., 137 A.L.R. 1361 (1942); 126 A.L.R. 1465, 1474 (1940).

16. International Salt Co. v. Herrick, 367 Mich. 160, 116 N.W.2d 328 (1962); Bardwell v. Anderson, 44 Minn. 97, 46 N.W. 315 (1890); Hunstock v. Estate Development Corp., 126 P.2d 932 (2d Dist. Ct. of App., Cal. 1942), *aff'd*, 22 C.2d 205, 138 P.2d 1 (1943).

17. Schroeder v. City of New York, 371 U.S. 208 (1962); O'Bannon v. O'Bannon, 257 Ala. 248, 58 So. 2d 779 (1952); Ware v. Ware, 302 Ky. L. Rep. 438, 194 S.W.2d 969 (1946); Roberts v. Roberts, 135 Minn. 397, 161 N.W. 148 (1917).

18. D. W. Onan & Sons, Inc. v. Superior Court, 65 Ariz. 262, 179 P.2d 243 (1947). See, 41 Colum. L. Rev. 724 (1941).

19. N.Y. Sess. Laws 1876, ch. 5, § 438.

20. N.Y. Sess. Laws 1879, ch. 542, § 438.

21. N.Y. Sess. Laws 1920, ch. 478, § 1.

22. N.Y. Sess. Laws 1920, ch. 478, § 2.

23. N.Y. Sess. Laws 1921, Vol. 4, § 232.

24. N.Y. Judicial Council Reports and Studies, Eleventh Annual, 197 (1945); N.Y. Judicial Council Reports and Studies, Ninth Annual, 343 (1943).

25. Soemann v. Carr, 8 A.D.2d 489, 188 N.Y.S.2d 611 (4th Dep't 1959).

26. Myrick v. Superior Court, 256 P.2d 348 (1st Dist. Ct. of App., Cal. 1953); Merritt v. Heffernan, 142 Fla. 496, 195 So. 145 (1940); Camden Safe-Deposit & Trust Co. v. Barbour, 66 N.J.L. 103, 48 Atl. 1008 (1901); Hetson v. Sommers, 48 N.Y.S.2d 35 (App. Div. 1st Dep't 1944); Mishkin v. Mishkin, 47 N.Y.S.2d 514 (Sup. Ct. 1944).

of the attitude and intent to make the place of abode a permanent home, while residence, determined by the fact of presence alone, does not.[27] This intention to make the residence permanent often remains undisclosed and is difficult to prove.[28] The concept of reasonableness of residence does away with the necessity of determining the difficult element of intent. Residence is made a basis for exercising jurisdiction when by reason of the nature of the place of abode and the length of time he stays there, the individual's contacts with the state become sufficient to make its use as basis reasonable.[29] The Supreme Court of the United States has not yet had occasion to determine whether residence, as opposed to domicile, constitutes an adequate basis for the exercise of jurisdiction.[30]

The view was expressed in New York that although *residence* was sufficient to obtain in personam jurisdiction over the defendant, the legislature had exercised this power only when the summons was served personally on the defendant without the state,[31] and that where process was served by publication in an action for money only, a prior levy of attachment upon the defendant's property was necessary and limited the court's jurisdiction to that property attached.[32] Such was not the case in marital actions involving absent resident defendants. In divorce actions, the court's jurisdiction over the marital res of a defendant domiciliary was held sufficient to grant in personam judgments.[33] Residence of the husband and the wife in New York, though one be absent, was held to confer a sufficient basis for granting in personam jurisdiction. Publication was considered a reasonable form of service in the latter situation.[34] Some writers, having reviewed the New York decisions as to marital actions, expressed the desire to see these holdings expanded so as to include actions for money only.[35] The sections of the Civil Practice Act describing when and how service by publication could be made in judgments for money only, did not state whether such judgments were limited to the property attached or were in personam.[36]

In the instant case, the Appellate Division felt that the only reason the legislature included attachment as a prerequisite to an order for publication was to limit the jurisdictional basis over the absent resident.[37] As such, this

27. Clapp v. Clapp, 272 App. Div. 378, 71 N.Y.S.2d 354 (1st Dep't 1947); Smith v. Smith, 190 Misc. 298, 74 N.Y.S.2d 233 (Sup. Ct.), *aff'd*, 273 App. Div. 784, 75 N.Y.S.2d 662 (2d Dep't 1947); *In re* Green, 99 Misc. 582, 164 N.Y.S. 1063 (Surr. Ct.), *aff'd*, 179 App. Div. 890, 165 N.Y.S. 1088 (1st Dep't 1917).

