Buffalo Law Review

Volume 11 | Number 1 Article 25

10-1-1961

Civil Procedure—Relationship Between Vouching in and Impleader

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Due process is a concept of law that cannot be exactly defined, it is true,[15] but all authorities agree that there are at the very least two essential requirements.[16] These are notice and an opportunity to be heard. And, in determining whether these basic requirements have been met, the courts must look to the substance of things and not to mere form.[17] For as it was pointed out in *Mullane v. Central Hanover and Trust Company*,[18] "When notice is a person's due, process which is a mere gesture is not due process." In fact, this Court felt that the presumption that one knows the law falls short of being even the mere gesture which was held to be insufficient in the *Mullane* case.

In its opinion, the Appellate Division also spoke of notice to persons other than petitioner being sufficient to start the running of the thirty day period of limitation within which she had to apply for review. This was not made a requirement, however, for the Appellate Division did not state who these persons might be. Therefore, the Court of Appeals did not pass upon this question. However, in *Matter of Blewitt*,[19] (a petition to set aside a commission and proceedings in lunacy), the Court stated that if the presiding judge was satisfied that notice to the alleged mentally ill person would be useless or harmful to his health, notice to relatives in lieu of personal service would be sufficient. Therefore, by analogy, it would seem that if notice to a relative or friend of Mrs. Coates had been given, it probably would have been sufficient to satisfy due process requirements. However, as was stated earlier, this was not made a requirement and so the Court did not pass upon it. The precise issue here was, (in view of the Appellate Division's construction of Section 76), whether adequate notice had been given to this petitioner that the thirty day period of limitation within which she had to make a demand for a jury trial had commenced. And in view of the unrealistic proposition that someone in petitioner's place should be presumed to know the law, the Court concluded that nothing short of actual personal notice upon the petitioner would serve to commence the running of the thirty day period of limitation after which she would lose her right to demand a jury trial.

J. S. M.

RELATIONSHIP BETWEEN VOUCHING IN AND IMPLEADER

At common law a defendant having a third party liable over to him could vouch him into the litigation and bind him by the conclusiveness of the judgment by giving him proper notice of the pendency of the suit.[20] In

15. Stuart v. Palmer, 74 N.Y. 183, 191 (1878).
16. E.g., Dohany v. Rogers, 281 U.S. 362 (1930); Inter Chemical Corp. v. Mirabelli, 269 App. Div. 224, 54 N.Y.S.2d 522 (1st Dep't 1945).
17. Louisville and Nashville Railroad Co. v. Schmidt, 177 U.S. 230 (1900).
18. 339 U.S. 306 (1949).
19. 131 N.Y. 541, 30 N.E. 587 (1892).
20. See Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N.Y. 663, 39 N.E. 360 (1895); The Village of Port Jervis v. The First National Bank of Port Jervis, 96 N.Y. 550 (1884); City of Rochester v. Montgomery, 72 N.Y. 65 (1878).

addition to this doctrine the New York Civil Practice Act Section 193(2) provided a defendant the opportunity to implead a third party by filing a verified third party complaint and proceeding as a third party plaintiff.[21] Since vouching in is but the common law counterpart of statutory impleader, it is seldom invoked today, except in situations where a party seeking to implead a third party cannot meet the requirements of the statute. In *Glens Falls Insurance Co. v. Wood*,[22] the plaintiff insurance company sought a summary judgment in a subrogation action against the driver of an automobile on the grounds that the defendant had been vouched into the original action against the insured owner of the automobile by certain notices sent to him concerning the pendency of the suit. In the prior litigation the present defendant's wife brought suit for personal injuries against the owner of the car in which she and her husband were riding, the owner being the defendant's father. She recovered a judgment against the father only, after he had refused to submit to the wishes of the insurance company to implead the present defendant.

The Court of Appeals held that the doctrine of vouching in had been restricted to a named defendant who had offered control of the litigation to the third party,[23] and that neither the general co-operation nor subrogation clauses of an insurance contract could confer the status of a named defendant on an insurer.[24]

Relying on the recent case of *Hinchey v. Sellers*,[25] the plaintiff contended that he was a party to the original action because of sufficient privity between an insurer and its insured to permit the insurer to invoke the doctrine. However, the Court of Appeals, in affirming the trial court and Appellate Division,[26] rejected this contention by pointing out that in the *Hinchey* case, not only did the parties against whom the defense of collateral estoppel was invoked have full opportunity to litigate, but they were also actual parties in the first action.

