St. John's Law Review

Volume 8, May 1934, Number 2 Article 25

Substituted Service of Summons on Nonresident--Residence and Domicile Construed (Rawstorne v. Maguire, 240 App. Div. 1 (1st Dept. 1934))

St. John's Law Review

although conceding that he is generally liable for his torts,[9] to protect himself under the plea of infancy.[10] However, the court recognizes the undue hardship on defendant but feels itself remediless. It points out that the relief must come through legislation and that in a number of states such remedial statutes have already been enacted.[11]

A. A. M.

SUBSTITUTED SERVICE OF SUMMONS ON NONRESIDENT—RESIDENCE AND DOMICILE CONSTRUED.—Defendant has his home, which he owns and in which his family dwells, in Virginia. He owns no property either real or personal in New York. The defendant was a frequent visitor of this city and while here lived in the same room in the same hotel, staying at times as long as three weeks. On July 8, 1933, plaintiff issued a summons against the defendant, while latter party was not in town but who did return for three days in August, commencing August 21st. On August 30, 1933, an order was signed for substituted service of summons, which service was duly made and defendant appears specially to set such service aside. *Held,* defendant not a resident within the contemplation of the statute authorizing issuance of an order for substituted service.[1] *Rawstorne* v. *Maguire,*[2] 240 App. Div. 1, 269 N. Y. Supp. 39 (1st Dept. 1934).

Substituted service of process has no effect in giving a court jurisdiction over the person of the defendant, unless the person is *domiciled* in the state wherein the order was procured.[3]

---

[9] *Supra* note 2.

[10] *Ibid.;* 1 WILLISTON, CONTRACTS (1921) §245.

[11] Iowa, Kan., Utah, Wash.

[1] N. Y. CIVIL PRACTICE ACT (1920) §230. This section permits an order for substituted service to be issued, where defendant is "a natural person *residing* within the state" when satisfactory proof is given the plaintiff cannot be served within the state, due diligence being exercised.

[2] Martin, *J.,* dissents in opinion; Glennon, *J.,* concurs in dissent.

[3] De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996 (1890). The court states that a court may acquire jurisdiction by substituted service over both person and property of a person *domiciled* within its jurisdiction in the matter provided for in the *lex fori.* "But a court has no extra-territorial jurisdiction, and a person not domiciled in the state or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it or voluntarily submits himself to the jurisdiction of its court by appearing in some manner in the action or proceeding sought to be instituted against him." 120 N. Y. at 495, 24 N. E. at 999. Huntley v. Baker, 33 Hun

A person can have only one domicile, but as many residences as his means permit.[4] The domicile is where a person lives, intending to make it his fixed home.[5] Residence is mere bodily presence in a given place, as an inhabitant.[6] One's domicile may be in one place and his residence in another.[7] In order to effectuate a change of domicile, it is essential that a new residence be taken and an intention is had to remain there, making that place home, and the place of citizenship.[8]

In certain instances, "residence" and "domicile" have been con-

---

578 (N. Y. 1884); Sweeney v. Nat'l Assets Corp., 139 Misc. 223, 246 N. Y. Supp. 315 (1930).

In Johnson v. Diamond, 208 App. Div. 639, 203 N. Y. Supp. 895 (1st Dept. 1924), defendant was a traveling salesman with no fixed domicile. Substituted service was permitted to be made on him by affixing a copy of the summons to the door of the room he was then occupying in this state.

In Leighty v. Tichenor, 173 App. Div. 228, 159 N. Y. Supp. 457 (1st Dept. 1916), the court, in construing Mo. Rev. Stat. (1909) §1760, which is similar to note 1 *supra*, says: "* * * It appears to us from a consideration of the statutes that the intent of the statute was to prescribe a method of service on domiciled and not merely temporary residents, and that, therefore, by the terms of the statute as well as by the principles of the common law, the service would be ineffective if defendant was not at the time domiciled in Missouri, even though he happened to have a temporary 'place of abode' in the state." 173 App. Div. at 231, 159 N. Y. Supp. at 459.

In Rawstorne v. Maguire, instant case, Martin, *J.*, in his dissenting opinion, makes the statement that even if the defendant is domiciled in another state, he is not precluded from being a resident of New York and as such is amenable to substituted service of process.