28. Rawstorne v. Maguire, 265 N.Y. 204, 192 N.E. 294 (1934).

29. Restatement (Second), Conflict of Laws § 79 (Tent. Draft No. 3, 1956); 17 N.Y. Jur. *Domicile and Residence* §§ 1, 2 (1961).

30. 17 N.Y. Jur. *Domicile and Residence* § 2 (1961).

31. Langer v. Wiehl, 207 Misc. 826, 140 N.Y.S.2d 298 (Sup. Ct. 1955).

32. *Ibid.*

33. Doty v. Doty, 194 Misc. 907, 88 N.Y.S.2d 328 (Sup. Ct. 1949); Cohen v. Cohen, 193 Misc. 1023, 86 N.Y.S.2d 168 (Sup. Ct. 1948).

34. Dirksen v. Dirksen, 72 N.Y.S.2d 865 (Sup. Ct. 1947).

35. John F. X. Finn, 18 Fordham L. Rev. 242 (1949).

36. N.Y. Sess. Laws 1921, Vol. 4, § 232.

37. Fishman v. Sanders, 20 A.D.2d 905, 248 N.Y.S.2d 1013 (2d Dep't 1964).

limitation confined satisfaction to the property attached, twenty-two dollars and seventy cents. The Court of Appeals disagreed.[38] It stated, "The requirement that there be an attachment, before service could be made by publication on a resident, represented an effort by the Legislature to provide a form of substituted service 'reasonably calculated to give him (defendant) actual notice of the proceedings and an opportunity to be heard.' "[39] The Court considered the *Milliken v. Meyer* case as rejecting the view of *Pennoyer v. Neff* when used in relation to *residents* as opposed to *nonresidents*. The New York legislative and judicial history reveal that the attachment was not a limiting factor on the court's exercise of jurisdictional basis but a further, though arguably needless, requirement making more reasonable the notice rendered by service by publication.[40] The Court of Appeals referred to section 645 of the Civil Practice Act[41] which set out the requirements for the Sheriff in satisfying a judgment where a warrant of attachment had been levied. The first subdivision of that section relates to judgment debtors who are *nonresidents* or *foreign corporations* and limits execution to the property attached. Subdivision two, however, relates to all other judgment debtors and permits execution, in a certain order, to virtually all of the debtor's property within the forum state. The Court concluded that, "Subdivision 2 necessarily meant that as to a resident on whom service has been gotten by attachment and publication (as distinguished from nonresidents dealt with in subdivision 1) the judgment . . . [is] not a judgment in rem."[42] "The attachment of defendant's unpaid wages and the subsequent order for publication . . . were in compliance with the applicable statutes and valid. It seems equally clear that such service on a resident of the State who keeps himself concealed to avoid direct personal service of a summons . . . is [a] sufficient predicate for a conventional judgment in personam. . . ."[43]

It is desirable to afford plaintiffs at least one forum where it is certain that their claims against a defendant can be litigated.[44] Inequity would prevail if a *resident* of the forum state was allowed to avoid jurisdiction of his person by absconding from the state or by concealing himself in efforts to avoid service. The plaintiff in these situations would be frustrated by a defendant's purposeful absence, and his claim, possibly of immediate necessity, unnecessarily prolonged. *Residence* in the state under these situations would provide a reasonable basis for the exercise of jurisdiction. It has been argued that though residence is a sufficient basis for jurisdiction, subsequent service by publication alone would not comply with constitutional due process.[45] The New York Judicial

38. Fishman v. Sanders, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965).
39. Instant case at 302, 206 N.E.2d at 329, 258 N.Y.S.2d at 384.
40. Soemann v. Carr, 8 A.D.2d 489, 188 N.Y.S.2d 611 (4th Dep't 1959); N.Y. Judicial Council Reports and Studies, Ninth Annual & Eleventh Annual (1943 & 1945).
41. N.Y. Sess. Laws 1921, Vol. 4, § 645.
42. Instant case at 302, 206 N.E.2d at 328, 258 N.Y.S.2d at 383.
43. Instant case at 301, 206 N.E.2d at 328, 258 N.Y.S.2d at 383.
44. 73 Harv. L. Rev. 909 (1959-60).
45. Restatement, Conflict of Laws § 79 (1934).

