

Jurisdiction Based on Residence or "Open the Door, Richard!"

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JURISDICTION BASED ON RESIDENCE

or

“OPEN THE DOOR, RICHARD!”

THE methods authorized by the Common Law to summon a defendant to answer a complaint in a civil action were adopted by the Colonies after the Declaration of Independence. They became a part of the Common Law of the thirteen original states. The Writ was called a summons and an attorney, as an officer of the court, was authorized to issue and sometimes to direct its service for the purpose of commencing a civil action. Different conditions required different methods of service, ranging from the simplest involving personal service on a competent adult to the complicated methods of service by publication. In the latter instances, it might require several months before the service would be deemed complete. The powers of an attorney to direct service of process were limited to the simplest cases and when circumstances required resort to service by substitution or publication an order must first be obtained, issued by a court or judge and supported by an affidavit or affidavits and establishing the necessary facts permitting service in one of these exceptional ways. The order, if issued, then directed the manner in which the service should be made. However, our colonial lawyers were not presented with serious difficulties. They “grew up” in their profession with the methods of the common law well understood. At the time of Magna Charta (1215) the simplest methods commencing civil ac-

tions were known to the profession. During the following 560 years or on July 4, 1776 the methods had become definitely crystallized. While it was expected that new situations would arise creating jurisdiction, the essentials of this jurisdiction remained constant. Our colonial lawyers were thoroughly versed as to what these essentials were.

In the first place, the court rendering the judgment had to possess the legal power to carry it out. If this power was not created by the service and the defendant refused to appear a personal judgment was void. Secondly, the proceeding had to accord with the "Law of the Land or due process of Law." These two phrases later came to have the same signification and were employed interchangeably. The meaning, as generally understood, was that every citizen shall hold his life, liberty and property under the protection of the general rules which govern society. If a proposed service did not confer jurisdiction the subsequent judgment was void, and, on the other hand, if a proposed service might confer jurisdiction but was a proceeding not in accordance with the law of the land, the subsequent judgment also became void.

Two simple illustrations may serve to explain these two important principles. We may assume a summons has been issued in the New York Supreme Court in an action by William White against Joseph Black, a resident thereof, to recover a money judgment. The process server locates the defendant driving his car on the state road to New Haven, Connecticut and is unable to overtake Black until after they pass the state line where the summons is delivered in person to the defendant. The summons, having no extra-territorial effect, its service conferred no jurisdiction or power in the Supreme Court and the subsequent judgment became a nullity in New York and every other place under the common law. We may also assume that Black is found and service is made personally upon him in New York State where by reason of his presence the service would be sufficient for conferring jurisdiction. But by reason of false representations and deceitful contrivances of the plaintiff in the suit or by one acting in his behalf the defendant has wrongfully been brought within the state. The ultimate question here is

whether or not the procedure accords with the requirement of due process or the law of the land. Blackstone sums it up in his commentaries to the effect: "That no man shall be disinherited nor put out of his franchise or freehold and unless he be duly brought to answer and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none."

In which circumstances might an attorney as officer of the court issue and direct service of the summons on a natural person? It has previously been observed that the instances were limited to the simple cases where jurisdiction was established by reason of the defendant's actual presence in the state. Due process of law did not require an application to the court for an order directing service in such instance as long as there was a delivery within the state to the defendant or the persons designated. Thus, we find due procedure. Service on an adult defendant could validly be made by a delivery of a copy of the summons to the adult person within the state, or secondly, if the defendant were an infant of the age of 14 years or over, then the service required a delivery of the summons to the infant and to his father, mother or guardian, or if there be none within the state, to the person having the care and control of him, or with whom he resides or in whose service he is employed. Thirdly, if the defendant be a person judicially declared to be incompetent to manage his affairs, of and for whom a committee has been appointed, the service would be made on the committee, and also on defendant in person; but the court in its discretion may make an order dispensing with the delivery to the defendant in person. Fourthly and under Section 227 of the Civil Practice Act service might be made, providing the adult resident defendant has designated another competent resident to accept service for him in his stead, by delivery to the designee of the summons within the state.