The Court's refusal to extend the doctrine of vouching in to the facts of this case can be premised on the fact that the impleader statute, having been enacted to control third party practice, is restricted to a named defendant. It would seem that the Court of Appeals believes that the statute was intended to do away with the old problems inherent in vouching in, namely, issues as to the adequacy of the notice given, and the opportunity to defend.

It is apparent that this holding imposes a great hardship on the present plaintiff, and does not avoid circuity of action and litigation. The trial court indicated that corrective legislation might furnish the insurer with a remedy

21. N.Y. Sess. Laws 1923, ch. 250; The present impleader statute is N.Y. Civ. Prac. Act, Section 193-a(1).
22. 8 N.Y.2d 409, 208 N.Y.S.2d 978 (1950).
23. Hartford Accident and Indemnity Co. v. First National Bank, 281 N.Y. 162, 22 N.E.2d 324 (1939).
24. American Surety Co. of New York v. Diamond, 1 N.Y.2d 594, 153 N.Y.S.2d 918 (1956).
25. 7 N.Y.2d 287, 197 N.Y.S.2d 129 (1959).
26. 9 A.D.2d 201, 193 N.Y.S.2d 147 (3d Dep't 1959).

in such cases where it tries unsuccessfully to implead and vouch in a third party. The Appellate Division and the Court of Appeals suggested that the plaintiff could have protected itself by inserting a clause in the insurance contract giving the plaintiff the right to compel the insured to institute a third party action.

M. A. L.

SERVICE OF SUBPOENA UPON FOREIGN CORPORATION UPHELD

The first question considered by the Court of Appeals in the case of *La Belle Creole Inter., S.A. v. Attorney-General*[27] was whether a subpoena duces tecum, served upon the petitioner-corporation, was unconstitutionally vague and indefinite because it failed to show what matters were under investigation by the Attorney General of New York State, or in what manner the documents requested by the Attorney General were relevant and material to such investigation. The petitioner-corporation's business consisted of the sale and shipment of duty-free, imported liquor to citizens of the state. The Attorney General, acting pursuant to his powers under the Executive Law to enjoin repeatedly fraudulent or illegal acts committed in the conduct of business within the state,[28] attempted to use the subpoena to command the production of the petitioner's corporate records for the past ten months at an inquiry into the possibly fraudulent or illegal acts being committed in the course of petitioner's business. The petitioner brought a proceeding to vacate the subpoena duces tecum.

The subpoena duces tecum has long been a useful investigative tool in the hands of law enforcement officials and, more recently, in the hands of administrative bodies.[29] No question as to a violation of constitutional rights against self-incrimination and unlawful search and seizure now remains in New York when the subpoena is used for law enforcement purposes.[30] One of the more usual grounds for attack of the subpoena has been that it is too burdensome and oppressive, but generally the courts have been quite liberal in upholding the validity of the subpoena, even though the production of rather extensive records has been requested by law enforcement officials.[31] The particular problem raised by the petitioner in the present case is that the subpoena on its face failed to inform him of the purpose and subject matter of the investigation, and the relevance the requested documents had to such investigation.

The Court in the present case admitted that the more preferable practice would have been for the Attorney General to show on the face of the subpoena the relevancy of the documents to an inquiry which the Attorney General was

27. 10 N.Y.2d 192, 219 N.Y.S.2d 1 (1961).
28. N.Y. Executive Law § 63 (12).
29. 1 Davis, Administrative Law § 3.04 (1st ed. 1958).
30. Dunham v. Ottinger, 243 N.Y. 423, 154 N.E. 289 (1926).
31. See, e.g., Manning v. Valente, 297 N.Y. 681, 77 N.E.2d 3 (1947); In re Edge Ho Holding Corp., 256 N.Y. 374, 176 N.E. 537 (1931).