North Dakota Law Review

Volume 24 | Number 1 Article 2

1948

Domicile of Absent Defendant Is a Basis for in Personam Jurisdiction (Milliken v. Meyer)

A. J. Gronna

How does access to this work benefit you? Let us know!

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation
Gronna, A. J. (1948) "Domicile of Absent Defendant Is a Basis for in Personam Jurisdiction (Milliken v. Meyer)," *North Dakota Law Review*: Vol. 24: No. 1, Article 2.
Available at: https://commons.und.edu/ndlr/vol24/iss1/2

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

DOMICILE OF ABSENT DEFENDANT IS A BASIS FOR IN PERSONAM JURISDICTION (MILLIKEN V. MEYER)

By the HON. A. J. GRONNA

Suppose that personal service outside the state is made upon a legal resident of North Dakota in an action *in personam,* say, an action upon a promissory note, would a District Court of North Dakota have jurisdiction to enter an *in personam* judgment? Our statutes, if literally construed, authorize extraterritorial service upon a domiciliary.

R.C. 1943, s. 28-0620 provides that summons may be served upon any defendant by publication,

> "4. when personal service cannot be made upon such defendant in this state to the best knowledge, information, and belief of the person making the affidavit mentioned in s. 28-0621 and such affidavit is accompanied by the return of the sheriff of the county in which the action is brought stating that after diligent inquiry for the purpose of serving such summons he is unable to make personal service thereof upon such defendant."

Service by publication must be founded upon an affidavit for publication setting forth the applicable jurisdictional facts.

R.C. 1943, s. 28-0621 provides,

> "Before service of the summons by publication is authorized in any case, there shall be filed with the Clerk of the District Court of the county in which the action is commenced a verified complaint setting forth a cause of action in favor of the plaintiff and against the defendant and also an affidavit stating one of the grounds for service by publication specified in s. 28-0620 and also stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact, and also stating, unless the complaint shows that:
>
> 5. the defendant, although a *resident* of this state, has been continuously absent from the state for more than sixty days."

R. C. 1943, s. 28-0623 reads:

> "a copy of the summons and complaint, within ten days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant to be served at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown."

Extraterritorial service is the legal equivalent of publication according to R. C. 1943, s. 28-0624, which reads as follows:

> "After the affidavit for publication and the complaint in the action are filed, personal service of the summons and complaint upon the defendant out of the state shall be equivalent to and shall have the same force and effect as the publication and mailing provided for in this chapter."

Service of process by publication was unknown at common law. See Hartzell v. Vigen (1896), 6 N.D. 117, 123, 69 N.W. 203, wherein it is stated that we have borrowed our statute from the New York Code of civil procedure of 1849. Although the New York statute did not provide that an attachment should accompany the service of summons, in 1858 a rule of court was adopted which provided that,

> "in actions for the recovery of money only, when the summons has been served by publication, no judgment shall be entered

> unless the plaintiff, at the time of making application for judgment, shall show by affidavit that an attachment has been issued in the action and levied upon the property belonging to the defendant."
>
> At page 125 of 6 N. D., Judge Bartholomew's opinion reads, "the rule of court as we understand it, was not based upon the theory that the statute required any attachment. It was based upon and foreshadowed those great principles enunciated and elucidated in 1877 by the Supreme Court of the United States in the case of Pennoyer v. Neff, 95 U. S. 714."

Section 114 of the Code of Procedure of 1848 (Field Code) authorized the granting of an order where "a cause of action exists against the defendant, in respect to whom the service is to be made, and that such defendant *is a resident of this state, or has property therein****

In 1849, sec. 114 was renumbered sec. 135 and was amplified. Subdivision 2 related to a *resident* and as to him authorized an order for service of summons by publication where the action arose out of contract. Subdivision 3 related to a nonresident, and in such case required that the nonresident defendant have property in the state. Other subdivisions affected actions where property was the subject of the action.

Until 1920, the statutes of New York did not require a prior attachment and levy in an action to recover a sum of money only, against a *resident* defendant. In Dimmerling v Andrews (1923) 236 N. Y. 43, 139 N. E. 774, the Court of Appeals emphasized the necessity of an attachment of property in such an action against a *nonresident* defendant before making an order for service of summons by publication.

There is no dispute that service by publication does not warrant a personal judgment against a nonresident. Pennoyer v. Neff and McDonald v. Mabee, infra.

However, our question does not concern itself with nonresidents but only with domiciliaries.

Prior to the Milliken case, the North Dakota Supreme Court, in Darling & Co. v. Burchard, 1939, 69 N. D. 212, 220, 284 N.W. 856, did not discriminate between residents and nonresidents, saying:

> "In an action wherein a personal judgment for money is sought, the defendant must be brought within the jurisdiction of the court by service of process within the state, or by his voluntary appearance, and a personal money judgment rendered without such service or appearance is violative of the constitutional requirement of due process. Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565, supra; McDonald v. Mabee, 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343, L.R.A. 1917F 58, supra.