There were other exceptional methods provided for the commencement of civil actions. These are the exceptional methods stated above by an *order* for substituted service or an *order* for publication. The former order could be obtained providing the defendant, a natural person, was a

resident of the state and equally important, that the plaintiff would be unable, with due diligence, to make personal service. If these facts satisfied the impartial judge, the order would provide for the substituted service. In such instance, the jurisdiction was created by reason of the defendant's *citizenship* in the state and due process was secured by conforming to the conditions specified in the order. There was no doubt that such procedure accorded with the Common Law requirements. The order as to service required that a copy of the summons as well as the order might be delivered to a competent person found at the defendant's *residence* who would be willing to accept the process. No further service in such event on the defendant within or without the state would be required. Secondly, if the service could not be made in this way, then by affixing to the outer door of defendant's residence a copy of the summons and order and immediately thereafter mailing duplicate copies to the defendant at his address. Those *acts* done within the state were the essential ingredients in establishing the jurisdiction. Such procedure was very effective, for in event of defendant's default, the plaintiff might have a personal judgment for the full amount of his claim and such judgment would be recognized in New York as well as any state or country following the common law.

The second method of reaching the defendant provided for service by publication. Here the first important problem presented to the state was that of jurisdiction. It was recognized that whatever methods of service were prescribed it was essential that they validly confer power on the court to adjudicate rights and declare liabilities. Three general types of actions might confer this jurisdiction based on three different grounds. First, in matrimonial actions where the plaintiff sought to have its status as a resident declared, it was recognized that the sovereign alone, had such jurisdiction. Therefore, in these types the power vested in the court without dispute. Secondly, in actions where the complaint demanded judgment that defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property *within the state* the power of the court was recognized because the property was situated here and the

action was strictly one *in rem*. Thirdly, where the complaint demanded a money judgment and was one *in personam* it might be made *quasi in rem* by providing for an attachment and a levy made on property within the state. If defendant defaulted after service, the court, having acquired jurisdiction to the extent of the attached property, had power to create the plaintiff's rights thereto.

Therefore, the second important problem confronting the state was the nature of the notice to be given the defendant. It has already been noted in the case of substituted service that the order permitting the same provided for a procedure in accordance with due process and in enacting the statute for an order of publication, a procedure was followed which had been adopted by the common law. It permitted a service by publishing in two newspapers, etc., or a service of the defendant personally outside the state with summons and verified complaint in lieu of publication. Since the jurisdiction of the court was established in one of the three instances stated above, it was recognized that there might be many instances where an order of publication might be an unnecessary and costly proceeding. The sufficiency of the service or required notice would be sustained by serving personally the defendant outside the state without obtaining an order of publication. This was the practice provided for under Civil Practice Act Section 235, prior to its amendment. The defendant would be sufficiently apprised of the action pending against him and these three methods of service were the law and are the law today.

On September 1, 1947 the legislature by amending Section 235 has completely revolutionized our procedure in the case of money demands against residents of the state. Not that the section does omit any of the former provisions but it is argued the addition must have this effect.

The law reads today:

Sec. 235. PERSONAL SERVICE WITHOUT THE STATE WITHOUT ORDER.

Where the defendant is a resident of the state and the complaint demands judgment for a sum of money only, and in any case specified in section two hundred thirty-two of this act, the summons may be

served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the verified complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed. (Am. L. 1939 ch. 18, in effect Sept. 1; L. 1946 ch. 144, in effect Sept. 1.)

The italicized matter is the new matter added to the section and the law is too recent to find judicial interpretation as to the effect and constitutionality of the change. However, some enlightenment may be gained by quoting the interview between Richard, a citizen of New York, and Mr. L., his lawyer. There can be no objection that the matter is incompetent as confidential or privileged because the writer was present throughout the interview.

RICHARD: I have come to ask your advice concerning the recent addition made to Section 235 of the Civil Practice Act which became effective on September 1, 1947.