Council thought otherwise and the New York courts have found difficulty in determining the reasons why anything more than publication is necessary. The view has been expressed that domicile or residence should be used in relation to the minimum contacts doctrine of *International Shoe Co. v. Washington*[46] in determining jurisdictional basis.[47] Thus domicile or residence would be considered a strong factor in determining the minimum contacts required in a specific case so as to meet the requirements of "fair play and substantial justice." In any event, the problem may occur less frequently since section 232 of the Civil Practice Act providing for substituted service by publication on residents has been omitted in the CPLR.[48] The sections and rules of article 3 of the CPLR concerning jurisdiction over persons and things and methods of service, was drafted with the objective of requiring the most desirable method of service.[49] In that connection, service by publication was omitted in all cases except those where no other method of service was available. The needless step of obtaining an order for substituted service was abolished; mailing of the summons and affixing it to the door or delivery to a person of suitable age and discretion at the defendant's home or place of business is permitted.[50] These provisions for service within or without the state make service by publication unnecessary except where a defendant's whereabouts are unknown and he has no fixed location in the state. When this is the situation, CPLR section 308(4) is the applicable statutory provision. Generally, under section 308(4) an affidavit in support of a motion for another form of service will be accompanied by an affidavit of the process server showing that it is impracticable to make service in one of the other prescribed manners.[51] This motion pursuant to CPLR section 308(4) may be for publication.[52] However, only the most exceptional circumstances will warrant service by publication under this section. The reason for the above statement is that publication on a resident is not specified in CPLR section 314 which lists the actions in which publication may be used, under section 315. One situation that may warrant service by publication under section 308(4) is where an adult resident has been continuously absent from the state for more than six months before the granting of the order.[53] Under the decision of the instant case there can be no doubt that service by publication will give in personam jurisdiction, whether attachment is necessary or not, over an absconding resident. Thus publication, without the expensive and time consuming property attachment, should be a sufficient form of service when used

46. 326 U.S. 310 (1945). See generally, Comment, 14 Buffalo L. Rev. 525 (1965).

47. 73 Harv. L. Rev. 909 (1959-60).

48. McLaughlin, Practice Commentary on CPLR § 308, 7B McKinney's Consol. Laws of N.Y. Ann., § 308, at 428 (1963).

49. Standard Civil Practice Service, Vol. 1, 292 (1963).

50. CPLR § 308(3).

51. 1 Weinstein, Korn, Miller, New York Civil Practice, § 308.

52. 1 Weinstein, Korn, Miller, New York Civil Practice, § 315.03.

53. 1 Weinstein, Korn, Miller, New York Civil Practice, § 315.03 n.8.

in conjunction with CPLR section 308(4). Whether this method of obtaining in personam jurisdiction is in accord with due process has not been decided by the Supreme Court.

BRIAN J. TROY

CIVIL PROCEDURE—EUROPEAN AIRLINE FOUND "DOING BUSINESS" TO SATISFY JURISDICTIONAL REQUIREMENTS, ALTHOUGH IT MAINTAINED NO AIRCRAFT WITHIN THE UNITED STATES, AND TORT UPON WHICH SUIT WAS BASED OCCURRED IN FRANCE

Plaintiff, an airline hostess for Trans-World Airlines, brought suit against defendant, Finnish National Airline, for personal injuries allegedly caused by defendant's negligence. Plaintiff alleged she was struck by a baggage cart, which was forcibly thrown upon her person by an excessive blast of air emanating from one of defendant's airplanes, as it was moving across an airfield ramp. The accident occurred at Orly Airport, Paris, France, and the summons and complaint were properly served upon the Agency and Interline Manager in New York state.[1] Pursuant to New York Civil Practice Laws and Rules (hereinafter CPLR), Rule 3211(a)(8),[2] defendant moved for dismissal, for lack of jurisdictional "basis." The supreme court, at Special Term,[3] denied defendant's motion, and defendant appealed from the order, contending that the airline was a foreign corporation organized under the laws of Finland, where its principal offices were located, and that it was not "qualified" to do business in New York state. The airline, moreover, conducted no flights, either beginning or ending, in New York state, nor did it operate aircraft anywhere within the United States. It maintained a small office in New York City, where reservations were transmitted to the European offices. In addition, some minor publicity and information activities were carried on by it. The office did not, however, sell any tickets, nor did any of the staff members have authority to bind defendant company. Therefore, reasoned defendant, it was not doing sufficient business to meet the requirements of CPLR section 301.[4] The Appellate Division,[5] agreeing with the defendant, reversed the order of the lower court and dismissed the action. The Court of Appeals, in an opinion delivered by Chief Judge Desmond, reversed the order of the Appellate

1. Pursuant to N.Y. CPLR section 311: "Personal service upon a corporation . . . shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. . . ."

2. Providing: "A party may move for judgment dismissing one or more causes of action asserted on the ground that . . . the court has not jurisdiction of the person of the defendant. . . ."

3. Bryant v. Finnish Nat'l Airline, 151 N.Y.L.J., February 18, 1964, p. 15, col. 2 (Sup. Ct. 1964).

4. Providing: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

5. 22 A.D.2d 16, 253 N.Y.S.2d 215 (1st Dep't 1964).