Many State cases, presenting conflicting views, are cited in 126 ALR 1474, supplemented in 132 ALR 1361.

With respect to eminent writers on the subject of Conflict of Laws who expressed their opinions prior to the Milliken case, the opinion generally expressed was that personal jurisdiction can be founded on domicile by means of appropriate substituted service outside of the state of forum. 1 Beale, Conflict of Laws (1935) 334; Goodrich, Conflict of Laws (1938) 158; Stumberg, Conflict of Laws (1937) 75.

The American Law Institute, Restatement of Conflict of Laws (1934) s. 79, unequivocally states that domicile is sufficient basis for jurisdiction:

> "s. 79 Individual Domiciled Within The State. A state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state."

It is elemental that state courts must accord the parties due process in determining the procedural and substantive law of the state. Due process of law is process due according to the "law of the land." This process in the United States is regulated by the law of the state. The power of the Federal Courts over that law is only to determine whether it is in conflict with the Supreme Law of the Land; that is to say, with the Constitution and laws of the United States made in pursuance thereof. The Federal Constitution does not prescribe certain methods the states must employ; due process requires only that the procedure adopted afford the defendant reasonable notice and a fair opportunity to be heard before the issues are decided. If personal service is not practicable the substitute method employed must be that most likely to reach the defendant. (McDonald v. Mabee).

What about the Constitutional validity of extraterritorial service upon an absent legal resident as fulfilling the requirements of due process?

Not until 1940 did the U. S. Supreme Court settle this question, by holding in Milliken v. Meyer that the acquisition of personal jurisdiction, under a state statute, by means of personal service outside the state on a person domiciled within the state, meets all the requirements of due process.

Historically, the basis for *in personam* jurisdiction was stated by Mr. Justice Holmes thus:

> "The foundation of jurisdiction is physical power." (McDonald v. Mabee)

To this basis, Milliken v. Meyer added a new test of jurisdiction to render a personal judgment:

> "Domicile in the state is alone 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." (per Douglas, J. at page 342 of 61 S. Ct.)

(Note: Since extraterritorial service upon a domiciliary is due process, accordingly the constitutionality of service of summonses by publication with mailing seems clear. As long as there is some basis of jurisdiction—and physical presence within the State and domicile are such bases—due process of law requires, not actual notice, but only a mode of service which is reasonably calculated to give notice. Hess v. Pawloski, (1927) 71 L. ed. 1091, 274 U. S. 352; see Wuchter v. Pizzutti, (1928) 72 L. ed. 446, 276 U. S. 13.)

Mr. Chief Justice Stone in delivering the opinion of the Court in International Shoe Co. v. State of Washington (1945), 66 S. Ct. 154, 158, summed up as follows:

> "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L. Ed. 565. But now that the capias ad respondendum

has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Milliken v. Meyer 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 132 A.L.R. 1357. See Holmes J., in McDonald v. Mabee, 243 U.S. 90, 91, 37 S. Ct. 343, 61 L. Ed. 608, L.R.A. 1917F, 458.

Dean Pound, (44 Rep. American Bar Assn., 443, 454-458 (1919), writes:

"Much of our difficulty in discussions of this subject (The Administrative Application of Legal Standards) comes from thinking of the modern law as made up wholly of rules; * * * Hence writers on jurisprudence, in and out of the profession, speak of law as an aggregate of rules. But in truth a modern legal system is much more complex. We have rules, in the sense in which a real-property lawyer thinks of them, but we have much besides; and I venture to think we shall understand the matter much better by distinguishing rules, principles, conceptions and standards. This may seem unduly complex. But life, which law is to govern, is a complex thing, and modern law requires and possesses a diversity of instruments for the purpose. * * *

"Fourth, we have standards—legally defined measures of conduct, to be applied by or under the direction of tribunals. * * * Due process of law, applied to legislation, is not an abstract conception from which to reach absolute conclusions as to the abstract validity of legislation, applicable to every time and place. It is a standard to guide the tribunal in upholding the claim of the individual, guaranteed to him by the bills of rights, that his will shall not be overridden arbitrarily, that his will shall not be subjected arbitrarily to that of the lawmaker, and it is to be applied in view of the special circumstances of time, place and public opinion in which the act is to take effect. Thus disagreements of judges in cases under the Fourteenth Amendment become intelligible. If the matter were one of pure logic, the long series of five-to-four decisions would suggest that there was madness in the logical method. Because, as Mr. Justice Holmes has so aptly put it, these judgments "depend on intuitions too subtle for any articulate major premise," we can expect no absolute agreement among those who apply the standard. And yet to have the standard applied in the light of the expert intuitions of trained judges may be a useful part of our scheme of social engineering. * * * The criticism sometimes directed at the illuminating *dictum of* Judge Holmes assumes that he was laying down a canon of interpretation. But he was not. He was describing what actually takes place in the application of a standard after the standard has been found and its limits have been fixed by deduction or interpretation or the appropriate means of finding the law."

Dated at Minot, North Dakota, January 15, 1948.

A. J. GRONNA