L.: Well, the law is interpreted by some to provide that in an action wherein the complaint demands solely money damages against a resident of New York, the summons and complaint may be served on the defendant personally without the state without first procuring an attachment and levy on his property within the state.

RICHARD: Just what protection do I lose by this change?

L.: If an attachment and levy were conditions precedent to the service outside the state the plaintiff would be required to satisfy the court that defendant has departed or is about to depart with intent to defraud his creditors or to avoid the service of a summons or keeps himself concealed within the state with like intent.

RICHARD: Have I not that protection now?

L.: Of course not, for an attachment and levy are not required.

RICHARD: What other protection do I lose?

L.: The warrant might issue, if the court was satisfied by affidavits that you had removed property with intent to defraud your creditors or had assigned, disposed of or secreted property with like intent.

RICHARD: Well, I would be a heel if I tried that and it would be only fair if I were guilty. But, as you have said, I am not entitled to such privilege today. Are there any other privileges I lose?

L.: Yes. If the action is based on contract and you are charged with fraud in contracting or incurring the liability the court might permit an attachment of your property.

RICHARD: I think such law would be just and fair.

L.: Yes, and if you made a false financial statement, by reason of which the plaintiff extended credit to you which you now refuse to pay, an attachment and levy might issue.

RICHARD: Do I lose any other protection?

L.: Yes, in order to obtain the warrant, the plaintiff must furnish an undertaking.

RICHARD: What does this provide?

L.: Well, if you vacate the warrant or succeed in the action, the damages you have suffered will be paid.

RICHARD: Are there any other privileges that are lost?

L.: Yes, where the attachment is required and you do not appear, then the recovery is limited only to the property attached.

RICHARD: How does it work now, should I default?

L.: Now the plaintiff will recover the full amount of his claim. You see the law does not depend on a *quasi in rem* action.

RICHARD: But in every instance I'm a wrongdoer, and as a citizen I should be amenable to the law. But if I am present and can be served personally without trouble or expense, or let us assume, I have filed a designation and service might be easily made during my absence then why should I be treated like a criminal?

L.: Some lawyers say that as a citizen you owe your state a duty.

RICHARD: You don't mean a duty to be a criminal?

L.: No, but a duty to defend, whatever may be the nature of the action.

RICHARD: Does this law extend to non-residents?

L.: Oh no. A non-resident owes our state no duty. Therefore our state must grant him every protection including an attachment and seizure.

RICHARD: Although he does nothing for my state, he must be accorded every protection known to the law.

L.: Certainly!

RICHARD: Can you explain why Governor Dewey whom I so admire, would ever allow such a statute to become the law?

L.: Why that is perhaps difficult to explain for the fact is that the Governor did veto the law.

RICHARD: He did veto the law? Why?

L.: *He* thought the action should be based on an attachment and levy.

RICHARD: That's just what I think. Yet you tell me *it is* the law. Will you explain that one?

L.: The Judicial Council of the state explains that the objection has been corrected by it.

RICHARD: But I don't see how a thing is corrected if the evil persists. Who is this Judicial Council to whom you refer?

L.: You must have heard of the Judicial Council. It proposes new laws to "improve the old." Whenever the legislature enacts their suggestions into law, it causes the footnote, "Amendment was recommended by Judicial Council" to be subscribed.

RICHARD: Oh! It is something like "Tested and approved by Good Housekeeping."

L.: Well, there is not a conclusive presumption yet attached to their suggestions. The courts still exercise their powers of judicial review.

RICHARD: It strikes me that I should get so far away that it would be impossible to serve me.

L.: If you did that, then all the protection as a citizen would be reinstated in you.

RICHARD: I can't follow you. Please explain.

L.: If you cannot be personally served outside of the state, then service must be made by an order of publication. Before such order can be granted an attachment and levy are requisites. That returns your former protection.

RICHARD: In song, I never was compelled to open my door!

(Poor Richard of the Empire State dejectedly leaves L.'s office.)

Certain, one is, that he failed to understand Mr. L.'s reference to judicial review.

W. TAPLEY.