[4] Delaware, L. & W. R. Co. v. Petrowsky, 250 Fed. 554 (C. C. A. 2d, 1918); Bischoff v. Bischoff, 88 App. Div. 126, 85 N. Y. Supp. 81 (2d Dept. 1903); U. S. Trust Co. v. Hart, 150 App. Div. 413, 135 N. Y. Supp. 81 (1st Dept. 1912); *In re* Rooney, 172 App. Div. 274, 159 N. Y. Supp. 132 (3rd Dept. 1916); *In re* Lydig's Estate, 191 App. Div. 117, 180 N. Y. Supp. 843 (1st Dept. 1920); *In re* Green's Estate, 99 Misc. 582, 164 N. Y. Supp. 1063 (1917), *aff'd*, 179 App. Div. 890, 165 N. Y. Supp. 1088 (1st Dept. 1917); *In re* Stone's Estate, 135 Misc. 736, 240 N. Y. Supp. 398 (1929); *In re* Beechwood, 142 Misc. 400, 254 N. Y. Supp. 473 (1931); *In re* Wendel's Estate, 144 Misc. 467, 259 N. Y. Supp. 260 (1932).

[5] Mitchell v. United States, 88 U. S. 350 (1874); *In re* Newcomb's Estate, 192 N. Y. 238, 84 N. E. 950 (1908), *aff'g*, 122 App. Div. 920, 107 N. Y. Supp. 1139 (1907).

[6] *Supra* note 5.

[7] Frost and Dickinson v. Brisbin, 19 Wend. 11 (N. Y. 1837); *In re* Grant's Estate, 83 Misc. 257, 144 N. Y. Supp. 567 (1913); *In re* Curtis, 178 N. Y. Supp. 286 (1919).

[8] Mitchell v. United States, *supra* note 5; Sun Printing Co. v. Edwards, 194 U. S. 383, 24 Sup. Ct. 696 (1904); Williamson v. Osenton, 232 U. S. 619, 34 Sup. Ct. 442 (1914); Gilbert v. David, 235 U. S. 561, 35 Sup. Ct. 164 (1915).

strued to be synonymous,[9] as in the case at bar, and in other instances, the courts have held them to be diverse.[10]

V. G. R.

TRUSTS—"SOLE RISK" OF CORPORATE TRUSTEE.—The appellant bank was a trustee under a trust deed that permitted it to invest in certain so-called "non-legals." It invested in its own mortgage participations, two of which did not mature till after the period for which the trust was limited. When the trust period expired, the beneficiary was offered the participations which, owing to conditions surrounding the real estate market, were worthless. He brought suit, claiming that the investments were imprudently and negligently made and that the bank guaranteed its investments under the New York Banking Law.[1] *Held,* that the investments were not impru-

---

[9] Residence and domicile are generally construed as synonymous when used in the Constitution or in statutes relating to voting, eligibility for office, jurisdiction in divorce, probate and administration. Barney v. Oelrichs, 138 U. S. 529, 11 Sup. Ct. 414 (1891); De Meli v. De Meli, *supra* note 3; Bell v. Pierce, 51 N. Y. 12 (1872); see Cincinnati, H. & D. R. Co. v. Ives, 21 N. Y. Super. Ct. 67, 3 N. Y. Supp. 895 (1889).

Eligibility for office: People v. Platt, 117 N. Y. 159, 22 N. E. 936 (1889). Matrimonial actions: De Meli v. De Meli, *supra* note 3. Matter of succession and transfer taxes: *In re* Martin's Estate, 173 App. Div. 1, 158 N. Y. Supp. 915 (1st Dept. 1916); *In re* Wise's Estate, 146 N. Y. Supp. 789 (1914). Venue: Klenrock v. Nantex Manufacturing Co., 201 App. Div. 236, 194 N. Y. Supp. 142 (2d Dept. 1922); *cf.* Johnson v. Hoile, 205 App. Div. 633, 199 N. Y. Supp. 875 (2d Dept. 1923). *Contra:* Lyon v. Lyon, 30 Hun 455 (N. Y. 1883). In this case, at page 456, the court says: "The section of the code referred to (§984 C. C. P. now §182 C. P. A.) makes the residence of the parties the controlling fact in fixing the place of trial. This means actual residence and not necessarily the domicile of one of the parties."

[10] "Residence in attachment laws generally implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return to the true domicile." Weitkamp v. Weitkamp, 53 N. Y. Super. Ct. 79 at 82-3 (1886). Hislop v. Taaffe, 141 App. Div. 40, 125 N. Y. Supp. 614 (2d Dept. 1910); Zenatello v. Pons, 235 App. Div. 221, 256 N. Y. Supp. 763 (1st Dept. 1932).

[1] N. Y. BANKING LAW (1933) §188, subd. 7. "All investments of money received by any such corporation, and by any trust company * * * as * * * testamentary trustee * * * shall be at its sole risk, and for all losses of such money the capital stock, property and effects of the corporation shall be absolutely liable, unless the investments are such as are proper when made by an individual acting as trustee * * * or such as are permitted in and by the instrument or words creating or defining the trust. Investments in bond and mortgage by any such corporation as * * * testamentary trustee * * * may be made by apportioning or by transferring to any estate or fund so held a part interest in a bond and mortgage held by or in the name of such corporation * * * ; but such bond and mortgage shall be a legal investment for trustees under the laws of this state * * *."